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April 6, 2004

PUBLIC

Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: **Big West Oil LLC v. Frontier Pipeline Co., Docket Nos. OR01-2-~~000~~003, et. al.**

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding are the original and 14 copies of the Motion for Leave to File Response and Response of Frontier Pipeline Company to Request for Rehearing of Complainants, together with a certificate of service.

Attached to the Motion and Response is an Affidavit of Robert G. Van Hoecke, which contains material designated as confidential under the Protective Order in this proceeding. The public version of the Van Hoecke Affidavit, with all of the confidential material removed, is attached to the original and 14 copies of the Motion and Response that are enclosed. One copy of the confidential version of the Van Hoecke Affidavit is being submitted herewith under seal.

Please date-stamp and return the enclosed extra copy of the Motion and Response for our files.

Respectfully submitted,

Steven Reed
Steven Reed
Counsel for Frontier Pipeline Company

cc: Counsel of Record

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Big West Oil Company,	)
Complainant,	)
v.	) **Docket No. OR01-2-~~000~~ 003**
Frontier Pipeline Company and Express Pipeline Partnership,	)
Respondents.	)
Chevron Products Company,	)
Complainant,	)
v.	) **Docket No. OR01-4-~~000~~ 002**
Frontier Pipeline Company and Express Pipeline Partnership,	)
Respondents	)

MOTION FOR LEAVE TO FILE RESPONSE AND
RESPONSE OF FRONTIER PIPELINE COMPANY
TO REQUEST FOR REHEARING OF COMPLAINANTS

Frontier Pipeline Company ("Frontier") hereby moves for leave to file a response in opposition to the Request for Rehearing ("Rehearing Request") of Big West Oil LLC ("Big West") and Chevron Products Company ("Chevron") (collectively "complainants"), and files the response herewith.[1] As shown below, well-established legal precedent and sound policy reasons support the portion of the Commission's February 18, 2004 "Order Rejecting Compliance

[1] *See* Request for Rehearing of Complainants, filed on March 19, 2004 [hereafter Rehearing Request].

Filing" ("February 18 Order") addressing the issue of reparations for third party purchasers of oil transported by a pipeline.[2] Therefore, complainants' Rehearing Request should be denied.

The factual background of this issue is described in the February 18 Order. In brief summary, Big West and Chevron filed complaints on January 5, 2001, and February 15, 2001, respectively, challenging the lawfulness of Frontier's local rates and certain joint rates in which Frontier was a participating carrier. *Id.* P 4. In January 2002, Frontier and the complainants reached a settlement resolving all pending issues in the case except possible reparations for past movements under the joint rates. *Id.* P 7. On July 18, 2002, Frontier and complainants filed a stipulation agreeing to certain facts regarding the calculation of possible joint rate reparations, including the volumes shipped under the joint tariffs by Big West and Chevron directly, the volumes purchased by Big West and Chevron from parties that shipped under the joint tariffs, and the rates paid on all such shipments. *Id.* P 8. Pursuant to the stipulation, Frontier submitted a compliance filing asserting that it did not owe any joint rate reparations, which Big West and Chevron opposed. *Id.* P 10-11.

In its February 18 Order, the Commission rejected Frontier's original compliance filing and ordered Frontier to make a new compliance filing to include reparations of approximately $4.2 million, plus interest. *Id.* P 29. However, the Commission denied complainants' request for reparations for shipments by third parties, noting that the complainants had not justified adoption of "a Commission requirement that a carrier award reparations to a party not in privity with the carrier." *Id.* P 26. On March 19, complainants filed their Rehearing Request challenging the third party reparations ruling.[3] Attached to that request were affidavits from Chevron employee

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[2] 106 FERC ¶ 61,171 at P 24-28 (2004).

[3] On the same date, Frontier filed a request for rehearing challenging the Commission's ruling that complainants are entitled to any reparations at all under the "sum of the local rates"

Brian F. Duff, Big West employee Robert P. Garner, and an independent consultant, Peter K. Ashton, which were not part of the record on which the February 18 Order was issued.

GROUNDS FOR GRANTING LEAVE TO FILE AN ANSWER

Frontier requests leave to file this response to the Complainants' Rehearing Request because the request introduced a number of new policy arguments not previously raised in these proceedings and was supported by three new affidavits that were not part of the record on which the February 18 Order was based.[4] By hearing from both sides on the expanded record, the Commission can better ensure that it has a complete picture of the legal and policy issues at issue here. Under these circumstances, Frontier's response should be allowed. *See* 18 CFR § 385.213(a)(2) (2003); *East Tennessee Natural Gas Company*, 105 FERC ¶ 61,139 (2003) (allowing a reply to request for rehearing to ensure a complete record and informed decision).[5]

REASONS WHY REHEARING SHOULD BE DENIED

The Commission's rejection of reparations for third party purchasers who are not in privity with the pipeline carrier is supported by a line of judicial and agency precedent going

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rule applied in the February 18 Order. If Frontier's rehearing request is granted, the third party reparations issue will be moot. Solely for purposes of argument, and without waiving Frontier's position on rehearing, this response will assume that some joint rate reparations are payable in this case and will focus solely on the issue of reparations for third party purchasers.

[4] The Commission "looks with disfavor on parties proffering evidence for the first time on rehearing." *United States Dept. of Energy*, 100 FERC ¶ 61,194, at P 16 (2002). "The Commission has discretion to reject evidence that was available but not proffered for consideration at the time of the decision." *Public Utilities Comm'n of the State of California v. Sellers of Long Term Contracts*, 99 FERC ¶ 61,087 at P 21 (2002). If the Commission nonetheless considers the new evidence submitted by Big West and Chevron and the arguments in the Rehearing Request based on that evidence, Frontier respectfully requests that the Commission also accept the attached affidavit of Robert G. Van Hoecke, which responds to the Complainants' affidavits.

[5] *See also Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2002) (accepting answer that was helpful in the development of the record).

back to the very early days of the Interstate Commerce Act ("ICA"). Indeed, complainants have not cited any case in which either the Interstate Commerce Commission ("ICC") or this Commission awarded reparations to a party whose sole connection to the transportation in question was that it purchased the product after transportation was complete for a price that allegedly incorporated the tariff charge. Complainants have provided no basis for the Commission to depart from this well-established rule of law.

The thrust of complainants' Rehearing Request is that there is no rule requiring a party to be in privity with the carrier in order to obtain reparations and, even if there were such a rule, it would be unworkable and economically inefficient for various policy reasons. As shown below, complainants' attempt to deny the existence of the rule denying reparations to mere indirect purchasers flies in the face of almost a century of precedent. Moreover, the longstanding rule on third party purchaser reparations, far from being unworkable, serves a number of important public policy goals, including (1) avoiding the risk of multiple liability on the part of the carrier; (2) preventing endless and unproductive inquiries into the "economic incidence" of tariff rates beyond the party legally obligated to pay the rate; and (3) keeping the Commission's focus on the transaction (transportation under a tariff) that falls within its statutory jurisdiction, rather than the myriad of unregulated commercial transactions involved in the buying and selling of oil that has been transported by pipeline. For all these reasons, complainants' Rehearing Request is without merit and should be rejected.

I. The Rule Against Third Party Reparations Has Existed From the Earliest Days of the ICA and Has Not Been Overturned

A. Governing Supreme Court and Agency Decisions Support the Privity Doctrine

The Rehearing Request asserts that "the 'privity' doctrine, which was developed in antitrust cases, and cited by the Commission in its February 18, 2004 Order, has no applicability to the shipments made by Big West and Chevron in this case."[6] To the contrary, the privity doctrine that applies here was developed by the ICC and the U.S. Supreme Court in the specific context of the ICA, and long predates the imposition of a similar rule in antitrust proceedings.

As early as 1908, the ICC squarely rejected the argument that a seller of lumber transported by a common carrier regulated under the ICA could obtain reparations based on the argument that the seller "had to absorb the freight rate in the selling price of his lumber." *Nicola, Stone & Myers Co. v. Louisville & Nashville R.R.*, 14 I.C.C. 199, 207 (1908). In that case, the evidence showed that lumber manufacturers (or "mill men") typically sold their lumber "f.o.b. cars at the mill, at prices taking into account the amount of the freight which must be paid for transportation from that point to destination." *Id.* Thus, although the purchasers were the actual shippers of record who paid the freight rate, the manufacturers sought reparations on the ground that "the party really injured and damaged by the establishment and exaction of the unreasonable rate is the manufacturer or the mill man, the price of whose commodity has been unfavorably affected by such rate." *Id.*

The ICC denied the manufacturers' reparations claims, noting that, if accepted, they would "lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and the vendee of the lumber." *Id.* at 208. According to the ICC, "[t]he vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges." *Id.* Thus, the ICC concluded:

[6] Rehearing Request at 2.

> Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between the vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties in interest in the transaction *in which such transportation charges have been made.* The reparation is due to the person who has been required to pay the excessive charge *as the price of transportation.*

Nicola, 14 I.C.C. at 208-09 (emphasis added). Thus, the ICC limited reparations to the purchasers "who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation." *Id.* at 209; *see also Davis v. Mobile & Ohio R.R.*, 194 F. 374, 375-76 (5th Cir. 1912) (denying mill owner's reparations claim that excessive railroad charge lowered the value of his lumber); *In re Wool, Hides, & Pelts,* 25 I.C.C. 675, 677 (1913) ("[T]he person entitled to an award of . . . damages is the one who has actually paid the rate.").

Against this backdrop, the U.S. Supreme Court in *Baer Bros. Mercantile Co. v. Denver & Rio Grande R.R.*, 233 U.S. 479 (1914), sharply distinguished between the standing of non-shipper parties to file complaints seeking new rates for the future and the entitlement of such non-shippers to reparations for allegedly excessive past rates. As the Court noted: "Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation, and not to a new rate; or to a new rate, and not to reparation." *Id.* at 487. As an example of the latter situation, the Court noted that, upon a complaint by a non-shipper, "old rates might be declared unjust and new rates established, but, of course, no reparation would be given for the reason that such complainants *were not shippers, and therefore were not entitled to an award of pecuniary damages.*" *Id.* at 487-88 (emphasis added).[7]

[7] The Supreme Court's decision in *Baer Bros.* undercuts complainants' assertion that the legislative history of the original enactment of the ICA in 1887 supports granting non-shippers

This rule was confirmed by the Supreme Court's decision four years later in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), where Justice Holmes, writing for a unanimous Court, ruled that a shipper who sold goods f.o.b. destination could not be denied the recovery of reparations simply upon a showing that it passed on the allegedly excessive tariff charge to the purchaser of the goods transported. Noting that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step," *id.* at 533, Justice Holmes determined that only the party actually liable for the tariff charge could recover reparations:

> If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. *He has no privity with the carrier.*

Id. at 534. In other words, the only party that could recover reparations from the carrier was "the one that alone was in relation with him, and from whom the carrier took the sum." *Id.* Explaining this requirement, Justice Holmes stated: "Behind the technical mode of statement is the consideration, well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.*

In *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), the Court applied the privity requirement of *Darnell-Taenzer* to uphold an award of reparations

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standing to claim reparations. Rehearing Request at 9-11. General language in the legislative history cannot override the definitive interpretation of the statute by the Supreme Court, particularly when the Court is ratifying the interpretation adopted by the administrative agency entrusted with implementing the statutory scheme. *See, e.g., Nicola, Stone & Myers Co. v. Louisville & Nashville R.R.*, 14 I.C.C. 199, 207 (1908). Nor does the use of the term "[a]ny person" in section 8 of the ICA dictate a contrary result. As was recently noted by Justice Stevens in his concurring opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 884 (2004), in the analogous area of section 4 of the Clayton Act, the term "any person" has not been read so broadly as to grant standing to recover damages to indirect purchasers. "[W]e have eschewed a literal reading of § 4, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury." *Id.* (Stevens, J., concurring).

to a consignor (*i.e.*, the party that tendered freight for shipment by the carrier), even though it was alleged that the purchaser ultimately bore the economic incidence of the tariff charge. Justice Brandeis, writing for the majority, focused on the fact that the consignor had the freight delivered on an "f.o.b. destination" basis. According to Justice Brandeis, the "f.o.b. destination" provision of the parties' contract barred any attempt to shift recovery of the freight charge to the purchaser because it was "settled by [*Darnell-Taenzer*] that where goods are sold f.o.b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who consequently is entitled to sue." *Id.* at 235; *see also id.* at 237 (noting that the ICC had consistently held that "the consignor must sue if goods were sold f.o.b. destination").

The privity rule likewise formed the basis for the Fifth Circuit's ruling in *Gabbert v. Atchison, Topeka & Santa Fe Ry.*, 93 F.2 562 (5th Cir. 1937), a decision on which complainants mistakenly rely. In *Gabbert,* the plaintiffs were purchasers of coal in Colorado that was subsequently transported by railroad to Texas. Under the terms of sale, it was clear that title passed to the plaintiffs at the origin points in Colorado, not at the destination points in Texas. *Id.* at 562. Thus, plaintiffs were both legally and practically the shippers of the coal at issue. However, because the railroads insisted on prepayment for the shipments, the sellers of the coal physically paid the freight charges at the origin points as agents for the purchasers. The sellers were later reimbursed for those charges by the plaintiffs. *Id.* The district court in *Gabbert* incorrectly held that only the person who "physically pays the freight" could recover reparations. *Id.* The Fifth Circuit reversed, concluding that *Darnell-Taenzer* and *Sloss-Sheffield* do not support a rule based on the party that "physically pays" the freight, but rather that the privity rule actually turns on who is "obligated to pay the freight." *Id.* at 563. According to the Fifth Circuit, *Sloss-Sheffield* "clearly decides that one who bears the burden of the illegal charges *that* *are paid for his account by an agent* may sue to recover the damages awarded him by a reparation order." *Id.* (emphasis added).

Gabbert is consistent with a well-established line of ICC decisions holding that the "true consignor" who actually bears the freight charge that is paid on its behalf by an agent "does not come within the rule which prohibits an award of reparation to a stranger to the transportation record." *Morgan's Louisiana & Texas R.R. & Steamship Co.*, 39 I.C.C. 483, 484 (1916). Such parties are not mere after-the-fact purchasers. For example, in *Missouri Portland Cement Co. v. Director General*, 88 I.C.C. 492 (1924), the ICC discussed the circumstances in which a consignee (the recipient of goods shipped by railroad) could be in privity with the carrier for purposes of obtaining reparations. "Where the consignor contracts with the railroad for the movement of the goods but sells the goods *f.o.b. point of origin* and collects the freight charges from the consignee," the ICC stated, "it is clear that the consignor is acting as an agent and that the consignee is the undisclosed principal in the transaction." *Id.* at 496 (emphasis added) *see also Consolidated Cut Stone Co. v. Atchison, T. & S.F. Ry.*, 39 F. 2nd 661, 662 (N.D. Okla. 1930). Thus, contrary to complainants' argument here,[8] the actual ownership of the goods during the transportation has been deemed a critical factor in determining whether the consignor is acting as a mere agent for the purchaser or is fulfilling its own legal obligation to pay the freight charge.

Since the FERC inherited the ICC's oil pipeline jurisdiction in 1977,[9] at least two initial decisions in oil pipeline cases have expressly denied reparations to non-shippers who lacked

[8] *See* Rehearing Request at 13 (arguing that the "issue is not who had title to the goods, but who paid the carrier for the shipment").

[9] Department of Energy Organization Act, Pub. L. No. 95-91, § 402, 91 Stat. 565, 583 (1977).

privity with the carrier. In *Amerada Hess Pipeline Corp.*,[10] a producer of oil in Alaska sought reparations from the owners of the Trans Alaska Pipeline System ("TAPS") on the ground that, while the producer was not the actual shipper, it effectively bore the tariff charge through a netback pricing arrangement with the purchasers who took title at the inlet to TAPS. 64 FERC at 65,038. Based on an analysis of *Baer Bros., Darnell-Taenzer, Sloss-Sheffield* and *Gabbert*, the administrative law judge reaffirmed the rule "that a party may recover reparations only if that party is in privity with the carrier." *Id.* Finding that the producer in that case "is not in privity with the TAPS Carriers," the judge held that "it does not have standing to seek reparations." *Id.* at 65,039.[11] Similarly, in *SFPP, L.P.*, 93 FERC ¶ 63,023 (2000), the administrative law judge ruled that "non-shippers under the ICA lack standing to sue for reparations." *Id.* at 65,140. As the judge explained:

> Under the ICA, Congress intended that 'persons' upon whom an unlawful charge falls may seek damages/reparations . . . and, regardless of who physically pays the charges, are entitled to recover such . . . . However, to receive damages/reparations, persons must have a direct nexus to or be in privity with the carrier from which the reparations arise. Neither the Congress nor the courts have required that, when enforcing the ICA, the Commission peel the onion to determine the ultimate consumer who bears the ultimate burden of paying an unlawful price.

Id. at 65,093 (citations omitted).

[10] 64 FERC ¶ 63,008 (1993), *aff'd in part and rev'd in part on other grds.*, 68 FERC ¶ 61,057 (1994), *reh'g denied*, 69 FERC ¶ 61,297 (1994), *vacated and remanded sub nom. ARCO Alaska Inc. v. FERC*, 89 F.3d 878 (D.C. Cir. 1996).

[11] The Commission did not reach this issue on review of the initial decision in *Amerada Hess* because it ruled against the complainant on other grounds. *Amerada Hess*, 68 FERC at 61,193.

B. Contrary to Complainants' Assertions, the Privity Doctrine Has Not Been Overruled or Abandoned

In their Rehearing Request, complainants refer to *Darnell-Taenzer* and *Sloss-Sheffield* as "two ancient Supreme Court cases," Rehearing Request at 12, suggesting that the privity rule adopted in those decisions is no longer good law. To the contrary, however, the Supreme Court has never overruled either of those decisions, and no lower court or agency would have the authority to do so on its own. Indeed, as recently as January of this year, three Justices of the Supreme Court referred to *Darnell-Taenzer* approvingly in a concurring opinion, quoting "Justice Holmes' observation that the 'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 884 (2004) (Stevens, J., concurring), *quoting Darnell-Taenzer*, 245 U.S. at 533.

Complainants focus on three decisions that they assert are contrary to the privity rule applied in *Darnell-Taenzer, Sloss-Sheffield*, and related cases -- *Gabbert; McCarty Farms, Inc. v. Burlington Northern, Inc.*, 91 F.R.D. 486 (D. Mont. 1981); and *Gaviota Terminal Co.*, 67 FERC ¶ 61,358 (1994). None of these three decisions awarded reparations to a mere purchaser such as Big West or Chevron, however, and none either expressly or implicitly purported to overturn the privity rule.

Complainants criticize the Commission's February 18 Order for pointing out that in *Gabbert* "the firm that had sought reparations had title to the goods during the period in which they were being shipped," whereas here the complainants did not take title to the oil until it reached its destination in Salt Lake City. Rehearing Request at 13, citing February 18 Order at P 28. According to complainants, "[t]he issue is not who had title to the goods, but who paid the carrier for the shipment." Rehearing Request at 13. As discussed above, however, that statement has *Gabbert* precisely backwards. The Fifth Circuit explicitly determined that "who paid the carrier for the shipment" was irrelevant, since payment of the freight charge by an agent would still entitle the true shipper to reparations. In *Gabbert*, it was precisely because title transferred at the origin point that the court was able to determine that the purchaser was the party in privity with the rail carrier. *See, e.g.*, 93 F.2d at 563 (distinguishing *Darnell-Taenzer* and *Sloss-Sheffield* because "[i]n both cases the shipments were f.o.b. destination, meaning that the seller and shipper were obligated to pay the freight").[12]

Complainants also rely heavily on *McCarty Farms*, *supra*, where the district court denied a motion to dismiss the complaint of a putative class of wheat growers seeking reparations from the rail carrier that transported their wheat. According to complainants, the railroad "interposed the same defense that Frontier pipeline presented in this case -- *i.e.*, since the wheat growers did not contract directly with the common carrier, they had no standing to collect overcharges." Rehearing Request at 14. The issue presented in *McCarty Farms*, however, was quite different from the issue posed here. The wheat growers in that case consigned their wheat to grain elevator operators who, in turn, arranged for shipment of the wheat by the railroad and paid the freight charges in the first instance. 91 F.R.D. at 487. The wheat growers alleged that the freight charges were debited to their accounts by the grain elevator operators. *Id.* Given this state of facts, the district court ruled that the wheat growers "as consignors do in fact have individual

[12] In any event, if *Gabbert* were interpreted as complainants suggest it should be -- *i.e.*, to hold that privity is "irrelevant" to the issue of reparations, Rehearing Request at 13 -- then *Gabbert* itself was wrongly decided, since the Fifth Circuit lacks the authority to overrule decisions of the Supreme Court (particularly ones that were at the time both recent and, in the case of *Darnell-Taenzer*, unanimous). Plainly, the Fifth Circuit did not believe it was overruling *Darnell-Taenzer* and *Sloss-Sheffield*, but rather implementing the privity rule adopted in those cases.

standing." *Id.* at 488. In other words, the ruling in *McCarty Farms* fell within the well-established line of cases that the "true consignor" could recover reparations where the freight charge was paid on its behalf by another party acting as its agent. *See also id.* at 490 ("as consignors, [the wheat growers] do not lose their standing because the consignee-elevator operators also have standing").

The court's ruling in *McCarty Farms*, even if correct, has no bearing on the issue presented in this case. The *McCarty Farms* plaintiffs were not mere purchasers at destination of goods transported by the railroad. As recounted by the district court, they were both the sellers of the wheat and the real parties in interest in the transportation of the wheat by the railroad. Moreover, the principal issue addressed in *McCarty Farms* was not the plaintiffs' individual standing, but whether their claims were barred because they were based on a "pass-on" theory that would not sustain a claim for damages under the antitrust laws. *See id.* at 489-92. In the specific context of a seller/consignor, the *McCarty Farms* court found that the considerations that would normally bar a "pass-on" claim under the antitrust laws did not apply to the wheat growers' claims. In particular, the court held that it "would be remiss were it to summarily dismiss the plaintiff-wheat growers from this action without giving them the opportunity to establish that the business records of the parties involved adequately reflect that for a certain amount of wheat shipped via the defendants' railroad a particular plaintiff-wheat grower's account was debited for freight charges which accrued." *Id.* at 491-92. In short, *McCarty Farms* did not purport to overrule the privity rule of *Darnell-Taenzer* and *Sloss-Sheffield*, nor did it do more than apply the well-settled rule that the true consignor may recover reparations where the freight charge is paid on its behalf by an agent.[13]

The final case on which complainants principally rely to attack the privity rule is *Gaviota Terminal Co.*, 67 FERC ¶ 61,358 (1994). As the Commission correctly noted in the February 18 Order, all *Gaviota* held was that the Producer Group in that case had standing to file a complaint, even though the members of the Group "lacked privity with Gaviota and did not pay actual rates." February 18 Order at P 27. The Commission in that case did not hold that the plaintiffs in that case were entitled to reparations, nor did it award any reparations. *Id.* As noted earlier, in *Baer Bros.*, the Supreme Court recognized the clear distinction between standing to maintain a complaint under the ICA and standing to claim reparations, specifically noting that non-shippers could file complaints seeking new rates, but lacked standing to claim reparations. 233 U.S. at 487-88. In *Gaviota*, the Producer Group's complaint invoked both kinds of claims, contending that "the existing filed rate and all previous charges are unjust and unreasonable." 67 FERC at 62.248. Thus, it was unnecessary for the Commission to reach the question of reparations in order to determine that the Producer Group's complaint could not be dismissed outright.[14] Since

[13] As recognized in *McCarty Farms*, 91 F.R.D. at 489, the "pass-on" doctrines developed by the Supreme Court in the antitrust area bear a close resemblance to the privity doctrine employed in ICA reparations cases. In particular, the Supreme Court has ruled both that an antitrust defendant may not assert a "passing-on" defense to a claim for treble damages by a direct purchaser from the defendant, *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and that an indirect purchaser cannot maintain an action for damages against an antitrust defendant on the ground that the effects of the alleged antitrust violation were "passed on" to it. *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977). The general consistency between these doctrines and the privity doctrine developed in the ICA area lends weight to the continued vitality of the rule denying ICA reparations to mere purchasers of the product transported. However, the privity doctrine exists as an independent rule of law, and is not dependent on the "pass-on" doctrines in the antitrust area.

[14] The Commission also correctly distinguished two other cases cited by complainants that similarly turned on the standing of a non-shipper to file a complaint, rather than the entitlement to reparations. February 18 Order at P 28 & n. 32.

Gaviota did not decide the issue presented here, there is no inconsistency between the February 18 Order and *Gaviota* and no obligation on the part of the Commission to "explain its departure from prior precedent." Rehearing Request at 16.

C. Complainants Were Not in Privity With the Joint Tariff Carriers With Respect to Shipments Purchased at a Delivered Price in Salt Lake City

The February 18 Order correctly found that an "examination of the contracts that Complainants attached to their Response in Exhibits G and H shows that Complainants purchased and took title to the oil at Salt Lake City." February 18 Order at P 26. The complainants did not nominate the oil in question to the joint tariff carriers, they were not legally obligated to pay the tariff charge to the joint tariff carriers, and they did not make any such payments to the carriers. On the shipments in question, it is undisputed that the shippers of record were the sellers of the oil who retained title until the oil was delivered in Salt Lake City. *Id.* at P 26, 28. Thus, Big West and Chevron are precisely the kind of indirect purchasers that are not entitled to seek reparations, regardless of the terms of their sales contracts.

Complainants' Rehearing Request alleges, without citing any specific source, that "both Big West and Chevron engaged other firms to ship crude oil on the joint tariff on their behalf and as their agents." Rehearing Request at 3. By this statement, complainants appear to be attempting to bring themselves within the rule that the "true consignor" may recover reparations where the tariff charge was paid on its behalf by its agent. This attempt is unavailing, however. First, to be the "true consignor" the complainants would have to demonstrate that they actually had title to the oil during the period when it was being transported, *see, e.g., Gabbert, supra,* which they obviously cannot do. Moreover, there is no evidence in this record that any of the sellers acted, or were even authorized to act, as agents for Big West and Chevron in shipping the oil in question. Indeed, under the joint tariff rules and regulations, the shippers were required to warrant that they held clear title to the oil during the period when it was in the carriers' possession. *See* Van Hoecke Affidavit at ¶ 3 n.1.

The Commission properly concluded that the fact that "Complainants paid prices for the crude oil that were calculated under formulae including the joint rates at issue here" is not dispositive of their standing to recover reparations. February 18 Order at P 26. The same could be said of the purchaser in *Darnell-Taenzer*, and yet the Supreme Court unanimously concluded that the unity of the transaction "from a business point of view . . . is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price." 245 U.S. at 534. The Court noted that if reparations were to be traced beyond the party or parties in privity with the carrier, the result would be "the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.*

II. Complainants' Policy Arguments Cannot Support Departure From the Established Privity Rule

Contrary to complainants' assertions, the traditional privity rule serves a number of important public policy goals, including simplifying administration of the ICA, avoiding the risk of subjecting carriers to multiple liability for the same claims, and limiting the involvement of the Commission in disputes over unregulated commercial sales of oil and petroleum products. At the same time, the alleged policy interests advanced by complainants provide no basis for the Commission to depart from the privity rule, even if the Commission had the discretion to disregard the governing decisions of the U.S. Supreme Court, which of course it does not.[15]

[15] Mere policy reasons cannot justify the Commission in adopting a rule of law that is inconsistent with the interpretation of the governing statute by the U.S. Supreme Court. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see also Norfolk Southern Railway Co. v. Shaklin*, 529 U.S. 344, 356 (2000).

A. The Privity Rule Serves a Number of Important Public Policy Goals

1. The Rule Avoids Complex Inquiries Into the Economic Incidence of Allegedly Excessive Tariff Rates

By drawing a bright line in terms of the parties entitled to seek reparations, the privity rule simplifies the administration of the statute and helps to avoid protracted litigation over the issue of where the economic burden of allegedly excessive tariff rates falls in particular cases. This important purpose was recognized as early as *Darnell-Taenzer*, where Justice Holmes observed that the alternative would be "the endlessness and futility of the effort to follow every transaction to its ultimate result." 245 U.S. at 534; *see also id.* ("Probably in the end the public pays the damages in most cases of compensated torts."). The ICC likewise observed early on that departing from the rule of privity would "lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and the vendee of the [product transported]." *Nicola, Stone & Myers*, 14 I.C.C. at 207-08.

Complainants suggest that none of these difficulties will arise because "the contracts between the parties almost invariably specify that tariff charges are to be paid by the firm on whose behalf the shipments are made." Rehearing Request at 6; *see also id.* at 21 ("contracts clearly state that Big West and Chevron are responsible for payment of the joint tariff and the invoices substantiate the fact that Big West and Chevron paid those overcharges"). This argument vastly oversimplifies the issue.

To begin with, the contracts in question are not between the carrier and the shipper but rather are the purchase and sale agreements for the product transported. Furthermore, the face of the contract, even when supported by invoices, does not necessarily dictate where the *economic burden* of the tariff charge actually falls. Where, as here, the product is sold at the destination point, the transportation charge ordinarily will be part of the seller's cost structure, not the buyer's. *Cf. Sloss-Sheffield*, 269 U.S. at 238 ("On goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production."). In other cases, the burden of the tariff charge may be shared between the seller and the buyer, since the seller may reduce or increase its selling price to reflect the value of providing the product at the destination market. Finally, even in those cases where it may be determined that the tariff charge was "passed on" in full to the third party purchaser, that purchaser will virtually always flow the cost of the transportation through to its customers in the price they pay for the products made from the oil transported by the pipeline. Hence the "endlessness and futility of the effort to follow every transaction to its ultimate result." *Darnell-Taenzer*, 245 U.S. at 534.

The facts of this case clearly demonstrate the pitfalls of assuming that an indirect purchaser is, in fact, the party who bears the economic injury from an allegedly excessive tariff rate. In response to the affidavits submitted by Big West and Chevron with the Rehearing Request, Frontier has attached to this response as Exhibit 1 the Affidavit of Robert G. Van Hoecke ("Van Hoecke Affidavit"). Mr. Van Hoecke is a principal in the economic consulting firm Regulatory Economics Group ("REG") and is highly knowledgeable about the economics and regulation of oil pipelines as a result of his work with REG as well as his prior positions with Williams Pipe Line Company dating back 20 years. Van Hoecke Affidavit at ¶ 1. Mr. Van Hoecke has examined complainants' affidavits and the crude oil purchase and sale contracts and related invoices submitted by Big West and Chevron in this proceeding and the results of his analysis are set forth in his affidavit.[16]

Even if it is assumed that Big West and Chevron always absorbed the full burden of the transportation costs under their purchase contracts with the sellers, that would not necessarily end the inquiry. As the Commission is well aware, the crude oil market in the United States is extremely dynamic, with millions of barrels of oil being traded (often multiple times) every day. In many, if not most, third party purchaser situations, there would be nothing to prevent the first purchaser from immediately re-selling the oil to another purchaser, thereby passing along the economic burden of the transportation cost to that even-more-indirect buyer. Moreover, even if the purchaser processes the crude oil in its own refinery, the implicit cost of the transportation -- like the refiner's other costs -- is presumably built into the price charged to wholesalers and others who purchase the products from the refinery. Van Hoecke Affidavit at ¶ 12. Once the Commission begins to search for the party that "bore the burden" of the tariff charge in the economic rather than the legal sense of that term, there is literally no stopping point, and certainly no way to determine who suffered the actual injury without a complex and potentially indeterminate economic analysis.[17]

[16] Because the contracts and invoices are deemed to be confidential materials under the protective order in effect in this proceeding, relevant portions of Mr. Van Hoecke's affidavit are being filed under seal.

[17] These are, of course, precisely the considerations that underlie the Supreme Court's refusal to grant standing to indirect purchasers to claim damages in an antitrust context. *See Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977). Economists can argue endlessly about the degree to which, in any given market, a particular producer is able to "pass on" the economic incidence of any particular cost. *E.g.*, *Hanover Shoe*, 392 U.S. at 492-93.

2. The Privity Rule Minimizes the Risk of Subjecting Carriers to Multiple Liability for the Same Shipment

By drawing a clear line between shippers and non-shippers with respect to reparations, the privity rule also reduces the risk that carriers will face potential multiple liability for the same shipments. To take one example, assume that a pipeline charges a rate for movements of crude oil from point A (the wellhead) to point B (an intermediate trading hub). The producer of the oil sells its barrels at the wellhead (point A) to a crude oil trader (Shipper) who ships the barrels for its own account to point B, where the barrels are traded multiple times before being acquired by a refiner. At point B (or some other more distant point), the refiner processes the crude oil into various petroleum products. The refiner then sells the resulting petroleum products to wholesalers, jobbers and retail customers (including airlines, trucking companies, and ordinary consumers through the refiner's directly owned service stations). Under the traditional rules as discussed above, virtually any of these parties could file a complaint seeking a new rate to be established for the future, and if such a rate were established, the future benefits would accrue throughout the chain of custody of the oil. However, only the actual shipper could sustain a complaint seeking reparations for allegedly excessive rates charged in the past. Thus, both the Commission and the carrier are safe in assuming that the issue of reparations can be entirely resolved by adjudicating the rights of the direct parties to the tariff transaction.[18]

Without the privity rule, however, almost any of the multiple parties in the chain described above could file a complaint for reparations based on a claim that the "economic burden" of the excessive tariff rate fell, in whole or in part, on them. *See* Van Hoecke Affidavit at ¶ 18. The producer could claim that its price at the wellhead is reduced by the transportation

[18] As discussed further below, to the extent they may be concerned, other interested parties can protect their commercial interests by private contract.

charge incurred to reach point B.[19] Shipper, as the party in privity with the carrier, would obviously have a claim for reparations. Any of the trading partners of Shipper at the Point B trading hub could presumably argue that the transportation charge was "passed on" to them through their contracts with the seller. The refiner likewise could argue that it was the party that "ultimately bore" the tariff charge as part of its delivered price of crude. Finally, the various purchasers of petroleum products from the refiner would be in a position to argue that the excessive tariff charges were spread over all the products sold by that refiner and were therefore absorbed by all of the end-users in the market.

Even assuming all of the potential claimants could be assembled into a single action at the Commission, the task of sorting out their conflicting and overlapping claims would be overwhelming. Moreover, it is easy to imagine a scenario in which the claims could arise serially, thereby exposing the pipeline at a minimum to multiple rounds of litigation, if not the potential for duplicate reparation awards. Suppose, for example, that the refiner in the hypothetical described above files a complaint and receives an award of reparations based on its allegation that it "bore the burden" of the tariff charge. Six months later, Shipper, as the actual shipper of record who paid the tariff charge to the carrier on its own behalf, files a complaint seeking reparations for the same shipments. Will the first award be treated as res judicata so as to preclude Shipper from maintaining a duplicate cause of action against the carrier? If not, and if the carrier is ultimately determined on a different record to owe reparations to Shipper, will the carrier have a right of action back against the refiner to recover the reparations previously paid? What procedural mechanisms will the Commission need to develop to avoid the potential for multiple recoveries on the same shipments in cases such as this? These and a multitude of

[19] Indeed, that is precisely the kind of claim advanced by the producer (and rejected by the administrative law judge under the privity rule) in *Amerada Hess*, *supra*.

similar questions have been avoided through the application of the privity rule, which is intended to provide a clear answer to the question of which party is entitled to claim reparations on a particular shipment.[20]

A related concern involves the impact of the complainants' proposed approach on settlements of reparations claims. At present, many oil pipeline cases involving reparation claims are settled by private agreement between the pipeline and the shipper, following which the shipper simply withdraws its complaint, thereby terminating the proceeding. *E.g.*, *Sinclair Oil Corp. v. Rocky Mountain Pipeline System, LLC,* 103 FERC ¶ 63,018 (2003); *Southern Pacific Pipe Lines Partnership, L.P.*, 49 FERC ¶ 61,081 (1989). So long as non-shippers cannot seek reparations for the same shipments, such settlements are a relatively straightforward and secure mechanism to resolve disputes without an unnecessary burden on the Commission's and the parties' resources. However, if the carrier must fear that third party purchasers or others claiming to have "borne the burden" of the tariff charge might later file complaints seeking reparations for the same shipments, they may feel compelled to litigate all such cases to a final decision on the merits, if only to minimize the risk of multiple liability. Such a result would run directly counter to the Commission's longstanding policy favoring voluntary negotiation and resolution of disputes. *Trailblazer Pipeline Co.*, 106 FERC 61,034 at P 25 (2004); *see also American Electric Power Service Corp.*, 98 FERC ¶ 61,156 at P 1 (2002).

[20] As the case law illustrates, there may be instances in which the tariff charge is paid by an agent acting on behalf of the true shipper where both the agent and the would have standing to seek reparations. *See, e.g., Adams v. Mills*, 286 U.S. 397 (1932). In those cases, however, the law of agency dictates that any recovery by the agent is solely on behalf of the principal, *see Missouri Portland Cement Co. v. Director,* 88 I.C.C. 492, 496 (1924), meaning there would be no potential for a duplicate recovery.

3. The Privity Rule Reflects the Limits on the Commission's Jurisdiction, Which Extends to Provision of Transportation Services, Not Sales of Crude Oil and Petroleum Products

Another important purpose of the privity rule is to assure that the Commission's remedial processes are focused on the transaction over which the Commission has statutory jurisdiction -- *i.e.*, transportation of oil by pipeline. Because the actual shipper is in privity with the pipeline, the Commission can grant reparations to the shipper without extending its inquiry into the details and economic consequences of transactions between parties in the commercial sale of crude oil and petroleum products, an area well outside the scope of the Commission's statutory authority. By comparison, if the privity wall is breached, the Commission will necessarily be drawn into issues of contract interpretation between the buyers and sellers of oil and products, as well as complex analyses of the allocation of economic burdens as among those parties. This would be directly contrary to the Commission's longstanding view that it should avoid resolving private contractual disputes except where doing so is directly relevant to the exercise of its statutory powers. *E.g., Rocky Mountain Natural Gas Co.*, 80 FERC ¶ 61,163 at 61,709 (1997); *Transcontinental Gas Pipeline Corp.*, 43 FERC ¶ 61,207 at 61,542 (1988).

Big West and Chevron argue that there is "no meaningful difference between a refiner who ships crude oil directly on interstate pipelines and a refiner who uses another firm to ship crude oil on its behalf." Rehearing Request at 4. This contention is flatly wrong, given the profound difference between the shipper/carrier relationship, on the one hand, and the relationship of a carrier to an indirect third party purchaser on the other. First, only the shipper is liable to the carrier for the transportation charge imposed by the tariff. If the oil is delivered and the tariff charge is not fully paid, the carrier's recourse is against the shipper of record, not the indirect purchaser. In fact, as Mr. Van Hoecke's affidavit describes, a shipper who submitted a nomination under the joint tariff at issue here obligated itself to pay 95% of the tariff charge even if it failed to transport the barrels during the month in question. Van Hoecke Affidavit at ¶ 5.

Second, by tendering oil to the pipeline for transportation, the shipper binds itself to the terms of the carrier's rules and regulations tariff. Among other things, those rules and regulations may require the shipper to (1) provide a proportionate share of the pipeline linefill, (2) pay demurrage charges and other penalties when oil is not removed from the system on a timely basis, (3) avoid contamination of other shippers' crude oil or products, (4) bear a proportionate share of line losses and shrinkage, and (5) bear the risk of loss or damage incurred as a result of the shipper's negligence. *Id.* None of those obligations fall on the third party purchaser. Third, many pipelines (including the joint system in this case) impose minimum batch requirements a shipper must meet. A purchaser may buy volumes at destination that would not meet the pipeline's minimum batch requirement. *See id.* at ¶ 6. Finally, to the extent the shipper has chosen to use a volume incentive tariff requiring a long-term commitment of throughput in exchange for a reduced tariff rate, the shipper may be required to pay additional amounts if it fails to meet its volume commitment. *Id.* at ¶ 7. Again, the third party purchaser faces no liability whatsoever to the carrier in this situation.[21]

In short, complainants are essentially trying to have it both ways. They want to obtain one of the principal legal benefits of the carrier/shipper relationship (*i.e.*, the right to recover reparations), without being subject to any of the other aspects of the complex legal relationship

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[21] Notably, the Commission has held that when sophisticated parties, who are knowledgeable about their rights under the ICA, enter into a voluntary rate contract, the carrier generally should not be subject to reparations on the ground that the agreed-upon rate was too high. *See SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,075 (1999). Thus, the direct shipper who takes advantage of a volume incentive rate would ordinarily be barred from recovering reparations on a rate to which it agreed. Under complainants' theory, however, the indirect purchaser (not being a party to the tariff transaction) could pursue reparations the shipper itself could not get.

between carrier and shipper under the ICA. The carrier/shipper relationship is both unique and subject to substantial regulatory oversight by the Commission. By comparison, there is essentially no legal relationship between the carrier and a third party purchaser. Far from being indistinguishable, these relationships are as different as night and day, and clear precedent demonstrates that the Commission's reparations authority extends only to the relationship over which it has direct statutory jurisdiction.

B. Complainants' Policy Arguments For Abandoning the Privity Rule Are Unavailing

Complainants' principal policy arguments for overturning the privity rule as adopted by the Commission are (1) that direct shippers lack the incentive to seek reparations, thereby leaving pipelines with little incentive to charge lawful rates (Rehearing Request at 2, 6), and (2) that denying reparations to third party purchasers will discourage economically beneficial transactions and lead to "market inefficiencies" (*id.* at 6, 24-26). For the reasons set forth below, neither of these policy arguments is valid. Moreover, as discussed earlier, even if these arguments were valid, they would not justify the Commission in disregarding the governing interpretation of the ICA with respect to third party reparations.

Regarding the incentives of direct shippers to seek reparations, complainants simply assert without support or analysis that "since the only person with an economic incentive to seek reparations is the firm on whose behalf shipments were made, any rule limiting reparations to direct shippers will result in pipelines retaining the benefit of unjust, unreasonable and discriminatory rates." *Id.* at 6. To the contrary, however, ample incentives exist for direct shippers to seek reparations, and such claims have in fact recently been granted. *See, e.g.*, Opinion No. 435, *SFPP, L.P.*, 86 FERC ¶ 61,022 (1999).

The main incentive for the direct shipper to seek reparations is that, as the immediate victim of the alleged overcharge, the direct shipper clearly has standing to recover reparations, even in cases where the defendant carrier claims the charge was "passed on" to another party. *See, e.g., Darnell-Taenzer*, 245 U.S. at 533; *Adams v. Mills*, 286 U.S. at 397. Whether the direct shipper then has any potential liability to the party to whom it sold the oil at destination is a separate issue of private contract over which the Commission exercises no jurisdiction. Depending upon the terms of its contract, the seller may have numerous contractual defenses to any claim that its recovery of reparations must be passed through to the purchaser. Even if not, the direct shipper will typically have a strong interest in reducing any tariff rate deemed by it to be excessive because the effect of the excessive rate will be to raise the delivered price of the seller's product in the marketplace. Van Hoecke Affidavit at ¶ 18. Finally, if an indirect purchaser is concerned that the direct shipper lacks sufficient incentive to pursue reparations, there are a variety of contractual mechanisms by which the indirect purchaser can seek to protect itself, such as imposing a duty on the seller to seek reparations in appropriate cases. *Id.* None of these mechanisms would require the Commission to widen the circle of parties potentially eligible for reparations, contrary to the settled interpretation of the statute.

With respect to the claim that the privity rule discourages beneficial transactions, the short answer is that this argument defies economic logic. As explained in the Van Hoecke Affidavit, in all of the examples cited by complainants, the indirect purchaser is already receiving the benefit of the least expensive delivered price available in the market at a particular point in time. *Id.* at ¶ 14. Thus, regardless of how the Commission resolves the issue of third party reparations, the indirect purchaser almost certainly would have made the same choices with or without the prospect of reparations.

The only means by which the permissibility of third party reparations could conceivably impact a purchaser's economic activities involve scenarios so implausible they would never occur in the real world. *Id.* In essence, one would have to hypothesize a situation in which the purchaser had the choice between two suppliers of crude oil and consciously chose the more expensive delivered price because of the theoretical availability of reparations on the transportation tariff. As Mr. Van Hoecke explains, it is virtually inconceivable in the real world of oil trading transactions that any buyer would pass up the less expensive crude for the more expensive crude simply on the possibility that years later the buyer would recover reparations on the tariff rate. *Id.* As a result, it is implausible that any economically beneficial transactions will ever be influenced by the Commission's resolution of this issue.

In any event, the very scenarios hypothesized by complainants demonstrate why the privity rule is both sound and necessary. As explained by Mr. Van Hoecke, these scenarios all involve, one way or the other, the third party purchaser either attempting to obtain part of the value of a benefit accruing to a direct shipper as a result of its shipper status (*e.g.*, volume discount rates, access to prorationed capacity in the pipeline), or taking advantage of a market opportunity created by a shipper's obligation to the carrier (such as its volume commitment under a throughput and deficiency agreement). *Id.* at ¶¶ 15-17. In such circumstances, each party will have a degree of bargaining leverage that will determine how much of the benefit or detriment accruing to the shipper is passed through to the purchaser. It will rarely be clear which party bore precisely what amount of the nominal transportation charge, since that charge is merely one factor in the overall bargaining process that determines the final delivered price. *Cf. Nicola, Stone & Myers*, 14 I.C.C. at 208 (as between seller and buyer, "[t]he price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges").

In short, because common carrier oil pipelines are available on equal terms to all potential shippers, any party can typically choose to be a direct shipper -- taking on all the rights and obligations that pertain to that status.[22] If a party chooses to be a mere purchaser of oil transported on the pipeline, paying a delivered price for the oil at the destination, it does so because that transaction offers it the best price available at that location at that point in time. Having received the best available price, it is questionable whether the purchaser even has a credible claim to have been injured by the transaction. But even if it did, that claim is entirely derivative of the injury suffered in the first instance by the direct shipper. As such, under well-settled principles, the purchaser must look to its contractual rights with respect to the seller -- and not to the regulated carrier -- to recover whatever remedy it may be due. That has been the rule for nearly 100 years, and there is neither authority nor justification for the Commission to change the rule at this time.

[22] This case does not pose the issue that appears to concern would-be intervenor Sinclair Oil Corporation. Sinclair apparently is involved in litigation with another pipeline company over whether Sinclair was improperly denied the ability to be a direct shipper on that pipeline. *See Sinclair Oil Corp. v. BP Pipelines (North America) Inc*, Docket No. OR02-6-002. No such issue has been raised in this case because complainants Big West and Chevron have never been prevented from shipping directly, and in fact have shipped substantial volumes of oil in their own names. By separate response, Frontier has opposed the Sinclair motion to intervene, noting both that the motion is completely out of time and that the issue Sinclair is raising has no place in this proceeding.

CONCLUSION

For the reasons set forth herein, the Commission should accept this response and deny complainants' Rehearing Request.

Respectfully submitted,

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April 6, 2004

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Big West Oil Company and		
Chevron Products Company,	)	
Complainants	)	
	)	
v.	)	
	)	**Docket No. OR01-02-000**
	)	**Docket No. OR01-04-000**
Frontier Pipeline Company	)	

AFFIDAVIT

OF

ROBERT G. VAN HOECKE

April 5, 2004

PUBLIC VERSION

AFFIDAVIT
OF
ROBERT G. VAN HOECKE

Introduction

1. My name is Robert G. Van Hoecke. I am a Principal with Regulatory Economics Group, LLC ("REG"), a firm specializing in economic, financial and regulatory consulting for the pipeline industry. My business address is 12010 Sunset Hills Rd., Suite No. 730, Reston, VA 20190. I have more than 20 years of experience working directly in the oil pipeline industry and as a consultant. I have presented testimony on several occasions regarding the economic regulation of oil pipelines and pipeline ratemaking. I have also presented testimony several times in this case. I have attached a more detailed statement of my qualifications as Exhibit No RGV-1.

2. Frontier Pipeline Company ("Frontier") has asked me to prepare an affidavit addressing the claims raised by Big West Oil LLC and Chevron Products Company (collectively "the Complainants") in their request for rehearing. In its February 18, 2004 Order, the Commission determined that Big West and Chevron "are not entitled to reparation for shipments by third parties." (Order ¶ 26) On March 19, 2004 Big West and Chevron filed a motion asking the Commission to reconsider this determination.

This affidavit will address four issues relating to the Complainants' request for rehearing. First, it will discuss the Complainants' relationship to the carriers who provided service under the joint tariff. Second, it will analyze Big West and Chevron's claim that the invoices and contracts submitted as part of the testimony of

Messrs. Garner and Duff demonstrate that the economic burden of the transportation charges was actually borne by the purchasers. Third, it will address the Complainants' claims regarding the economic efficiency of third party movements. Finally, it will discuss the broader policy implications of awarding reparations for third party shipments.

3. The Complainants' motion outlines their claim of harm as follows:

> Big West and Chevron's shipments on the joint tariff were made in two ways, each of which had the very same effect and impact. Big West shipped substantial quantities of crude oil as direct shippers in their own name. In addition, both Big West and Chevron engaged other firms to ship crude oil on the joint tariff on their behalf and as their agents. When Big West and Chevron engaged other firms to ship crude oil on their behalf, they invariably entered into contracts which expressly stated that Big West and Chevron were responsible for all tariff charges paid to the pipeline. (Rehearing request at 3-4)

The Commission's February 18, 2004 order provided the Complainants with reparations for volumes they shipped in their own name. This affidavit therefore addresses only the second circumstance, where Big West and Chevron purchased oil shipped by third parties.[1] Tables 3 and 4 of Mr. Ashton's testimony, filed on September 9, 2002 show the amount and month that Big West and Chevron purchased oil from these companies. All references to Big West and Chevron's purchases of oil refer to these batches.

[1] For simplicity, I will describe the shippers from whom the Complainants purchased crude oil as "shippers" or "shippers of record" and the companies such as Big West and Chevron that purchased crude oil from these shippers as "refiners" or "purchasers." Pursuant to Item 17.2 of the rule and regulations tariff that governed the joint movements, the shipper of record warranted that it owned the crude oil that it tendered for shipment and would indemnify the carrier against any claims by third parties alleging ownership or an interest in the crude that was delivered for transport. (Express, FERC No.1)

4. On July 18, 2002, Frontier and the Complainants filed a stipulation agreeing to certain facts regarding the calculation of possible joint rate reparations, including the volumes each party shipped under the joint tariffs, the volumes purchased from third parties that shipped under the joint tariffs, and the rates paid on all such shipments. In particular, the stipulation stated the quantity of light petroleum that each Complainant "shipped on the Express/Frontier joint tariff on a fifteen year term basis during the period January 1, 1999 to January 31, 2002 through third parties and the rate each Complainant paid for those shipments." Stipulation at ¶¶ 3, 4. The charts accompanying those paragraphs referred to these volumes as "third party shipments" or "third party barrels." The stipulation did not expressly address any potential damages or consequences that might accrue to Big West and Chevron for crude purchases from third parties in the event Frontier's rates were deemed unjust and unreasonable. All the stipulation determined were the third party volumes and the rates paid to the pipeline carriers by the direct shippers that were included in the invoices to Complainants as purchasers of the oil.

5. The first question I will address is whether the Complainants had the status of shippers under the joint tariff and the significance of this question. The simple answer is that, with regard to the movements for which they seek rehearing, neither Big West nor Chevron were shippers under the joint tariff. This distinction is not irrelevant, nor is it a technicality. A shipper of record on a pipeline has a variety of rights and obligations that do not apply to purchasers. Among other things, the shipper of record is liable for payment of the tariff charge. In fact, in some

circumstances the shipper can be obligated to pay the tariff charge even on barrels that are nominated but not transported by the pipeline. For example, Item No. 6.8 of Express FERC No. 1, the rules and regulations tariff that governed the joint tariff movements in this case, states that

> Each Shipper not a party to a Contract shall in each Month Tender to Carrier a volume of Petroleum equal to its nomination for that month. Such Shipper shall pay to Carrier an amount equal to the product of the rate for uncommitted volumes contained in the Tariff and a volume equal to the greater of (i) the volume Tendered or (ii) ninety-five percent (95%) of Shipper's nomination.

In other words, a shipper that fails to tender an amount equal to its nomination is required to pay a penalty equal to 95% of its nomination.[2]

Express FERC No. 1 Item No. 9.1 requires that a "Shipper shall accept and remove its shipments from the facilities of Carrier upon Delivery of Petroleum." Item No. 9.2 provides that that if the shipper fails to remove its petroleum then "Carrier shall have the right to remove and sell such Petroleum… Carrier shall pay from the proceeds of such sale all costs incurred by Carrier with respect to storage, removal, and sale of such Petroleum." The obligations contained in both of these examples impose costs upon the shipper both in terms of ensuring its compliance, as well as possibly paying significant penalties in the event of non-compliance. Other obligations of shippers can include being required to provide a proportionate share of linefill, having to absorb a proportionate share of loss and shrinkage in transit, having liability for loss or damage incurred as a result of the shipper's own

[2] The issue of contracts and term commitments is discussed below. Parties who were subject to contracts had further obligations beyond simply tendering an amount equal to their nomination.

negligence (including harm to others' oil or the pipeline itself from tendering contaminated oil to the pipeline), and being subject to prorationing of nominations when the pipeline does not have sufficient capacity available.

6. As with most pipelines, Express also requires that shippers tender batches of a minimum size. Specifically, Item No. 6.3 states that the "Carrier will not accept a batch size of less than eight thousand cubic meters (8,000 m^3) (50,300 bbls)." [

] **CONFIDENTIAL**

In addition, the transit time between Hardisty and Salt Lake City is significant. The actual shippers incurred significant inventory carrying costs during the time when their oil was in transit. By contrast, Big West and Chevron had full use of their capital until they purchased the oil in Salt Lake City. They incurred none of the inventory carrying costs that actual shippers incurred.

7. Beyond the costs that a shipper on any pipeline would incur, certain shippers under the joint tariff incurred additional costs, because they committed to move significant volumes via Express Pipeline (one of the joint tariff carriers) over a 15-year period. In turn, these term shippers were charged a discounted rate. This fact has particular

relevance in this case because the shippers from whom the Complainants purchased oil were moving under Express's 15-year term rates, the most highly discounted tariff rate. As the Commission noted in the Declaratory Order granting Express permission to construct this innovative rate system, the shippers who were providing these commitments were taking on some of the risk from the pipeline and could be compensated through reduced rates. *See Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,254 (1996). By taking on some of this risk, these term shippers provided critical financial underpinning that allowed Express to be built. The Commission recognized this fact and stated that it was appropriate for Express to offer discounts to these term shippers. Neither Big West nor Chevron incurred the additional risk of the 15-year term shippers.[3] Yet, Big West and Chevron seek reparations for crude oil they purchased from shippers who had made this commitment. In other words, Big West and Chevron seek to obtain the economic advantage that a 15-year term shipper has without having to make any commitment or incur any risk.

8. In short, Big West and Chevron were not shippers and their statement that the two types of shipment "had the very same effect and impact" is simply incorrect. As purchasers of crude oil (rather than shippers), Big West and Chevron would not have incurred a penalty if they failed to fully tender a nomination. They also would not have incurred any demurrage if they failed to remove their product promptly upon

[3] Big West and Chevron apparently did make a 5-year commitment to Express. In another part of its February 18, 2004, order the Commission awarded Big West and Chevron reparations on these barrels. The barrels at issue in this rehearing request, however, involve movements for which Big West and Chevron had made no commitment. They purchased these barrels on the spot market, and even if they had been shippers, they would have been spot shippers, not 15-year term shippers.

delivery. They did not have to tender batches of a minimum size. They did not incur inventory carrying costs. Finally and most importantly, they did not incur the risk associated with a long-term tariff commitment that would entitle them to the same discount to which an actual 15-year term shipper was entitled.

9. Throughout their brief, and in the testimony of their witnesses, Big West and Chevron seek to blur this distinction and intimate that they were the shippers on the line that paid the tariff and therefore deserve the reparations. For example, they state, "Disputes rarely, if ever arise as to who is responsible for paying the tariffs because the contracts between the parities almost invariably specify that the tariff charges are to be paid by the firm on whose behalf the shipments are made." (Rehearing Request at 6) To be clear: regarding the barrels at issue in the motion for rehearing, neither Big West nor Chevron were the shippers of record, and they did not pay the tariff to the pipeline carriers. In its Order, the Commission recognized this important distinction: "Complainants paid prices for the crude oil that were calculated under formulae including the joint rates at issue here." Despite the Complainants' intimations to the contrary, they did not pay the tariff to Express, Frontier or any other common carrier. As the Commission correctly states, they purchased crude oil for which the contract used the tariff as one element with which to determine the price.

10. The Complainants also claim that they directly bore the purportedly excessive tariff charges because the shippers of record were merely agents acting on their behalf.

This allegation is without merit given that Big West and Chevron never held title to or control of the crude prior to its transportation. The purchase agreements clearly indicate that [

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Confidential There is simply no evidence in the record (nor anything in the stipulation) that demonstrates any of the shippers were acting as an agent for Big West or Chevron when they tendered crude oil under the joint tariff.

11. The Complainants claim that they directly bore the purportedly excessive tariff charges because the shippers of record passed the tariff rate through to them. In making this argument, however, the Complainants are oversimplifying the point. There is no dispute that the Complainants paid the direct shippers a delivered price for the oil that, as the February 18 Order stated , was "calculated under formulae including the joint rates at issue here." However, that is not the same as saying Complainants bore the economic burden of the transportation rate or were injured if that rate was too high. Such a conclusion would require a complex analysis of the commercial relationship among the seller and the purchaser of the oil, as well as other parties in the chain of ownership of the product.

That analysis might be simpler if there were a fixed or regulated price for the oil to which the transportation charge was simply an incremental add-on. However, that will rarely be the case in the highly dynamic trading market for crude oil in the U.S., and an analysis of the contracts and invoices submitted by Complainants in this case[4] indicates that [

[4] In its September 9, 2002 filing, Big West provided the invoices and contracts for the crude purchases as an attachment to Mr. Garner's testimony. Chevron provided the contracts and invoices relating to these purchases as an attachment to Mr. Duff's testimony.

[5] The Commission has long recognized that the delivered price is the relevant concern. In Opinion No. 391, the Commission stated "We agree [with the ALJ] that the real economic concern of the shippers is the delivered product and its price rather than whether the product travels between specific location via pipeline." 68 FERC ¶61,136 at 61,660-61.

] Confidential

Mr. Garner also attached contracts and invoices to his testimony. These attachments show [

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Confidential

12. Even assuming the economic burden of the transportation cost was passed on to the Complainants, that does not necessarily mean they were the parties who ultimately bore any injury. Barrels of oil may be traded multiple times between the wellhead and the ultimate user, and third party purchasers are often mere middlemen who pass their costs along to other parties to whom they may sell the oil. In the case of refiners such as Big West and Chevron, even if they do not resell the oil but process

it in their own refineries, the delivered price of the oil is presumably one element of their cost of processing that will be factored into the prices they charge for petroleum products. The extent to which any particular cost is passed through to the consumers of the finished product is a very complicated economic issue, but it would be surprising if the refiners retained the full burden of the allegedly excessive tariff charge (even if that burden was passed through to the refiners in the first instance).

13. The Complainants also assert that purchasing oil from shippers of record enhances economic efficiency. To evaluate this assertion properly it is important to understand the meaning of the term economic efficiency, a term the Complainants never bother to define. In his seminal textbook Intermediate Microeconomics, Hal Varian defines an allocation of resources as economically efficient if there is no alternative allocation that would make everyone at least as well off and some people better off. (See Varian Page 15). To put this in less abstract terms, consider the following example. Mr. X and Mr. Y face the choice of mowing their lawn or playing golf. Mr. X hates mowing his lawn and loves playing golf. He is willing to pay $30 to avoid mowing his lawn and have the ability to play more golf. Mr. Y also dislikes mowing his lawn but only values it at $10 relative to golf. If Mr. X offers to pay Mr. Y $20 to mow Mr. X's lawn, they are both better off by $10. Mr. X gets to play more golf and Mr. Y gets more money. Economists sometimes refer to this as the "gains from trade." By contrast if Mr. X and Mr. Y both valued playing golf over mowing lawns at $20, any trades that did occur would be economically neutral and would not increase economic efficiency. The examples of

transactions that the Complainants assert promote economic efficiency all involve gains from trade.

14. The key question raised by Complainants' assertion is whether denial of reparations to third parties discourages economically efficient transactions. The answer is that any such effect is highly implausible in the real world when one considers that, as discussed above, the relevant factor to the purchaser is the delivered price of oil. In every case cited by Complainants' expert Mr. Ashton, the purchaser enters into the transaction in question because it is getting the lowest delivered price in the market at a particular point in time. As a rational business, it is unlikely any purchaser would ever turn down the lowest-priced oil available in the market to buy more expensive oil in hopes of someday recovering reparations for any allegedly excessive tariff rate involved in transporting the oil. Yet that is the scenario Complainants are suggesting when they argue that they will be discouraged from making economically efficient decisions by the third party reparations rule.

15. In any event, the examples of economically efficient third party transactions cited by Complainants actually undermine their argument that the purchaser is necessarily bearing the economic burden of the transportation charge. In his testimony, Mr. Ashton discusses several scenarios where a refiner might find it economically attractive to engage in third party shipments, i.e. purchase oil from a shipper of record. (Ashton, ¶ 5). The first involves a situation, such as the one in this case, where the pipeline offers a discount to shippers who enter into term commitments.

In this case, the shippers of record who have made term commitments could either charge the purchaser a discount or a premium for the oil. For example, assume the shipper of record has entered into a 15-year commitment at a rate of $1.50 per barrel, whereas the five year rate is $2.00 per barrel. The 15-year shipper can afford to sell oil at a delivered price below its competitor who is paying the five-year rate. However, the 15-year shipper need not pass through the full amount of the differential in order to attract buyers; it only needs to undercut the five-year shipper's price by some margin, and can then keep the remainder of the differential as a premium. [

] This transaction would be economically efficient. The shipper of record is better off because it can charge a premium and the purchaser is better off because it is obtaining product at a price less than its next best alternative. It is important to note that the economic efficiency implies that the purchaser does not simply pay an amount equal to the crude price plus the tariff. Instead it pays a price that includes a premium. There is no simple way to break apart the delivered price to determine where to apply this premium.

Another way that the term commitment could lead to an economically efficient transaction is if the shipper of record does not have enough barrels to fulfill its volume commitment. Presumably if it does not fulfill its commitment, it will have to pay a penalty. In this case, the shipper might sell barrels at a discount to avoid paying this penalty. As long as it can sell its unneeded capacity at an amount above the penalty, the shipper will be better off. In this case, the economic efficiency implies a discounted price. Again there is no way to break apart the delivered price to determine where to apply the discount.

16. Mr. Ashton also posits that a case might arise where a marketer would have an excess supply of crude oil. (Aston ¶ 5) This case is analogous to the situation just discussed. In this case, the shipper would presumably sell its "excess crude" oil at a discount.[6] Distressed barrels generally sell at a significant discount. Again, this is economically efficient, and yet again demonstrates that the delivered price the purchaser pays is more complicated than the simple aggregate of a market set crude oil price and a FERC tariff.

17. Mr. Ashton also claims that a purchaser might purchase oil from a shipper in a case where a pipeline has limited space and is subject to pro-rationing. In this case, presumably the firms that were selling oil would charge a premium.[7] As in all of the cases of premiums and discounts, it is not possible from an economic perspective to determine whether the premiums and discounts should apply to the price of the oil itself, the transportation or some combination. All of the cases of "economic efficiency" cited by the Complainants and Mr. Ashton imply cases where the purchasers do not bear the transportation charge as a direct flow through. Indeed, if a case existed where the purchaser paid a delivered price that was exactly equivalent to a market set price for the crude and a set price for transportation, it would likely

[6] In the industry, excess oil is sometimes referred to as distressed oil or distressed barrels.
[7] In addition, if a firm happened to have oil already stored in the destination market that it had shipped before pro-rationing went into effect, it might also sell this oil at a premium.

be either a coincidence or an economically neutral transaction. It would be analogous to the case where Mr. X and Mr. Y both valued not mowing lawns at $20.

18. Moreover, if the purchasers did believe that the possibility of reparations were significant, they could have addressed this concern in their contracts. In my twenty years of experience in the industry, I am aware of several cases where purchasers have specifically included provisions in their contracts that obligate the shipper of record to pass through any pipeline reparations or refunds it receives. This point undermines another argument made by Mr. Ashton, Mr. Garner, and Mr. Duff, namely that the shippers of record have no incentive to challenge excessive rates. If the purchasers believe the rates are excessive, they can structure their contracts such that the shippers of record would be obligated to assist in any challenge to a carrier's rates and pass any potential reparations on to the purchasers.

Even if the purchasers did not include these types of provisions in their contracts, the shippers of record would still have compelling incentives to challenge these rates. In the first place, if the contracts are silent on reparations, the shippers of record would presumably be able to keep any reparations they collected after successfully challenging the rates. Even if they had passed some or all of the excessive charges on to their customers, collecting reparations would presumably increase the seller's profits. Moreover, paying lower transportation rates would either allow the shippers to increase their profits, i.e. charge higher premiums, or increase the amount of oil they sold in the future by allowing them to charge lower prices relative to competitors who sourced crude locally or transported it to the destination via an alternative tariff. For all of these reasons, the claim by the Complainants and their witnesses that the shippers of record have no incentive to challenge the rates is specious. In short, the Commission's February 18, 2004 decision is unlikely to decrease economically efficient activity, and it is unlikely to decrease the incentives shippers have to pursue legitimate complaints.

19. By contrast, reversal of the Commission's February 18, 2004 decision, could lead to serious harm, greatly increase the complexity of rate cases, and potentially decrease the incentive for shippers to file legitimate challenges to rates. The most obvious problem with the Complainants' position is that it could lead to the problem of "double recovery." For example, if the Commission forced Frontier to pay reparations to Big West and Chevron and then one of the shippers of record filed a complaint and asked for reparations on the same barrels, Frontier might have to pay reparations twice. Presuming the Commission did not want to subject Frontier to double recovery, it would be forced to engage in the complex task of apportioning the reparations between the purchasers and the shippers of record. The Complainants claim these problems will not arise because the contract for sale of the oil always proves which party bears the tariff. As discussed in detail above, this claim is spurious.

REGULATORY ECONOMICS GROUP, LLC

ROBERT G. VAN HOECKE

Principal

Mr. Van Hoecke has over fifteen years experience in the oil pipeline business. For twelve years, Bob held various positions with William Pipe Line Company ("WPL"), most recently as Manager of Regulatory Affairs. Since leaving WPL, Bob has provided consulting services to industry, primarily relating to cost of service, market studies and business planning. Bob has provided expert testimony in numerous matters relating to pipeline tariffs, cost of service and business practices.

Relevant Experience

Rates and Regulation

- For WPL, directed company's Phase II defense in rate case before the FERC (IS-90-21-000 et. al.). Responsible for developing the course of defense and selecting appropriate expert witnesses to testify on the company's behalf. Supervised development of various stages of discovery, direct testimony, rebuttal testimony and case preparation. Served as chief company witness and performed short-run marginal cost analysis of integrated pipeline network containing more than 40,000 distinct routes.
- Presented testimony in a FERC complaint proceeding to determine whether certain bookkeeping services provided by a common carrier pipeline were jurisdictional.
- Expert testimony regarding the proper method for determining just and reasonable transportation charges for unregulated carbon dioxide pipelines in two separate class action disputes initiated by royalty interest owners in the Federal District Court of New Mexico and Colorado.
- Expert testimony regarding rate reasonableness and revenue adequacy on behalf of an anhydrous ammonia pipeline at the Surface Transportation Board (STB).
- Expert testimony regarding just and reasonable rates for the Trans Alaska Pipeline Settlement ("TAPS") under various alternative cost of service methodologies.
- Prepared market evaluation, laid-in cost data, and testimony for market-based rate applications at the FERC.

Economics and Finance

- Assisted in the financial and regulatory evaluation of potential acquisition opportunities.
- Participated in the development of a historical cost trend analysis for the oil pipeline industry.
- Provided expert testimony regarding the reasonableness of certain decisions made by a majority partner in a joint venture pipeline in a dissolution action initiated by a minority partner before the Federal District Court of Missouri.

Commercial Analysis

- Market evaluations and determining appropriate competitive tariff structures to maximize a pipeline's profitability. Conducting competitive analysis of potential market encroachments and assisting pipeline clients in developing a series of strategic and tactical responses. Developing the data and testimony required for market-based rate applications at the FERC.

- Performing economic analysis of proposed business development projects to assist pipeline management in evaluating various business strategies.

- While with WPL, responsible for performing market evaluations and establishing competitive tariff rates and ancillary fees to maximize profitability. Worked closely with Marketing and Business Development groups to develop and implement market-based, negotiated rates with strategic shippers and joint pipeline carriers.

Testimony

Dec. 11, 2003	Presented Oral Testimony and Cross Examination on behalf of the TAPS Carriers in the matter of Tariff Rates To Be Effective January 1, 2003 for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System and the Investigation Into the 2001 and 2002 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the Regulatory Commission of Alaska. P-03-4.
Oct. 15, 2003	Submitted Rebuttal on behalf of the TAPS Carriers in the matter of Tariff Rates To Be Effective January 1, 2003 for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System and the Investigation Into the 2001 and 2002 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the Regulatory Commission of Alaska. P-03-4.
Sep. 10, 2003	Filed Affidavit at the Federal Energy Regulatory Commission in support of Shell Pipeline Company LP's motion to compel discovery in OR02-10.
Aug. 29, 2003	Submitted Prepared Direct Testimony at the Federal Energy Regulatory Commission on behalf of Shell Pipeline Company LP in support for its application for authority to charge market-based rates. Docket No. OR02-10.
Jul. 24, 2003	Filed Affidavit at the Federal Energy Regulatory Commission in support of Shell Pipeline Company LP's motion to extend the procedural schedule in OR02-10.
Jun 10, 2003	Submitted Prepared Answering and Rebuttal Testimony at the Federal Energy Regulatory Commission supporting Platte FERC Tariff No. 1474 in Docket No. IS02-384-000 *et al.*

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Jun. 3, 2003	Submitted Prepared Direct Testimony on behalf of the TAPS Carriers in the matter of Tariff Rates To Be Effective January 1, 2003 for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System and the Investigation Into the 2001 and 2002 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the Regulatory Commission of Alaska. P-03-4.
Dec. 20, 2002	Submitted Prepared Direct Testimony at the Federal Energy Regulatory Commission supporting Platte FERC Tariff No. 1474 in Docket No IS02-384-0000 *et al.*
Oct. 28, 2002	Submitted Reply Testimony at the Federal Energy Regulatory Commission on behalf of Shell Pipeline Company in response to protest by Phillips Petroleum Co., Tosco Corporation, and ToscoPetro Corp. Docket No. OR02-10-000.
Aug. 9, 2002	Submitted Testimony at the Federal Energy Regulatory Commission in support of reparations calculations proposed by Frontier Pipeline Company in Docket Nos. OR01-2-00 and OR01-4-000.
Jul. 9, 2002	Submitted Testimony at the Federal Energy Regulatory Commission on behalf of Shell Pipeline Company in support for its application for authority to charge market-based rates. Docket No. OR02-10-000.
Jan. 11-31, 2002	Cross-examination in complaint of ARCO Products Company *et al* vs. SFPP, LP in Docket Nos. OR96-2-000, *et al* before the Federal Energy Regulatory Commission.
Nov. 2, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting Plantation Pipe Line Company's Petition for Declaratory Order regarding initial rates for proposed new pipeline service from Bremen, Georgia to Chattanooga and Knoxville, Tennessee OR02-1-000.
July 31, 2001	Filed Prepared Reply Testimony on behalf of SFPP in response to complaint of ARCO Products Company *et al* in Docket Nos. OR96-2-000, *et al.*
May 15, 2001	Filed Prepared Answering Testimony on behalf of SFPP in response to complaint of ARCO Products Company *et al* in Docket Nos. OR96-2-000, *et al.*
April 23-26, 2001	Presented Oral Testimony on behalf of TAPS CARRIERS in the matter of the correct calculation and use of acceptable input data to calculate the 1997, 1998 1999, and 2000 tariff rates for the intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the Regulatory Commission of Alaska P97-4 and P97-7.
April 2, 2001	Filed an affidavit with the Superior Court of Arizona, Tax Court discussing Commission regulations regarding the concept of Original Cost in SFPP, L.P. v. Arizona Department of Revenue No. TX 1999-00532.

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March 29, 2001	Filed Rebuttal Report on behalf of Cortez Pipeline Company in CO_2 Claims Coalition, *et. al.*, vs. Shell Oil Company, et. al. in the United States District Court for the State of Colorado CIV NO. 96-Z-2451.
March 26, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Anschutz Ranch East Pipeline to the complaint made by Chevron Products Company. Docket No. OR01-05-000.
March 20, 2001	Submitted Testimony at the Federal Energy Regulatory Commission on behalf of West Shore Pipe Line Company in support for its application for authority to charge market-based rates. Docket No. OR01-06-000.
March 14, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Frontier Pipeline Company to answer of complaint made by Chevron Products Company. Docket No. OR01-04-000.
March 13, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Anschutz Ranch East Pipeline Inc. to the amended complaint made by Big West Oil Company. Docket No. OR01-03-000.
March 5, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Frontier Pipeline Company to answer of complaint made by Big West Oil Company. Docket No. OR01-02-000.
Feb 26, 2001	Rebuttal Testimony on behalf of TAPS CARRIERS in the matter of the correct calculation and use of acceptable input data to calculate the 1997, 1998, 1999 and 2000 tariff rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the State of Alaska, Regulatory Commission of Alaska, P-97-4.
Feb. 6, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Anschutz Ranch East Pipeline Inc. to the complaint made by Big West Oil Company. Docket No. OR01-03-000.
Jan. 29, 2001	Filed Affidavit at the Federal Energy Regulatory Commission supporting the response of Frontier Pipeline Company to the complaint made by Big West Oil Company. Docket No. OR01-02-000.
Dec. 20, 2000	Prepared Direct Testimony, filed with the FERC, in support of Chase Transportation Company's application for authority to charge market-based rates OR01-1-000.
Nov. 14, 2000	Presented oral testimony on behalf of Kinder Morgan Energy Partners, L.P. before the state of Arizona, Board of Equalization regarding the proper valuation of SFPP's pipeline assets in the state of Arizona.
July 12, 2000	Second Prepared Direct Testimony on behalf of TAPS CARRIERS in the matter of the correct calculation and use of acceptable input data to calculate the 1997, 1998, 1999 and 2000 tariff rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System before the State of Alaska, Regulatory Commission of Alaska, P-97-4.

May 9, 2000	Submitted second report to the American Arbitration Association regarding oil pipeline tariff regulations rebutting testimony of Marcum Midstream-Farstad, LLC in the arbitration between Marcum Midstream-Farstad, LLC et .al. vs. Amoco Oil Company. Case No. 70 198 00294-99.
May 5, 2000	Filed Affidavit at the Federal Energy Regulatory Commission supporting the Response of ExxonMobil Pipeline Company to the Motion to Intervene of BP Exploration & Oil, Inc. in Opposition to ExxonMobil Pipeline Company's Petition for Declaratory Order and Petition for Discovery regarding initial transportation rates on the Hoover Offshore Oil Pipeline System ("HOOPS") OR00-2-000.
May 2, 2000	Submitted Testimony at the Federal Energy Regulatory Commission on behalf of Equilon Pipeline Company, LLC in support of its cost-of-service filing in IS00-208-000.
March 20, 2000	Submitted report to the American Arbitration Association regarding oil pipeline tariff regulations in support of Amoco Oil, Company's position in the arbitration between Marcum Midstream-Farstad, LLC et. al. vs. Amoco Oil Company. Case No. 70 198 00294-99.
March 9, 2000	Filed Affidavit at the Federal Energy Regulatory Commission supporting ExxonMobil Pipeline Company's Petition for Declaratory Order regarding initial transportation rates on the Hoover Offshore Oil Pipeline System ("HOOPS") OR00-2-000.
Feb. 15, 2000	Submitted Testimony at the Federal Energy Regulatory Commission on behalf of Marathon Ashland Pipe Line LLC in support of its application for the authority to charge Market-Based Rates in OR00-1-000.
June 16, 1999	Submitted Testimony at the Federal Energy Regulatory Commission on behalf of Amoco Pipeline Company in support of its cost-of-service filing in IS99-268-000.
April 30, 1999	Supplemental Testimony on behalf of Cortez Pipeline Company in CO_2 Claims Coalition, *et. al.*, vs. Shell Oil Company, et. al. in the United States District Court for the State of Colorado CIV NO. 96-Z-2451.
Feb. 19, 1999	Supplemental Testimony on behalf of Explorer Pipeline Company as part of its Motion for Summary Disposition in its Application for Market-Based Rates at the Federal Energy Regulatory Commission, OR99-1-000.
Jan. 29, 1999	Oral testimony and cross-examination in Conoco Pipeline Company, Inc. vs. Transmontaigne Pipeline, Inc. in the United States District Court for the Western District of Missouri, Southwest Division, Case No. 97-5085-CV-SW-1.
Jan. 13, 1999	Deposition in CO_2 Claims Coalition, *et. al.*, vs. Shell Oil Company, et. al in the United States District Court for the State of Colorado CIV NO. 96-Z-2451.
Nov. 23, 1998	Prepared Testimony on behalf of Cortez Pipeline in CO_2 Claims Coalition, *et. al.*, vs. Shell Oil Company, et. al. in the United States District Court for the State of Colorado CIV NO. 96-Z-2451.

Oct. 15, 1998	Submitted Testimony on behalf of Explorer Pipeline Company as part of its Application for Market-Based Rates at the Federal Energy Regulatory Commission, OR99-1-000.
Oct. 8, 1998	Prepared Direct Supplemental Testimony on behalf of the TAPS Owners in the Alaska Public Utilities Commission Docket No. P-97-4, the protest of the 1997 and 1998 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System (revised Oct. 15, 1999).
Sept. 25, 1998	Deposition in Conoco Pipeline Company, Inc. vs. Transmontaigne Pipeline, Inc. in the United States District Court for the Western District of Missouri, Southwest Division, Case No. 97-5085-CV-SW-1.
Aug. 14, 1998	Testimony in Conoco Pipeline Company, Inc. vs. Transmontaigne Pipeline, Inc. in the United States District Court for the Western District of Missouri, Southwest Division, Case No. 97-5085-CV-SW-1.
Mar. 2, 1998	Rebuttal Testimony in CF Industries, *et al.*, vs. Koch Pipeline Company, LP. at the Surface Transportation Board, STB Docket No. 41685.
Dec. 17, 1997	Deposition in Doris Feerer, *et al.*, vs. AMOCO Production Company in the United States District Court for the State of New Mexico CIV NO. 95-00012-JC/WWD.
Nov. 10, 1997	Direct Testimony in CF Industries vs. Koch Pipeline Company, LP. at the Surface Transportation Board, STB Docket No. 41685.
May 5, 1997	Doris Feerer, *et al.*, vs. AMOCO Production Company in the United States District Court for the State of New Mexico CIV NO. 95-00012-JC/WWD.
Dec. 1995	Cross-examination in Phase II of Williams Pipe Line Company, IS90-21-000 *et. al.*, before the Federal Energy Regulatory Commission.
Oct. 26, 1995	Rebuttal Testimony in Phase II of Williams Pipe Line Company, IS90-21-000 *et. al.*, before the Federal Energy Regulatory Commission.
July 21, 1995	Supplemental Direct Testimony in Phase II of Williams Pipe Line Company, IS90-21-000 *et. al.*, before the Federal Energy Regulatory Commission.
July 1995	Deposition in Phase II of Williams Pipe Line Company, IS90-21-000 *et. al.*, before the Federal Energy Regulatory Commission.
Jan. 23, 1995	Direct Testimony in Phase II of Williams Pipe Line Company, Docket No. IS90-21-000 *et. al.*, before the Federal Energy Regulatory Commission.
July 30, 1993	Verified Statement in Kerr-McGee Refining Corporation and Texaco Refining and Marketing, Inc. vs. Williams Pipe Line Company, Docket No. OR91-01-000, before the Federal Energy Regulatory Commission.

REGULATORY ECONOMICS GROUP, LLC

Presentations

- **FERC Jurisdictional and Non-Jurisdictional Services (May 2003).** Association of Oil Pipelines, Annual Business Conference, Baltimore, Maryland.
- **FERC Form 6 – Page 700 (May 2002).** Association of Oil Pipelines, Accounting and Regulatory Workshop, St. Petersburg, Florida.
- **FERC Jurisdictional and Non-Jurisdictional Services (May 2002).** Association of Oil Pipelines, Accounting and Regulatory Workshop, St. Petersburg, Florida.
- **Market-based Rates for Oil Pipelines (May 2001).** Association of Oil Pipelines, Accounting and Finance Workshop, New Orleans, Louisiana.
- **Market-based Rates for Oil Pipelines (May 2000).** Association of Oil Pipelines, Accounting and Finance Workshop, San Antonio, Texas.
- **Market-based Rates (May 1999).** Association of Oil Pipelines, Accounting and Finance Workshop, San Antonio, Texas.
- **FERC Form 6 (May 1998).** Association of Oil Pipelines, Accounting and Finance Workshop, Atlanta, Georgia.
- **FERC's Indexation of Oil Pipeline Rates (April 1998).** American Petroleum Institute, Pipeline Conference, Houston, Texas.
- **Applying for Market-based Rates (May 1997).** Association of Oil Pipelines, Accounting and Finance Workshop, Atlanta, Georgia.
- **Oil Pipeline Rate Regulation (March 1997).** Executive Enterprises, Oil Pipeline Regulation, Houston, Texas.
- **Pipeline Economics (1992 – 1996).** American Petroleum Institute, School of Pipeline Technology, Harris College, Houston, Texas.
- **Overview of Current Oil Pipeline Regulations (May 1996).** Association Of Oil Pipelines, Accounting and Finance Workshop, St. Louis, Missouri.
- **Oil Pipeline Rate Regulation (October 1995).** Executive Enterprises, Alternative Ratemaking and Gas Price Methodologies, Houston, Texas.
- **Challenges Facing Oil Pipelines (June 1995).** Executive Enterprises, Oil Pipeline Ratemaking Strategies for the 90s, Houston, Texas.

- **Recent FERC Rulemakings (May 1995)**. Association of Oil Pipelines, Accounting and Finance Workshop, St. Louis, Missouri.

- **Quantifying Competition in the Quest for Market-Based Rates (May 1994)**. Association of Oil Pipelines, Accounting and Finance Workshop, Dallas, Texas.

- **The Future of Oil Pipeline Ratemaking (May 1993)**. Association of Oil Pipelines, Accounting and Finance Workshop, San Antonio, Texas.

Prior Experience

Klick, Kent & Allen, Inc. (1997 – 1998)	Senior Consultant Led client engagements regarding oil pipeline regulatory matters; provided financial and economic consulting services to clients regarding strategic planning, market analysis, ratemaking and litigation support.
Williams Pipe Line Company (1993 – 1997)	Manager, Tariffs and Regulatory Affairs Directed company's Phase II defense in rate case before the FERC (IS-90-21-000 et.al.).
Williams Pipe Line Company (1990 – 1993)	Manager, Strategic Planning and Tariffs. Supervised the preparation of monthly, annual and long-range forecasts of volumes, revenues and related variance comments.
Williams Pipe Line Company (1987 - 1990)	Supervisor, Health and Safety. Responsible for establishing system-wide health and safety programs for approximately 700 employees in 10 states.
Williams Pipe Line Company (1986 - 1987)	Operations Supervisor. Responsible for supervising all aspects of pipeline terminal and pump station operations for terminal complex handling refined petroleum, fertilizer, asphalt and LPG.
Williams Pipe Line Company (1984 - 1986)	Various Positions in Field Operations Responsible for various aspects of pipeline operation and administration at the terminal, station and regional field office level.

Education

Northwestern University	Pipeline Economics and Management Program
University of Kansas	BS Business Administration

VERIFICATION

STATE OF VIRGINIA)
) SS.
CITY OF RESTON)

Robert G. Van Hoecke having first been duly sworn according to law, deposes and states that he has read the foregoing answering and rebuttal testimony, is familiar with the contents thereof, and that the same are true and correct to the best of his knowledge, information and belief.

Robert G. Van Hoecke

Subscribed and sworn to before me this 5 th day of April, 2004.

Notary Public

My Commission Expires: Jan. 31st, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a true and correct copy of the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 6th day of April, 2004.

Alice E Loughran

Alice E. Loughran
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