

149 FERC ¶ 61,149  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

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

Docket Nos. OR14-6-000  
OR14-6-001

ORDER ON INITIAL DECISION AND REQUEST FOR REHEARING

(Issued November 20, 2014)

1. On November 8, 2013, the Commission issued an order that dismissed as untimely the complaint filed on August 20, 2013 by Flint Hills Resources Alaska, LLC (Flint Hills) against the Trans Alaska Pipeline System (TAPS) Quality Bank (QB), but concurrently initiated a hearing to investigate the questions of fact and law raised by the complaint.<sup>1</sup> On December 9, 2013, Flint Hills filed for rehearing of the Commission's November 8, 2013 Hearing Order. On May 8, 2014, the Presiding Administrative Law Judge issued an Initial Decision upholding the current QB methodology.<sup>2</sup> For the reasons set forth below, the Commission affirms the Initial Decision and denies rehearing.

**Background**

2. TAPS consists of a 48-inch diameter common carrier crude oil pipeline owned and operated by the TAPS Carriers,<sup>3</sup> extending approximately 800 miles from Pump Station

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<sup>1</sup> *Flint Hills Resources Alaska, LLC v. BP Pipelines (Alaska), et al.*, 145 FERC ¶ 61,117 (2013) (Hearing Order).

<sup>2</sup> *BP Pipelines (Alaska) Inc., et al.*, 147 FERC ¶ 63,008 (2014) (Initial Decision).

<sup>3</sup> The current TAPS Carriers are ExxonMobil Pipeline Company (Exxon), BP Pipelines (Alaska) Inc. (BP), ConocoPhillips Transportation Alaska Inc. (Conoco) and

(continued...)

No. 1 on Alaska's North Slope (ANS) to the Marine Terminal located in Valdez, Alaska, on Alaska's southeastern coast. Since 1977, TAPS provides the only commercially viable method for moving crude oil from ANS oil fields to the shipment point at Valdez. Because the crudes produced on the ANS have different qualities (i.e., different proportions of the various types of hydrocarbon molecules), they all have different values to refiners.

3. The TAPS QB is designed to compensate shippers for differences in the values of the crude oils tendered versus the value of the commingled ANS common stream they receive at Valdez. The TAPS QB requires shippers of crude oils that have a lower value than the ANS common stream to pay into the QB, while shippers of crude oils with a value higher than the ANS common stream receive payments from the QB. The QB has been the subject of litigation almost from its very inception, and we refer to that history to the extent necessary to understand the instant matter.

4. As a result of a complaint filed in 1989, the Commission in December 1993 adopted the distillation methodology for valuing the crude oil.<sup>4</sup> The distillation methodology recognizes various crude cuts boil off at different temperatures, with Resid as the cut consisting of any material that does not boil out until the temperature reaches or exceeds 1050°F. While the D.C. Circuit affirmed the Commission's adoption of the distillation QB methodology in *OXY U.S.A. Inc. v. FERC*,<sup>5</sup> the Court remanded the valuation of certain cuts, including valuation of Resid, and as a result Resid was the subject of continuing litigation. After a lengthy hearing, the Presiding Judge issued an Initial Decision which the Commission affirmed in Opinion No. 481 that resolved all of the issues relating to valuation of various cuts, including Resid.<sup>6</sup> As approved in Opinion No. 481, the existing QB formula determines a value based on the assumption that Resid will be used as a coker feedstock. Coking is the process that breaks down Resid into lighter fuel products and a heavy residue, such as asphalt. Under the QB formula, Resid's value is the value of the products from the coking less the cost of the apparatus and material used in coking. Opinion No. 481 further explained how the QB would calculate Resid's coking costs. The D.C. Circuit affirmed the Commission in all respects

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Unocal Pipeline Company (Unocal) which is in the process transferring its share on TAPS to the other TAPS Carriers. See October 24, 2014, Compliance Filing at the Regulatory Commission of Alaska in Docket No. P-12-013.

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

<sup>5</sup> 64 F.3d 679 (D.C. Cir. 1995) (*OXY*).

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

in *Petro Star Inc. v. FERC*.<sup>7</sup> One of the main issues in the continuing litigation was the valuation of Resid.

### **Flint Hills' Complaint, and Responses**

5. Flint Hills, a shipper on TAPS, owns and operates the North Pole Refinery in North Pole, Alaska.<sup>8</sup> During the refining process Flint Hills extracts middle distillate products from the common stream crude, and redelivers the remaining unused portion of the extracted TAPS stream. As Flint Hills extracts the more valuable crude components in the refining process, Flint Hills pays into the QB. Flint Hills' complaint alleged that the valuation of Resid under the existing QB formula needed to be changed because the current formula undervalues Resid, because it is no longer chiefly used for coking but instead is blended with other oils. Flint Hills requested that the Commission investigate its claim that the currently effective QB formula fails to produce a just and reasonable value for the commingled ANS common stream Resid cut,<sup>9</sup> and to issue a final order adopting a new methodology for valuing Resid.

6. Flint Hills claimed the QB formula functioned as intended from November 1, 2005, the effective date of Opinion No. 481, through December 2008. The complaint contended that beginning in 2009 the existing formula started to calculate Resid values below the market-based value of Resid as a blending agent for FO-380, a type of bunker fuel oil. Flint Hills argues that although the market generally placed a higher value on Resid as a coker feedstock than as a blended component of FO-380 throughout the entire 2005-2013 period, the QB formula no longer reflects market conditions and it inaccurately values Resid at levels below that of FO-380.

7. As a result of these alleged problems with the existing TAPS QB formula, Flint Hills asked the Commission to determine a new TAPS QB formula, with a new methodology for valuing Resid. Flint Hills also argued the Commission had to establish and make effective the new formula fifteen months immediately preceding the order

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<sup>7</sup> No. 06-1166 (D.C. Cir. March 6, 2008) (unpublished opinion).

<sup>8</sup> Flint Hills announced that beginning in May 2014 it will permanently halt operations at the North Pole refinery. See press release dated February 4, 2014 at [https://www.fhr.com/newsroom/news\\_detail.aspx?id=327](https://www.fhr.com/newsroom/news_detail.aspx?id=327).

<sup>9</sup> As explained *infra*, Resid is the portion of the petroleum stream remaining after distillation of all other cuts.

imposing the requested adjustments consistent with section 4412(c)(2) of the Motor Carrier Safety Reauthorization Act of 2005 (Motor Carrier Act).<sup>10</sup>

8. In response to the complaint, a number of parties filed motions to dismiss, or in the alternative, requests for a hearing contending that Flint Hills has not demonstrated changed circumstances warranting a change in the QB methodology. Exxon filed a motion to reject the complaint on the grounds that it was not filed within two years of the date the claim arose, which was the deadline for filing a TAPS claim under section 4412(c)(1) of the Motor Carrier Act. That section states:

(1) IN GENERAL.—A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than 2 years after the date on which the claim arose.

9. Exxon maintained that Flint Hills, under section 4412(c)(1), “Deadline for Claims,” was required to file its claim “not later than 2 years after the date on which the claim arose,” or by January 2011. Exxon asserted that this two-year time period set forth in section 4412(c)(1) offers ample time for a potential complainant to assess the merit of the claim and determine whether to bring it. Therefore, Exxon contended that the Complaint was time-barred, noting that Flint Hills repeatedly stated in the complaint that the existing QB formula became unjust and unreasonable beginning in January 2009, a date more than four years prior to the August 20, 2012 filing date of the complaint, and Section 4412(c)(2) established a deadline for filing QB claims no later than two years after the date on which the claim arises

10. In response to Exxon’s motion, intervener Petro Star, Inc., in support of Flint Hills’ position, asserted that since there was what it characterized as continuing “violations,” the complaint is not time-barred, citing *Zenith*.<sup>11</sup> Flint Hills also asserted that Exxon’s position is contrary to the recognized standard for determining when “a claim arises,” namely the time when a claim arises “does not commence earlier than the

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<sup>10</sup> Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005). That section provides:

(2) FINAL ORDER. – Not later than 15 months after the date on which a claim is filed under paragraph (1), the Federal Energy Regulatory Commission shall issue a final order with respect to the claim.

<sup>11</sup> *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971) (*Zenith*).

date the plaintiff can file suit and obtain relief.”<sup>12</sup> Essentially, Flint Hill argued that date does not occur until “the plaintiff has a complete and present cause of action.”<sup>13</sup>

11. Flint Hills and those supporting it argue that in determining a limitation period, “the period does not commence earlier than the date the plaintiff can file suit and obtain relief” citing *TRW*, and that a plaintiff only satisfies that requirement “when the plaintiff has a complete and present cause of action,” citing *Bay Area*.

12. Flint Hills stated that it did not have a claim in 2009 because while there were QB formula valuation fluctuations in 2009 when compared to the Platts Assessed Market Price of ANS; it argued that until those fluctuations subsided and a definite pattern emerged, there was not a pattern on which Flint Hills could rely to show that the existing QB formula was broken and no longer produced just and reasonable results. Further, Flint Hills maintained, it was necessary to have additional evidence beyond data for January 2009 to determine why the QB formula was broken and no longer produced just and reasonable rates. Thus, Flint Hills argued that January 2009 “cannot start the statute of limitations clock” for section 4412(c)(1) purposes, which it believed was the date Exxon was alleging was the start of the two-year period within which Flint Hills should have filed its complaint. Flint Hills also alleged that each time it received an unreasonable Resid valuation based on the existing tariff methodology amounted to a separate “violation” that started the two-year deadline anew.

13. Exxon asserted that it never contended that Flint Hills should have filed its complaint in January 2009 or within two years thereafter. Rather, Exxon explained that Flint Hills’ continuing violation theory offered no situation in which the Commission could apply section 4412(c)(1) to deny a claim, and would render the two-year filing window of section 4412(c)(1) meaningless. The Hearing Order stated that the Commission, faced with applying a section unique to TAPS, and adopted by Congress to limit the extent of retroactive refunds in cases that have dragged on interminably,<sup>14</sup> found it was necessary to give section 4412(c)(1) meaning, but adopted an approach different from those urged by the parties.

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<sup>12</sup> See *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (*TRW*).

<sup>13</sup> Citing *Bay Area Laundry and Dry Cleaning Pension Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (*Bay Area Laundry*).

<sup>14</sup> See *Flint Hills Resources of Alaska v. FERC*, 634 F.3d 543, 546 (D.C. Cir. 2011).

### **The Hearing Order**

14. The Hearing Order recognized that the parties had differing views of how to determine whether Flint Hills' complaint was filed before the two year deadline for filing claims under section 4412(c)(1), and then analyzed the requirements under that section.<sup>15</sup>

15. The Hearing Order first found that those cases cited by parties urging that the section 4412(c)(1) deadline did not apply to the Flint Hills complaint because the cases involved a continuing violation were not on point. Thus, in *Zenith*, there was a continuing anti-trust conspiracy against the plaintiff which prevented it from selling its products in Canada, and the deadline for an antitrust claim was renewed each time it was so prevented.<sup>16</sup> The Hearing Order found that in the instant complaint there was no claim of any intentional conduct violating the complainant's rights. Rather, the Hearing Order concluded the issue is a rate found by the Commission to be a just and reasonable rate, affirmed by the D.C. Circuit court in *Petro Star*, but which the complainant was asserting is now no longer just and reasonable. Given that the rate derived from the existing QB methodology was presumptively just and reasonable until proven otherwise, the Hearing Order ruled there was no statute or regulatory provision that was subject to any continuing "violation."

16. Similarly, the Hearing Order reasoned that *Bay Area Laundry* was consistent with the Hearing Order's ruling on *Zenith* because *Bay Area Laundry* involved the failure to pay a schedule of payments, thus the limitation periods commenced anew on each subsequent scheduled payment date that was missed. The Hearing Order determined there was no schedule of payments or any regulatory payment requirement that was missed in the instant case.

17. The Hearing Order reasoned that to adopt Flint Hills' argument would in effect render section 4412(c)(1) meaningless, because the parties could always claim it was injured by the TAPS QB payment assessed against it for the last shipment. To render section 4412(c)(1) meaningless, the Hearing Order found, would be contrary to the standard for statutory interpretation that Congress intends its legislation to accomplish something.

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<sup>15</sup> Section 4412(c)(1) requires that a TAPS Quality Bank claim must be filed "not later than two years after the date on which the claim arose."

<sup>16</sup> "A plaintiff may allege a new cause of action for every time a conspiracy in restraint of trade operates against him." *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 74, 78 (D.C. Cir. 1997).

18. Rather than trying to find a precise date when a claim first arose and adding two years, as Exxon urged, or adopt the “continuing violation” position that Flint Hills and Petro Star claimed arose anew each month, the Hearing Order concluded the question presented was whether Flint Hills had a claim more than two years before its August 20, 2013 filing, so that its complaint was barred under the Motor Carrier Act.

19. The Hearing Order noted that while Flint Hills did not state exactly when its cause of action arose, i.e., when it had perfected a colorable claim that the existing Resid valuation was no longer just and reasonable, the order noted that Flint Hills did state that commencing in January 2009 the QB formula began producing uneconomic and contradictory results due to the formula’s undervaluation of the Resid cut, which Flint Hills claimed continued to the present. Although Flint Hills asserted that it could not have “filed a complaint prior to the end of December 2011,”<sup>17</sup> the Hearing Order determined the data from the beginning of 2011 did not appear to be different from the data for the subsequent six or seven months of 2011. The Hearing Order concluded that “[u]nder these circumstances, by August 1, 2011, after more than two years of results following the purported change in January 2009 of the results of the Resid valuation under the QB formula, a reasonable person in Flint Hills’ position would have determined the QB was no longer just and reasonable as to the Resid valuation.”<sup>18</sup> The Hearing Order then held that the August 20, 2013 complaint was beyond the two year deadline in section 4412(c)(1) because by the start of August 2011, in the exercise of due diligence, Flint Hills should have already filed a complaint and sought relief under section 4412(c)(1). The Hearing Order therefore dismissed Flint Hills’ complaint.

20. While dismissing Flint Hills’ complaint, the Commission did initiate an investigation and established a hearing to investigate the questions of fact and law raised by Flint Hills’ complaint. The Commission found that although the initial complaint was untimely, a sufficient showing had been made as to whether the existing QB formula was just and reasonable insofar as it valued Resid.<sup>19</sup> The Commission therefore instituted an investigation under section 15(1) of the Interstate Commerce Act (ICA) into the continued lawfulness of the existing QB methodology.<sup>20</sup>

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<sup>17</sup> Flint Hills’ Answer at 8.

<sup>18</sup> Hearing Order, 145 FERC ¶ 61,117 at P 46.

<sup>19</sup> Initial Decision, 147 FERC ¶ 63,008 at P 47.

<sup>20</sup> The Commission also noted that while section 4412(c)(2) of the Motor Carrier Act did not apply upon the dismissal of the complaint, the Presiding ALJ was required, based on the underlying reason for the enactment of section 4412, to follow the

### **Request for Rehearing and Answer**

21. Flint Hills filed for rehearing of the Hearing Order insofar as that order dismissed Flint Hills' complaint on the grounds that it "is barred as beyond the two year deadline in section 4412(c) (1)."<sup>21</sup>

22. Flint Hills asserts the dismissal rests on an erroneous interpretation of the governing law, and it urges the Commission to grant rehearing for purposes of (1) correcting this legal error and (2) reinstating its complaint as timely filed.

23. Flint Hills contends the Commission, in dismissing the complaint, erred in holding that the continuing violation doctrine was not applicable on the grounds that this case does not involve any intentional conduct violating the complainant's rights.

24. Flint Hills asserts that the Hearing Order referred to restraint of trade cases, and while intentional conduct is one element of a conspiracy in a restraint of trade action, Flint Hills claims the court in *Zenith*, on which the Commission relied, did not set a general rule that such a showing is a prerequisite for application of the continuous violations doctrine.

25. Rather than focusing on intent, as it believes the Hearing Order did, Flint Hills argues that the Court in *Zenith* focused on when injury occurred, and each time the plaintiff is injured by an act of the defendant a cause of action accrues to recover damages caused by that act, and "the statute of limitations runs from the commission of the act."<sup>22</sup> Therefore, Flint Hills argues, under the continuous violation doctrine, each new injury starts a new statute of limitations period running as to it.

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compressed timelines set forth in that section and issue an Initial Decision within six months of the issuance of the Hearing Order. Hearing Order, 145 FERC ¶ 61,117 at P 48. While the Commission acknowledges the concerns expressed by the Presiding ALJ in regards to this timeline, we must all recognize and adhere to congressional mandates and intent set forth in the statutes we are charged with enforcing.

<sup>21</sup> Flint Hills stated it filed for rehearing in Docket No. OR14-6-000, the proceeding established by the Hearing Order, because the Hearing Order terminated Docket No. OR13-31-000. Flint Hills Request for Rehearing at 1.

<sup>22</sup> *Zenith*, 401 U.S. at 339.

26. Flint Hills thus argues “because a party misses the earliest date at which the continuing violation action could have been filed does not foreclose the same party from timely filing a later action challenging continuous violations.”<sup>23</sup>

27. Next, Flint Hills asserts the Commission erred in distinguishing *Bay Area Laundry* because in that case, according to Flint Hills, there was a defendant’s “fail[ure] to make periodic payments it was obligated to make” which led the Court to apply the continuous violations doctrine but here it claims “there is no schedule of payments” so the continuous violation doctrine did not apply.

28. Flint Hills asserts that there is no difference between *Bay Area Laundry* and the instant case because the QB tariff provisions provide that the “calculation of Shipper’s debits and credits shall be made each month” and that a monthly accounting “shall be rendered to Shipper after the end of each Month.” According to Flint Hills, it follows that each monthly QB adjustment involves another unlawfully high priced charge to Flint Hills. Thus, Flint Hills maintains, contrary to the Hearing Order, there is also a schedule of payment in the instant case, and “because there is a ‘schedule of payments’ here, the Commission should have followed the ruling of *Bay Area Laundry* that a ‘new cause of action,’ carrying its own limitations period, ‘arises from the date each payment is missed.’”<sup>24</sup>

29. Flint Hills contends that its August 20, 2013 complaint was timely filed for unlawful charges two years prior to that date, notwithstanding whether Flint Hills could have filed an earlier action related to charges more than two years old.

30. In short, Flint Hills argues, whether it could have filed earlier does not bar the instant complaint. In contrast, Flint Hill reasons the limitation period of section 4412(c)(1) precludes recovery for any injury outside the limitation period.

31. BP Exploration (Alaska), Inc. (BPXA) submitted a Motion for Leave to Answer and Answer to the Request for Rehearing. While the Commission’s Rules of Practice and Procedure provide that an answer may not be made to a request for rehearing absent authorization, we will accept the answer under Rule 213 because it has assisted the Commission in its decision making process.<sup>25</sup>

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<sup>23</sup> Flint Hills Request for Rehearing at 6-7 (citing *Bay Area Laundry*, 522 U.S. at 208).

<sup>24</sup> Flint Hills Request for Rehearing at 5.

<sup>25</sup> *Northern Natural Gas Co.*, 137 FERC ¶ 61,202, at P 10 (2011).

32. BPXA in its answer asserts that Flint Hills erroneously attempts to resuscitate its “continuous violation doctrine” argument claiming for the first time, that the ICA “places no time restriction on how far back a continuous violation claim could reach.” BPXA argues Flint Hills’ premise is flatly contradicted by the express terms of Section 16 of the ICA and decades of FERC, ICA, and court precedent thereunder.

33. In addition, BPXA argues that Flint Hills’ contention that the instant matter is similar to the *Bay Area Laundry* case is wrong on a number of counts. First, BPXA asserts the *Bay Area Laundry* case is inapposite because it did not involve a statutory provision like section 4412(c)(1), which was designed to preclude late-filed complaints such as the one at issue in this proceeding. BPXA also contends the court in *Bay Area Laundry* made very clear that it was relying on “general principles governing installment obligations” and there is no pre-determined schedule of payments based on a pre-existing obligation, such as in an installment payment context.

### **The Initial Decision**

34. On May 8, 2014, the Presiding ALJ issued an Initial Decision. The Initial Decision analyzed four issues: (1) what findings must be made by the Commission to warrant a change to the existing QB Methodology; (2) whether, based on applicable legal standards, the QB Methodology has become unjust and unreasonable for the valuation of Resid; (3) if it is determined that the existing QB methodology has become unjust and unreasonable for valuing Resid, what changes need be made to the existing methodology; and (4) if the existing QB methodology is to be modified, whether the modified methodology is capable of being administered by the TAPS Carriers. The Presiding ALJ ultimately found that Flint Hills/Petro Star were required to affirmatively demonstrate that the existing methodology was unjust and unreasonable,<sup>26</sup> but failed to do so.<sup>27</sup>

35. On June 9, 2014, Briefs on Exception were filed by Flint Hills, Petro Star and the State of Alaska. On June 30, 2014, Briefs Opposing Exceptions were filed by BPXA, Exxon, Conoco, Anadarko Petroleum Corp. and Tesoro Alaska Co., and Commission Trial Staff.

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<sup>26</sup> Initial Decision, 147 FERC ¶ 63,008 at P 40.

<sup>27</sup> *Id.* PP 116, 131.

## Discussion

### *Request for Rehearing*

36. The Commission first addresses Flint Hills' request for rehearing of the November 8, 2013 Hearing Order dismissing its complaint as untimely. We find no merit in Flint Hills' contentions and deny rehearing.

37. In its request for rehearing, Flint Hills does not contest the determination in the Hearing Order, based upon Flint Hills' own pleadings, that "by August 1, 2011, after more than two years of results following the change in January 2009 of the results of the Resid valuation under the QB formula, a reasonable person in Flint Hills' position would have determined the QB was no longer just and reasonable as to the Resid valuation."<sup>28</sup> Instead, Flint Hills argues that even if it could have filed a claim by August 2011, any claim it filed after that date would not be barred because there was a "continuing violation," and each time Flint Hills was injured by a new violation, the statute of limitations ran from the date of that new injury.

38. Flint Hills asserts that the Hearing Order erroneously limited that doctrine by ruling that the doctrine does not apply where "there is no claim of any intentional conduct violating [Flint Hills'] rights."<sup>29</sup> Flint Hills again argues that each new injury starts a new statute of limitations running as to it, and here every time the QB was applied to Flint Hills' shipments, a new injury purportedly occurred so the August 2013 filing was not untimely.

39. Flint Hills' theory of continuous violation set forth in its rehearing request, discussed *supra*, is misplaced. Where an existing regulation is presumptively just and reasonable until proven otherwise, there is no "violation" in simply complying with that regulation. To give meaning to section 4412(c)(1) of the Motor Carrier Act, one must determine when Flint Hills had a colorable claim that the existing method for valuing Resid no longer was operating to just and reasonable effect. Flint Hills was obligated to bring its complaint to the Commission within two years of the date its claim was arguably perfected, but did not. We affirm that the Hearing Order evaluated the time by which the claim was arguably perfected in a manner that was reasonable, and determined that sometime before August 2013 Flint Hills' complaint should already have been filed.

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<sup>28</sup> Hearing Order, 145 FERC ¶ 61,117 at P 46.

<sup>29</sup> *Id.* P 42.

40. We also affirm the Hearing Order's findings that the cases cited for the proposition that the section 4412(c)(1) deadline did not apply to the Flint Hills complaint were inapposite. The Commission recognized that in *Zenith*, there was continuing conspiratorial conduct which prevented the injured party from selling its products in Canada, and the court concluded that the deadline for an antitrust claim was renewed each time the injured party was so prevented. Here, in contrast, there is no claim of any intentional conduct violating the complainant's rights. Rather, at issue is a rate found by the Commission to be just and reasonable and affirmed by the D.C. Circuit in *Petro Star*, but which complainant asserts is now no longer just and reasonable. We affirm the Hearing Order and find that there is no intentional conspiratorial conduct similar to the conduct in *Zenith*.

41. Still focusing on the continuing violation contention, Flint Hills argues in its rehearing request that the Hearing Order erred in distinguishing *Bay Area Laundry*, on the ground that "here there is no schedule of payments."<sup>30</sup> Flint Hills contends the Commission failed to recognize that Flint Hills was subject to QB tariff language that governs the schedule of payments that it is obligated to make for service it receives under the tariff. Flint Hills asserts that these QB tariff payment provisions, which are applied on a monthly basis, are no different than the schedule of payments the employer was required to make in *Bay Area Laundry*.

42. Flint Hills' argument fails because there is no similarity between the obligation of the withdrawing employer in *Bay Area Laundry* and Flint Hills' obligation under the QB tariff provision. In *Bay Area Laundry*, the Court stressed that it was relying on general principles governing installment obligations, under which "each missed payment creates a separate cause of action within its own six-year limitations period."<sup>31</sup> As the Court explained, the departing employer under the plan was required to make installment payments at a predetermined level that approximated the periodic contributions the employer made before withdrawing from the plan, and each scheduled payment carried its own limitations period:

A withdrawing employer's basic responsibility under the MPPAA is to make each withdrawal liability payment when due.

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<sup>30</sup> *Id.* P 43.

<sup>31</sup> 522 U.S. at 195.

We therefore agree with the Third Circuit that ‘a new cause of action,’ carrying its own limitations period, ‘arises from the date each payment is missed.’ That is the standard rule for installment obligations, and nothing in the MPPAA indicates that Congress intended to depart from it.<sup>32</sup>

43. The distinguishing factor between this case and *Bay Area Laundry* is the Court based its decision on the fact that a departing employer under the plan had no right to sue to collect a particular installment payment before the employer missed that particular payment, and each missed payment was considered a new violation. The Hearing Order held, and the Commission affirms again here, that the two year statute of limitations began when a reasonable person in Flint Hills’ position would have determined that there was adequate data to make a claim that the QB was no longer just and reasonable as to the Resid valuation. At that time, by August 2011, a date Flint Hills does not dispute, Flint Hills was capable of filing its complaint and seeking relief. Flint Hills did not file the instant complaint until August 20, 2013, more than two years after it arguably could have.

44. In the Hearing Order, the Commission determined that Flint Hills’ position rendered section 4412(c)(1) meaningless, because parties could always claim it was injured by the QB payment assessed against it for its last shipment.<sup>33</sup> In its rehearing request, Flint Hills argues that the two-year limit in section 4412(c)(1) limits relief to the two year period preceding the filing, but does not limit when a complaint can be filed against continuing violations. Flint Hills also argues that the ability to file a complaint sooner does not limit a later filing in the presence of continuing violations.<sup>34</sup>

45. The Commission rejects Flint Hills’ argument. Based on the Commission’s determination that there is no continuing violation in this proceeding, the two-year time frame cannot be extended under section 4412(c)(1).

46. Accordingly, for all the foregoing reasons, the Commission denies Flint Hills’ request for rehearing.

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<sup>32</sup> *Id.* at 196-97.

<sup>33</sup> Initial Decision, 147 FERC ¶ 63,008 at P 44.

<sup>34</sup> Flint Hills Request for Rehearing at 5-7.

### **Burden of Proof**

47. The first issue addressed in the Initial Decision was what findings must be made by the Commission to warrant a change to the existing QB methodology. The Presiding ALJ noted the existing QB Methodology is Commission-approved.<sup>35</sup> A Commission-approved methodology, stated the Presiding ALJ, enjoys a continuing (rebuttable) presumption it remains just and reasonable.<sup>36</sup> The Presiding ALJ held that Flint Hills/Petro Star bear the burden of proof, by a preponderance of evidence, that the existing methodology is unjust and unreasonable.<sup>37</sup>

48. On exception, Flint Hills argues that the Presiding ALJ erred in imposing a preponderance of evidence burden instead of a “substantial record evidence” burden of proof.<sup>38</sup> Flint Hills argues that there is no support for a “preponderance of evidence” standard, and that in *OXY* the court upheld the Commission’s view that only “substantial evidence” is necessary to justify a change in the existing QB methodology.<sup>39</sup>

49. The Commission affirms the holding of the Initial Decision that Flint Hills/Petro Star bear the burden of proof under the preponderance of evidence standard. Under Section 7(d) of the Administrative Procedure Act, the proponent of a rule or order has the burden of proof.<sup>40</sup> The burden of proof is the obligation which rests with the proponent of a rule or order to persuade the trier of the facts, in this case the Commission.<sup>41</sup> The customary standard of proof in administrative hearings is the preponderance of evidence

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<sup>35</sup> Initial Decision, 147 FERC ¶ 63,008 at P 40.

<sup>36</sup> *Id.* P 40 (citing *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*)).

<sup>37</sup> Initial Decision, 147 FERC ¶ 63,008 at P 40.

<sup>38</sup> Flint Hills Brief on Exceptions at 13.

<sup>39</sup> *Id.*

<sup>40</sup> 5 U.S.C. § 556(d) (2014).

<sup>41</sup> *See Dir., Office of Workers’ Comp. Programs, Dept. of Labor v. Greenwich Collieres*, 512 U.S. 267, 275-277 (1994).

standard.<sup>42</sup> A party can meet the preponderance of the evidence standard by showing that the existence of a fact is more probable than its nonexistence.<sup>43</sup>

50. As detailed in the numerous Briefs Opposing Exceptions filed in this proceeding,<sup>44</sup> Flint Hills confuses the standard applicable to a Commission order at the Courts of Appeal (substantial evidence) with the standard a proponent faces when seeking to prove that an existing rate is unjust and unreasonable.<sup>45</sup> The substantial evidence standard of review asks whether a reasonable fact finder could have arrived at the agency's decision.<sup>46</sup> Substantial evidence has been described as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>47</sup> Clearly the preponderance of evidence standard requires "substantial" evidence, but the evidence must not be just substantial, but more probable than not. The Commission affirms the finding of the Initial Decision that Flint Hills/Petro Star have the burden of proof, and that the burden must be met by a preponderance of the evidence.

**Necessary Findings to Warrant a Change to the Existing QB Methodology**

51. In order to satisfy its burden of proof, the Presiding ALJ ruled that Flint Hills/Petro Star must demonstrate by a preponderance of evidence not only that the existing QB methodology is unjust and unreasonable in itself, but also that the proposed replacement methodology is just and reasonable.<sup>48</sup> In order for Flint Hills/Petro Star to meet their burden of proof, the Presiding ALJ found that it is not enough to show that the existing QB Methodology is inferior to an alternative, for more than one methodology may be just and reasonable under given circumstances.<sup>49</sup> As the existing QB

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<sup>42</sup> *Sea Island Broad. Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980), *see also La. PSC v. Entergy Corp.*, 139 FERC ¶ 61,240 (2012).

<sup>43</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993).

<sup>44</sup> *See generally* BP (Alaska) Brief Opposing Exceptions at 20.

<sup>45</sup> 5 U.S.C. § 706 (2) (2014).

<sup>46</sup> *See Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965 (D.C. Cir. 1979).

<sup>47</sup> *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>48</sup> Initial Decision, 147 FERC ¶ 63,008 at P 42 n.36.

<sup>49</sup> *Id.* P 40 (citing *Morgan Stanley*, 554 U.S. at 532, *OXY*, 64 F.3d at 692).

methodology enjoys a continuing presumption of justness and reasonableness, Flint Hills/Petro Star cannot satisfy their threshold burden to prove the QB Methodology is unjust and unreasonable by simply identifying a superior methodology.<sup>50</sup>

52. Flint Hills argues that the Presiding ALJ was incorrect in the assertion that an existing rate methodology enjoys a continuing rebuttable presumption to remain just and reasonable. Flint Hills criticizes the Initial Decision's reliance on the *Morgan Stanley* decision. Flint Hills argues that the only presumption of a rate remaining just and reasonable discussed in *Morgan Stanley* is the "Mobile-Sierra" presumption, which states the Commission must presume that a rate set out in a freely negotiated wholesale energy contract meets the just and reasonable standard.<sup>51</sup> Flint Hills states that the "Mobile-Sierra" presumption related to negotiated contracts is inapplicable to the QB Methodology.<sup>52</sup> Flint Hills further argues that the determination of a just and reasonable rate does not preclude a finding of unreasonableness in a subsequent proceeding. The State of Alaska agrees with Flint Hills, and argues on exception that a party challenging the TAPS QB methodology should be allowed to suggest an alternative, superior, pro-competitive methodology to replace the existing TAPS QB methodology.<sup>53</sup>

53. The Commission affirms the Initial Decision. The presumption of continued justness and reasonableness enjoyed by a rate approved by the Commission is well established in Commission and court precedent, including *Morgan Stanley*. Under section 15(1) of the ICA, the Commission must determine that a rate is or will be unjust and unreasonable before it is authorized to determine what the new just and reasonable rate will be.<sup>54</sup> A Commission order changing an existing, lawful rate or practice must be supported by a determination that the presumptively just and reasonable existing rate or practice is no longer just and reasonable, and that the proposed replacement is just and reasonable.<sup>55</sup> No matter the method through which a rate or methodology is established, be it negotiated contract or methodology determined through litigation, once the rate or

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<sup>50</sup> Initial Decision, 147 FERC ¶ 63,008 at P 42.

<sup>51</sup> Flint Hills Brief on Exceptions at 11-12.

<sup>52</sup> *Id.* at 13.

<sup>53</sup> State of Alaska Brief on Exceptions at 6.

<sup>54</sup> 49 U.S.C. App. § 15(1) (1988).

<sup>55</sup> *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 456 (D.C. Cir. 1988); *see also Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986).

methodological practice is deemed just and reasonable, it is presumed to remain so absent an affirmative showing to the contrary.

54. The Commission also affirms the Presiding Judge's ruling that identifying a superior alternative to an existing rate is not sufficient evidence to demonstrate an existing rate or methodology is unjust and unreasonable. A rate or methodology need not be perfect nor the most "desirable" alternative; it need only be just and reasonable.<sup>56</sup> Clearly, if a rate or practice can be deemed just and reasonable even with the existence of superior alternatives, a subsequent showing of an alternative approach does not necessarily render the pre-existing methodology unjust and unreasonable.

55. In its Brief on Exceptions, Flint Hills misunderstands the Presiding ALJ's ruling on alternative methodologies. Flint Hills believes the Initial Decision forecloses any reference to alternative methodologies when determining the continued justness and reasonableness of an existing rate.<sup>57</sup> That is not correct. Parties may use alternative methodologies in their analysis. However, simply demonstrating that an alternative is superior to the existing methodology is not enough to meet the burden of proving the existing methodology unjust and unreasonable. Flint Hills simply confuses the rebuttable presumption of justness and reasonableness, which the existing QB Methodology enjoys, with a refusal to review an existing rate. Neither the Commission nor the Presiding ALJ found that the QB Methodology was beyond review, and indeed the hearing provided such a review.<sup>58</sup>

56. A Commission-approved methodology enjoys a continuing, albeit rebuttable, presumption it remains just and reasonable.<sup>59</sup> As we stated in the Hearing Order, the Commission is not barred from seeking to determine whether a rate once found just and reasonable is no longer just and reasonable.<sup>60</sup> The Commission may change an existing

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<sup>56</sup> See *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (utility need establish that its proposed rate design is reasonable, not that it is superior to alternatives); *New England Power Co.*, 52 FERC ¶ 61,090, at 61,336 (1990), *reh'g denied*, 54 FERC ¶ 61,055, *aff'd Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992).

<sup>57</sup> Flint Hills Brief on Exceptions at 14-15.

<sup>58</sup> Initial Decision, 147 FERC ¶ 63,008 at P 40; Hearing Order, 145 FERC ¶ 61,117 at P 47.

<sup>59</sup> Initial Decision, 147 FERC ¶ 63,008 at P 40.

<sup>60</sup> Hearing Order, 145 FERC ¶ 61,117 at P 47. See also *OXY*, 64 F.3d at 690.

practice or rate only if it finds both that the existing practice or rate has become unjust and unreasonable and the proposed change is just and reasonable.<sup>61</sup> On the issue on what findings are necessary to warrant a change to the existing QB Methodology, the Presiding ALJ is affirmed.

*New Evidence/ Changed Circumstances*

57. The Presiding ALJ found that the issue of whether the existing QB methodology for valuing Resid has become unjust and unreasonable may be established either through the existence of changed circumstances or by means of new evidence.<sup>62</sup>

58. With regard to new evidence, the Initial Decision established that for evidence to indeed be “new” it must be new in relation to what was before the Commission in its earlier determination of the justness and reasonableness of the QB methodology, as well as sufficiently compelling to require reconsideration of the earlier resolution.<sup>63</sup> Put simply, evidence that was available to parties during the Opinion No. 481 proceeding, according to the Initial Decision, is not new evidence.<sup>64</sup>

59. The Commission affirms the Initial Decision. As the Presiding ALJ correctly held, any changed circumstances or new evidence on which Flint Hills/Petro Star rely in this investigation must in fact be new in relation to what was before the Commission in its earlier determination and sufficiently compelling to require reconsideration of the earlier resolution.<sup>65</sup> Evidence that was reasonably available to the parties during the Opinion No. 481 proceedings is not new evidence.<sup>66</sup> Newly raised evidence is not the same as new evidence.<sup>67</sup>

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<sup>61</sup> See 49 U.S.C. App. § 15(1) (1988).

<sup>62</sup> Initial Decision, 147 FERC ¶ 63,008 at P 44.

<sup>63</sup> *Id.* P 46.

<sup>64</sup> *Id.*, (citing *Friends of Sierra R.R. Inc. v. ICC*, 881 F.2d 663, 667 (9<sup>th</sup> Cir. 1989)).

<sup>65</sup> Initial Decision, 147 FERC ¶ 63,008 at P 46 (citing *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1288 (D.C. Cir. 2000)).

<sup>66</sup> Initial Decision, 147 FERC ¶ 63,008 at P 46 (internal quotes omitted).

<sup>67</sup> *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d at 667.

60. Flint Hills argues in its Exceptions that the Presiding Judge adopted an erroneous definition of new evidence for purposes of this proceeding.<sup>68</sup> According to Flint Hills, whether evidence was available during the Opinion No. 481 proceeding does not invalidate its use in this proceeding. Flint Hill's arguments are not persuasive. The cases Flint Hills cites in support of its argument, *Papago Tribal Utility Authority*<sup>69</sup> and *OXY*,<sup>70</sup> do not support a finding that the Presiding ALJ was in error. *Papago* held that determinations in a prior rate case were not relevant to a new rate case. *OXY* found that changing conditions need not have been unforeseeable in the prior proceeding in order to be used to support a change in a subsequent proceeding. Neither ruling conflicts with the Initial Decision. This proceeding is not a separate and distinct rate case but a review as to the continued justness and reasonableness of an existing methodology. Further, the Presiding ALJ cited to the Commission order reviewed in *OXY* as a situation where changing conditions were sufficiently compelling to warrant a revision in the QB methodology.<sup>71</sup> The Presiding ALJ's definition of what would constitute new evidence for purposes of this proceeding is affirmed.

**Whether the QB Methodology Has Become Unjust and Unreasonable**

61. Both Flint Hills and Petro Star assert that the existing QB Methodology is unjust and unreasonable. Flint Hills argues that the existing QB methodology significantly understates the Resid cut's relative QB value.<sup>72</sup> Petro Star argues that the Resid valuation formula is unjust and unreasonable because it understates coker liquid yields and includes coker unit capital investment costs in the processing cost adjustment, resulting in Resid processing costs that are too high.<sup>73</sup> These two issues, low liquid yields and a capital investment allowance, were identified by the Presiding ALJ as the basis for the allegations of unjustness and unreasonableness of the QB methodology in this proceeding.<sup>74</sup>

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<sup>68</sup> Flint Hills Brief on Exceptions at 16.

<sup>69</sup> *Papago Tribal Util. Auth. v. FERC*, 776 F.2d 828 (9<sup>th</sup> Cir. 1985).

<sup>70</sup> *OXY*, 64 F.3d 679.

<sup>71</sup> Initial Decision, 147 FERC ¶ 63,008 at P 46 n.40.

<sup>72</sup> *Id.* P 47.

<sup>73</sup> *Id.* P 54.

<sup>74</sup> *Id.* P 107.

*Coker Liquid Yields*

62. In Opinion No. 481, the Commission adopted for QB purposes the PIMS (Process Industry Modeling System) model coker yields stipulated among the parties. The Initial Decision found that this prior ruling embodies the PIMS method with a rebuttable presumption of justness and reasonableness.<sup>75</sup> Based on this presumption, the Presiding ALJ held that Flint Hills/ Petro Star bore an affirmative burden to prove by a preponderance of evidence that (1) it was unjust and unreasonable for the Commission to have previously adopted the PIMS method due to facts or circumstances unknown or not reasonably available at the time; or (2) events or developments subsequent to Opinion No. 481 render the PIMS model unjust and unreasonable for continued use in the QB methodology.<sup>76</sup>

63. The Initial Decision found that neither element was established by Flint Hills/ Petro Star. The Presiding ALJ ruled that even if the proposed method the parties advocated was superior, that alone did not establish that the existing method was unjust and unreasonable.<sup>77</sup> The Presiding ALJ also determined that the proposed alternative was known and available before Opinion No. 481 was issued.<sup>78</sup> The Presiding ALJ found that PIMS “was (and remains) an industry standard linear programming computer model used to simulate refinery operations around the world.”<sup>79</sup> The Presiding ALJ concluded that Flint Hills/ Petro Star failed to prove by a preponderance of evidence either that it was unjust and unreasonable for the Commission to have adopted the PIMS method in Opinion No. 481, or that subsequent events have rendered the PIMS method no longer just and reasonable.<sup>80</sup>

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<sup>75</sup> *Id.* P 108.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* P 109.

<sup>78</sup> *Id.* P 110.

<sup>79</sup> *Id.* P 112.

<sup>80</sup> *Id.* P 116.

64. On exceptions, Flint Hills argues that demonstrating the yields of the PIMS model are unjust and unreasonable in themselves presents “an impossible burden.”<sup>81</sup> Flint Hills first disputes the Initial Decision’s holding that existing rates enjoy a presumption of justness and reasonableness.<sup>82</sup> Flint Hills then argues that QB yields under the PIMS method are significantly below the yields of a new coker designed to maximize liquid yields, and are thus unjust and unreasonable.<sup>83</sup> Petro Star argued that the Initial Decision erred in finding the PIMS model remains just and reasonable.<sup>84</sup>

65. The Commission affirms the Initial Decision. As the Presiding Judge correctly held, in order for Flint Hills to demonstrate that the PIMS model is unjust and unreasonable, it must do so using new evidence, or a demonstration of changed circumstances. Flint Hills has done neither. The coker technology reflected in Flint Hills’ alternative was known and available before 2005, and is thus not new evidence.<sup>85</sup> To challenge the PIMS model using evidence available to the Commission in its prior ruling is a collateral attack on Opinion No. 481. Further, the Presiding ALJ found that the record in this proceeding established that use of a coker unit designed to maximize liquid yields would not be appropriate, and a more typical liquid yield was a preferable baseline for purposes of the QB Methodology.<sup>86</sup> The Presiding Judge found, and the Commission affirms, that because U.S. West Coast cokers vary widely in configuration, operating parameters, feedstock handling capabilities and potential product slates, the objective of the QB methodology was to mimic a typical U.S. West Coast coker. Flint Hills failed to demonstrate the existing PIMS method is unjust and unreasonable, and the Initial Decision is affirmed.

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<sup>81</sup> Flint Hills Brief on Exceptions at 47. The Commission notes that immediately after claiming that it faced an “impossible burden” of proving rates unjust and unreasonable, Flint Hills claims that its witness did just that. *Id.* at 49.

<sup>82</sup> Flint Hills Brief on Exceptions at 48.

<sup>83</sup> *Id.* at 49-50.

<sup>84</sup> Petro Star Brief on Exceptions at 19.

<sup>85</sup> Initial Decision, 147 FERC ¶ 63,008 at P 110.

<sup>86</sup> *Id.* P 114.

*Capital Investment Costs*

66. The Initial Decision identified as a fundamental question whether it remains just and reasonable for the QB Methodology to include a PIMS model coker capital investment allowance in the Resid processing cost adjustment.<sup>87</sup> Under the PIMS model, it is assumed that a PIMS model coker has been built, and includes an allowance for the capital investment required to build it in the Resid processing cost adjustment.<sup>88</sup> Flint Hills and Petro Star argue that the capital investment allowance should be eliminated.

67. The Initial Decision rejected Flint Hills/Petro Star's arguments for eliminating capital investment costs from the QB Methodology. The Initial Decision first criticized elimination of capital investment costs as detached from the real world.<sup>89</sup> The Initial Decision then determined that it was a fatal flaw to propose elimination of a capital investment cost from Resid valuation while continuing to include it in Light Distillate and Heavy Distillate.<sup>90</sup>

68. As the Initial Decision explains, Light Distillate, Heavy Distillate and Resid differ from the other six QB cuts in that they have no published market prices. The QB methodology therefore presumes these cuts receive additional processing in the hypothetical QB refinery to produce finished products for which published U.S. West Coast market prices are available.<sup>91</sup> The additional processing costs are subtracted from the finished products' published market prices in order to value Light Distillate, Heavy Distillate and Resid.<sup>92</sup> The Light Distillate, Heavy Distillate and Resid processing cost adjustments all include a capital investment allowance.<sup>93</sup>

69. Flint Hills/Petro Star proposed only to eliminate the capital investment allowance from the Resid cost calculation, and not from Light Distillate or Heavy Distillate. The

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<sup>87</sup> *Id.* P 117. The Presiding ALJ ignored the ramifications to capital costs of adopting the proposed coker liquid yield model, as that alternative was rejected.

<sup>88</sup> *Id.* P 119.

<sup>89</sup> *Id.* P 120.

<sup>90</sup> *Id.* P 123.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Initial Decision ruled that this violated the goal of the QB methodology, for it would overvalue Resid in relation to Light and Heavy Distillate.<sup>94</sup> The Initial Decision found that this would result in a “substantial” windfall for Flint Hills and Petro Star and their Resid-rich streams returned to the ANS common stream.<sup>95</sup>

70. On exceptions, Flint Hills argues that by refusing to focus solely on Resid, the Presiding ALJ impermissibly expanded the scope of the hearing to include Light and Heavy Distillate.<sup>96</sup> Petro Star agrees that this proceeding should focus solely on Resid, even if that results in inconsistent capital investment adjustments.<sup>97</sup> Flint Hills also stated it demonstrated that elimination of the capital investment adjustment for Light and Heavy Distillates would have a minimal effect on their QB valuations, and were therefore unnecessary.<sup>98</sup> Petro Star argues that neither refiners nor traders consider capital costs in their determinations of the relative values of different crude oils.<sup>99</sup>

71. The Commission affirms the Initial Decision. In *OXY*, the court required that if FERC chose to value some cuts at the prices they command in the market without the benefit of processing, it must attempt, to the extent possible, to value all cuts in the same manner.<sup>100</sup> As the Initial Decision correctly explains, it is the goal of the QB Methodology to assign accurate relative values to the petroleum that is delivered into TAPS, and it must accurately value all cuts to achieve this goal.<sup>101</sup> The Commission’s purpose, as stated in the Initial Decision, is to value different cuts on a methodologically consistent basis.<sup>102</sup> The Commission finds no merit to the argument that this investigation was limited in scope to the value of Resid without any reference to the

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<sup>94</sup> *Id.* P 124 (citing *OXY*, 64 F.3d at 693).

<sup>95</sup> Initial Decision, 147 FERC ¶ 63,008 at P 124.

<sup>96</sup> Flint Hills Brief on Exceptions at 29.

<sup>97</sup> Petro Star Brief on Exceptions at 46.

<sup>98</sup> Flint Hills Brief on Exceptions at 32.

<sup>99</sup> Petro Star Brief on Exceptions at 30.

<sup>100</sup> Initial Decision, 147 FERC ¶ 63,008 at P 126 (citing *OXY*, 64 F.3d at 694).

<sup>101</sup> Initial Decision, 147 FERC ¶ 63,008 at P 127 (citing *OXY*, 64 F.3d at 693).

<sup>102</sup> Initial Decision, 147 FERC ¶ 63,008 at P 128.

interrelation between valuations of other cuts within the common stream, especially given the *OXY* court's specific guidance on methodological consistency.

72. Despite ruling that Flint Hills/Petro Star failed to meet its burden by proposing an inconsistent valuation methodology for Resid, the Initial Decision still addressed the evidentiary presentation on the merits in order to provide a comprehensive investigative analysis.<sup>103</sup>

73. The Initial Decision summarizes Flint Hills/Petro Star's argument as a claim that since the QB methodology has resulted in valuations that make no sense, i.e., processed petroleum being valued less than common stream crude oil, it is no longer just and reasonable.<sup>104</sup> Flint Hills/Petro Star identifies the capital investment allowance for Resid as the reason why the QB methodology has become unjust and unreasonable.<sup>105</sup>

74. The Initial Decision found that Flint Hills/Petro Star's claim that the ANS Common Stream value should always exceed the Platts published price for common stream crude is simply wrong.<sup>106</sup> The Initial Decision states that the QB Methodology is to achieve internal valuation consistency, and needs only a rational relationship to real world market value.<sup>107</sup> The methodology, states the Initial Decision, is not to determine the actual market values of the cuts or streams, but to assign accurate relative values among the various QB cuts and the ANS crude stream.<sup>108</sup> Further, states the Initial Decision, under the ruling in *OXY* the QB Methodology permits all cuts to be undervalued to approximately the same degree.<sup>109</sup>

75. Flint Hills/Petro Star also attempted to demonstrate that the QB Methodology was unjust and unreasonable by comparing QB Resid valuations with the value of Resid as an FO-380 fuel oil blendstock.<sup>110</sup> The Initial Decision acknowledges a demonstration that

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<sup>103</sup> *Id.* P 131.

<sup>104</sup> *Id.* P 133.

<sup>105</sup> *Id.* P 134.

<sup>106</sup> *Id.* P 136.

<sup>107</sup> *Id.* P 136.

<sup>108</sup> *Id.* P 137.

<sup>109</sup> *Id.* P 138 (citing *OXY*, 64 F.3d at 693).

<sup>110</sup> *Id.* P 139.

Resid has a higher market value as an FO-380 blendstock would support the contention that the QB Methodology undervalues Resid.<sup>111</sup> However, the Initial Decision rejected Flint Hills/Petro Star's methodology for valuing FO-380 blendstock,<sup>112</sup> rejected the assumption that there is an active market for Resid as an FO-380 blendstock, and found flawed the assumption that U.S. West Coast refiners have the capability to blend Resid as an alternative to coking it.<sup>113</sup>

76. On exceptions, Petro Star claimed that a blendstock value for Resid can in fact be calculated based on published prices for FO-380. Petro Star also claims that blending does not have to replace coking as the predominant use of Resid on the West Coast to provide a check on the accuracy of QB valuation of Resid. Flint Hills argues that its calculation of blendstock market value can be used in the purely conceptual QB context to show value, even if it cannot be used to calculate an actual real-world market value. Flint Hills argues that any disconnect between real-world behavior is irrelevant, for its calculations are only designed for the conceptual QB context.

77. The Commission affirms the Initial Decision. The Commission agrees that the attempts to value blendstock were flawed and did not reflect the actual market value of Resid as a residual fuel oil blendstock. Further, it is unclear how a significant increase in FO-380 production could be absorbed by the market, or what effect such an increase would have on price. It also has not been established that West Coast coking refiners have the facilities necessary to blend Resid into FO-380. Flint Hills/ Petro Star failed to prove their arguments concerning use or value of Resid as blendstock. The Initial Decision is affirmed.

78. Finally, Flint Hills/Petro Star argue that the capital investment allowance should be eliminated from the Resid valuation because West Coast refiners have failed to generate capital investment returns since 2009, and have abandoned any reasonable expectation of future capital investment returns on cokers.<sup>114</sup> The Initial Decision rejected this argument. The Presiding ALJ found that the record confirmed U.S. West Coast coker utilization have not fallen materially below historical levels or the 87 percent utilization rate adopted in Opinion No. 481.<sup>115</sup> The Presiding ALJ also determined that

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<sup>111</sup> *Id.* P 140.

<sup>112</sup> *Id.* P 141.

<sup>113</sup> *Id.* P 142.

<sup>114</sup> *Id.* P 143.

<sup>115</sup> *Id.* P 144.

the record contradicts the claim that there has been no significant new investment in West Coast coking capacity.<sup>116</sup>

79. On exceptions, Flint Hills argues that by comparing the lack of investment in coking facilities on the West Coast to new coking investment overseas demonstrates that West Coast refiners do not see an opportunity to realize capital returns from capital investment for the foreseeable future. Petro Star agrees, arguing that the record indicated that there is no new coker construction on the West Coast to evidence a shortage of coking capacity.

80. The Commission affirms the Initial Decision. The record confirms that refiners still receive significant margins for investment in new coker facilities, and that coker facility utilization remains at historic levels. The evidence does not demonstrate that refiners have abandoned any expectation of return on or of investment from cokers. It would be unreasonable for a refiner to invest capital in a coker with the expectation of only recovering marginal costs. Thus, a capital investment allowance remains appropriate for purposes of the QB methodology.

The Commission orders:

(A) The May 8, 2014 Initial Decision is affirmed in its entirety; any exceptions not explicitly referenced in this Order are denied.

(B) Flint Hills' request for rehearing of the Commission's November 8, 2013 Hearing Order is denied.

By the Commission. Commissioner Bay is concurring in part and dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>116</sup> *Id.* P 144.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket Nos. OR14-6-000 and  
OR14-6-001

(Issued November 20, 2014)

BAY, Commissioner, *concurring in part and dissenting in part*:

I concur with the majority's decision to affirm the Presiding Administrative Law Judge's Initial Decision. I write separately, however, because I cannot agree with the majority's determination that Flint Hill's initial complaint was untimely.

Section 4412(c)(1) of the Motor Carrier Safety Reauthorization Act of 2005 provides that any claim relating to the Quality Bank must be brought "not later than 2 years after the date on which the claim arose." Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005). Here, Flint Hill alleges that, beginning in 2009, the Quality Bank formula undervalued Resid and, as a result, Flint Hill's monthly payments into the Quality Bank were unjust and unreasonable. In my view, a claim arose each time Flint Hill's Quality Bank adjustments were calculated pursuant to a formula alleged to be unjust and unreasonable. But only those claims relating to purportedly unlawful debits or credits calculated during the two-year limitations would be timely. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 210 (1997) (holding that "action to collect unpaid withdrawal liability is timely as to any payments that came due during the six years preceding the suit. Payments that came due prior to that time are lost"). This construction of section 4412(c)(1) permits parties to assess market conditions and bring complaints when they deem necessary, while still furthering the Congressional aim of limiting retroactive adjustments to the Quality Bank. *See Flint Hills Res. Alaska, LLC v. FERC*, 631 F.3d 543, 545-46 (D.C. Cir. 2011) ("Congress adopted § 4412 in response to a ... a prolonged quality bank proceeding ... [that] ... required quality bank adjustment refunds ... going back ... eleven years").

Under the majority's construction, a party that sues too late after the first allegedly unjust and unreasonable Quality Bank adjustment forfeits forevermore the right to challenge any subsequent Quality Bank payments. The majority contends that this reading is reasonable because there can be no "continuing violation" of a party's rights in the absence of intentional conduct and, here, Flint Hill's rights were allegedly violated by application of a tariff provision. It is unclear why intentional conduct is required to find a continuing violation under section 4412(c)(1) and, in any event, application of the tariff

was surely intentional. More important, the key question for statute of limitations purposes is not *how* a party's rights were purportedly violated, but rather *when* those rights were violated. Flint Hill claimed its rights were violated each month when it was required to pay Quality Bank adjustments pursuant to an allegedly unjust and unreasonable formula. As the Supreme Court has explained, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). *See also Bay Area Laundry*, 522 U.S. at 209 ("each missed payment" under the Multiemployer Pension Plan Amendments Act "carries its own limitations period"); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (each "unlawfully high priced sale[]" in a price-fixing scheme "is part of the violation that injures the plaintiff" and "each sale ... starts the statutory period running again").

Because I believe that the majority's construction of section 4412(c)(1) is erroneous and contrary to pertinent court precedent, I must respectfully dissent from that portion of the order denying Flint Hill's request for rehearing.

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Norman C. Bay  
Commissioner

Document Content(s)

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