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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1330
September Term, 2021

[Filed January 25, 2022]

NGL SUPPLY WHOLESALE, LLC,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

PHILLIPS 66 COMPANY AND PHILLIPS 66 PIPELINE LLC,
INTERVENORS

On Petition for Review of an Order of the Federal Energy Regulatory Commission

Before: SRINIVASAN, *Chief Judge*, ROGERS, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the Federal Energy Regulatory Commission and on the briefs and oral argument of the parties. The panel has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is hereby

ORDERED AND ADJUDGED that the petition for review be **DENIED**.

Operated by Phillips 66 Pipeline LLC (Phillips Pipeline), the 688-mile Blue Line carries propane between northern Texas and western Illinois. The northern half of the Blue Line is bidirectional, flowing west-to-east in the winter months and east-to-west in the summer. Its shippers include two propane suppliers: Phillips 66 Company (Phillips 66) and NGL Supply Wholesale, LLC. Phillips 66 is an affiliate of Phillips Pipeline.

Under the Interstate Commerce Act (ICA), 49 U.S.C. app. § 1 *et seq*. (1988), the Federal Energy Regulatory Commission (Commission) regulates the interstate transportation of propane by pipeline. In 2019, NGL filed a complaint with the Commission, alleging that Phillips Pipeline has unreasonably denied NGL access to the Blue Line and has instead favored Phillips Pipeline's affiliate, Phillips 66.

NGL's complaint made three arguments relevant here. First, it contended that Phillips Pipeline has illegally declined to offer common-carrier service over a small segment of Phillips 66-owned pipes and metering facilities that connect the Blue Line to a

privately owned terminal in Conway, Kansas. Second, NGL maintained that Phillips Pipeline's prorationing policy—used to allocate limited pipeline capacity among shippers in high-demand periods—is unjust, unreasonable, and unduly discriminatory. Third, NGL argued that a propane-exchange agreement into which it had entered with Phillips 66 effectively enabled Phillips 66 to set the terms and conditions of transportation service on the Blue Line in violation of the ICA.

The Commission rejected those arguments. *See NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC*, 172 FERC ¶ 61,016 (2020) (Order), J.A. 1–13. First, the Commission determined that it lacked jurisdiction over Phillips 66's proprietary interconnection at Conway, reasoning that the location of the Conway interconnection site comes before the commencement of propane transportation activities over which the Commission had jurisdiction. Second, the Commission found that Phillips Pipeline's prorationing policy was permissible. And third, the Commission concluded that the NGL-Phillips 66 exchange agreement was a non-jurisdictional commodity agreement rather than a jurisdictional transportation agreement.

NGL filed a timely petition for review of the Commission's order, which we review under the arbitrary-and-capricious standard. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016). Applying that standard, we conclude that none of NGL's arguments warrants relief.

First, NGL contends that the Commission ignored its arguments as to why Phillips 66's proprietary interconnection at Conway was subject to the Commission's jurisdiction. Specifically, NGL faults the Commission for failing to discuss its prior decision in *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338 (1995), which held that certain tank facilities located in the middle of a pipeline were subject to the Commission's jurisdiction because they were "necessary" and "integral" to the pipeline's overall transmission function. But the Commission adequately accounted for *Lakehead* by drawing upon a more recent Commission decision that was itself expressly based on *Lakehead*. In *TE Products Pipeline Co.*, 131 FERC ¶ 61,277, at ¶ 12 (2010) (*TEPPCO*), the Commission "appl[ied] . . . *Lakehead*" and determined that terminal facilities that were "not on [the pipeline's] mainline system and consist[ed] of smaller pipes, metering facilities, and storage tanks" were non-jurisdictional because they were "not integral or necessary to the [pipeline's] transportation function." The Commission relied on *TEPPCO* in the order under review, concluding that the Phillips 66 proprietary interconnection at Conway—"a few feet of pipeline and some metering facilities" through which Phillips 66 tenders propane to the Blue Line—was located before jurisdictional transportation commenced. Order ¶¶ 13, 15 (citing *TEPPCO* ¶ 12), J.A. 4–5.

In addition, the Commission noted that shippers retain "other options" besides the interconnection by which "to originate propane on the Blue Line at Conway." *Id.* ¶ 16 n.18, J.A. 5; *see also id.* ¶ 14, J.A. 5 (reciting some). That observation further rebutted

NGL's contention that the interconnection was a necessary or integral component of interstate propane transportation. It also demonstrates why NGL's "concerns" that the Commission's order enables FERC-regulated pipelines to evade the ICA's nondiscrimination mandate by providing affiliates control over pipeline origin points are "misplaced on this record." *Big Bend Conservation All. v. FERC*, 896 F.3d 418, 422 (D.C. Cir. 2018).

NGL relatedly insists that the Commission wrongly conflated *TEPPCO*, which addressed non-jurisdictional storage terminals, with the non-storage pipeline facilities at issue here. Just as in *TEPPCO*, however, Phillips 66's proprietary interconnection at Conway was "not on [the] mainline system" and "consist[ed] of smaller pipes" and "metering facilities" operated by a "non-jurisdictional entit[y]." *TEPPCO* ¶ 12. And while *TEPPCO* involved "storage tanks," the Commission there also determined that the array of "smaller pipes" and "metering facilities" connecting the mainline to the terminal were non-jurisdictional—even though product necessarily moved through (and was not stored in) those pipes and meters. *Id.* ¶¶ 7, 12. The same is true for the facilities the Commission deemed non-jurisdictional here. And while NGL briefly makes some additional arguments about the Conway site, none demonstrates any deficiency in the Commission's order.

Second, NGL challenges the Commission's decision to sustain Phillips Pipeline's prorationing policy. Set out in the pipeline's tariff, that policy allocates the vast majority of the Blue Line's limited capacity to "regular shippers" with a record of shipments on the pipeline

over a continuous twelve-month period. The policy allocates the remainder to less consistent, "new shippers." In sustaining the policy, the Commission observed that prorationing policies based on historical shipments are "commonplace" and have been "repeatedly approved." Order ¶ 19, J.A. 7.

NGL begins by asserting that the Commission failed to account for the implications of its prior decision in *Colonial Pipeline Co.*, 156 FERC ¶ 61,001 (2016). There, the Commission rejected a proposed prorationing policy that allocated capacity via a lottery system under which new shippers faced "nearly impossible odds of . . . obtaining sufficient capacity allocations" to become regular shippers. Order ¶ 21 (quoting *Colonial* ¶¶ 18–19), J.A. 9. In *Colonial*, new shippers then were largely precluded from becoming regular shippers regardless of the volumes they were prepared to nominate for shipment.

Here, by contrast, the Commission explained that "nothing" in Phillips Pipeline's prorationing policy "prevent[s] NGL from becoming a regular shipper if it nominates volumes in 12 consecutive months." *Id.* The Commission's inquiry into the prorationing policy's "practical effect" on shippers' ability to achieve regular-shipper status (should they nominate the requisite volumes) thus was consistent with *Colonial*. *Id.* (quoting *Colonial* ¶ 19); *see Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015) (explaining that "deference is due to the Commission's interpretation of its own precedent"). As the policy at issue here in no way prevented NGL from nominating the requisite volumes, the Commission permissibly

determined that the concerns underlying its order in *Colonial* were inapplicable in this case. Order ¶ 21, J.A. 9.

NGL further resists the Commission's refusal to require that the Blue Line be prorationed by season (winter and summer), rather than by year. As the Commission explained, however, "there is no single method of allocating capacity in times of excess demand," and pipelines retain "considerable latitude" in crafting allocation policies designed to "meet circumstances specific to their operations" and to "reward shipper loyalty." *Id.* ¶¶ 19, 22 n.36 (citation omitted), J.A. 7, 10. The Commission reasonably rejected NGL's analogy to *Suncor Energy Marketing Inc.*, 132 FERC ¶ 61,242, at ¶ 140 (2010), which approved a prorationing policy that allocated capacity separately on "two physical segments of a pipeline system . . . with different capacities." Order ¶ 22, J.A. 9. The Blue Line, by contrast, consists of only a single pipeline segment and "changes in seasonal flow direction." *Id.*, J.A. 9–10. The Commission permissibly determined that *Suncor* involved unique circumstances and "does not stand for the proposition that a pipeline's decision not to prorate based on segments"—or seasons—"would in all instances be unjust, unreasonable and unduly discriminatory." *Id.*, J.A. 10.

Third, NGL faults the Commission's treatment of the NGL-Phillips 66 propane exchange agreement, over which the Commission determined it lacked jurisdiction. Although the Commission's treatment of this issue is relatively terse and might have profited from further elaboration, the order passes muster

under our deferential standard of review. The Commission explained that its jurisdiction "encompasses oil pipeline transportation, and does not extend to the sales of petroleum products." *Id.* ¶ 12 (citation omitted), J.A. 3–4. Under the exchange agreement, NGL tendered propane to Phillips 66 at Conway in exchange for propane at NGL's terminals elsewhere on the Blue Line. The agreement thus plainly was an "exchange of product" that "does not constitute transportation service" under the ICA. *Id.*, J.A. 3. In accordance with that conclusion, the Commission incorporated by reference a section of the Phillips companies' joint answer explaining that the exchange agreement was a supply arrangement for which there was "no need to involve the pipeline at all," as there was "nothing for the pipeline to do to make an exchange happen." J.A. 253 (quoting *W. Refining Pipeline Co.*, 122 FERC ¶ 61,210, at ¶ 16 (2008)); *see* Order ¶ 11 & n.7, J.A. 3. And the Commission referenced precedent determining that analogous exchange agreements were non-jurisdictional, including one decision reasoning that, when "two shippers merely trade crude oil in one location on a pipeline system for barrels of oil located elsewhere on the pipeline and then individually arrange for transportation with the pipeline for the traded volumes . . . the trade . . . occurs separately from the pipeline's jurisdictional transportation services." Order ¶ 12 n.8 (quoting *Bridger Pipeline LLC*, 126 FERC ¶ 61,182, at ¶ 16 (2009)), J.A. 4.

NGL contends that the Commission failed to respond meaningfully both to its efforts to distinguish the cases upon which the order relied and NGL's

arguments as to why the exchange agreement facilitated the shipment of propane along the Blue Line. But the Commission's discussion necessarily rejected certain of NGL's contentions, and the remainder do not provide a sufficient basis for rejecting the Commission's rationale. *See Pub. Serv. Elec. & Gas Co. v. FERC*, 989 F.3d 10, 20 (D.C. Cir. 2021). Because the Commission determined that it lacked jurisdiction over the exchange agreement, moreover, it properly declined to opine on NGL's claims based on that agreement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B

172 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. OR20-5-000

[Issued July 9, 2020]

Before Commissioners: Neil Chatterjee, Chairman; Richard Glick, Bernard L. McNamee, and James P. Danly.

NGL Supply Wholesale, LLC)
)
v.)
)
Phillips 66 Pipeline LLC)
and Phillips 66 Company)

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT PROCEDURES

1. On December 3, 2019, NGL Supply Wholesale, LLC (NGL) filed a complaint (Complaint) against Phillips 66 Pipeline LLC (Phillips Pipeline) and Phillips 66 Company (Phillips 66) (collectively, the Phillips Cos.) alleging that the Phillips Cos.' actions

violate the Interstate Commerce Act (ICA).[1] For the reasons discussed below, we deny the Complaint in part and set the remaining issue for hearing and settlement judge procedures.

I. Background

2. NGL is a propane supplier and terminaling company providing service to customers east of the Rocky Mountains, throughout the United States and Canada.[2] NGL acquired the NGL Terminals from Phillips 66 as a result of directives from the Federal Trade Commission (FTC) during the Phillips Cos.' merger with Conoco Inc.[3] NGL purchased propane from Phillips 66 under an FTC-mandated long-term supply agreement (2002 Exchange Agreement), which expired in 2017. The current Exchange Agreement was executed on April 1, 2019.[4]

3. Phillips Pipeline operates the Blue Line, a propane and butane pipeline running from Borger, Texas, to East St. Louis, Illinois. The northern portion of the Blue Line (between Conway and East St. Louis) is bi-directional. From September to March, the Blue Line flows from Conway, Kansas to East St. Louis, Illinois. From April through August, it flows from East

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[1] 49 U.S.C. app. § 1 *et seq*. (1988).

[2] Compl. Ex. 2 at 1; NGL Intervention, Docket No. IS10-203-000 (June 4, 2010).

[3] The FTC order terminated in 2013. *Conoco Inc.*, 135 FTC 105, at 171 (2003).

[4] Compl. at 13.

St. Louis to Conway. Conway is a commercial hub for buyers and sellers of propane.

4. Phillips 66, an affiliate of Phillips Pipeline, is engaged in refining, processing, transporting and marketing crude oil, natural gas liquids, refined petroleum products and petrochemicals throughout the United States and globally. Phillips 66 is operator and part owner of the Wood River Refinery in Illinois and the Borger Refinery in Texas.

II. Complaint

5. As discussed in greater detail below, NGL raises several arguments in its Complaint. First, NGL argues that the Exchange Agreement with Phillips Pipeline's affiliate, Phillips 66, is subject to Commission jurisdiction because it "contemplates forward-haul, physical transportation of propane in the winter months."[5] Second, NGL argues that Phillips Pipeline should be required to offer common carrier service over the Phillips 66 proprietary interconnection from the Williams Companies (Williams) terminal in Conway, Kansas onto the Blue Line. Third, NGL argues that Phillips Pipeline's prorationing policy is not just and reasonable. Fourth, NGL raises objections to Phillips Pipeline's transmix charges and procedures.

III. Public Notice, Interventions, and Responsive Pleadings

6. Notice of the Complaint was issued on December 4, 2019, providing for answers, protests and

[5] NGL Jan. 17, 2020 Answer at 12; *see also* Compl. at 34.

interventions to be filed on or before January 2, 2020. On January 2, 2020, the Phillips Cos. filed a joint answer to the Complaint. On January 17, 2020, NGL filed an answer to the Phillips Cos. Answer.

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted.

8. Rule 213(a)(2) of the Commission's Rules and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept NGL's answer because it has provided information that assisted us in our decision-making process.

IV. Discussion

9. As discussed more fully below, we deny the Complaint regarding: (a) NGL's supply arrangement under the Exchange Agreement; (b) Phillips 66's proprietary interconnection at the Williams terminal; and (c) Phillips Pipeline's prorationing policy. However, we set for hearing and settlement judge procedures NGL's challenge to Phillips Pipeline's transmix charges.

A. NGL's Supply Arrangement under the Exchange Agreement

1. Pleadings

10. NGL argues that its Exchange Agreement with Phillips 66, Phillip Pipeline's unregulated affiliate, is

for transportation service subject to the Commission's jurisdiction.[6] Under the Exchange Agreement, NGL gives propane at the Conway hub to Phillips 66 in exchange for propane at the NGL Terminals. NGL notes that the Phillips Pipeline's Blue Line runs from Conway to the NGL Terminals. Accordingly, NGL asserts that via the Exchange Agreement, Phillips 66 is effectively providing NGL with transportation service using Phillips Pipeline's Blue Line.

11. In response, the Phillips Cos. maintain that the Exchange Agreement is non-jurisdictional. The Phillips Cos. explain that the Exchange Agreement is simply a private commodity transaction. The Phillips Cos. state that the Commission only regulates transportation services and that the Commission lacks jurisdiction over supply arrangements such as the Exchange Agreement.[7]

2. Commission Determination

12. We find that the Commission lacks jurisdiction over the Exchange Agreement and deny the Complaint on this issue. As the Commission has explained, an exchange of product does not constitute transportation service under section 1(1) of the ICA. The Commission's jurisdiction "encompasses oil pipeline transportation, and does not extend to the sales of petroleum

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[6] NGL Jan. 17, 2020 Answer at 12; *see also* Compl. at 34.

[7] The Phillips Cos. Answer at 23, 33-36 (citing *Western Refining Pipeline Co.*, 122 FERC ¶ 61,210, at P 16, *reh'g denied*, 123 FERC ¶ 61,271 (2008)).

products."[8] Moreover, the Commission has found that "[t]he fact that an oil pipeline engages in such a contract does not make it a jurisdictional issue."[9] As the Commission lacks jurisdiction over sales of petroleum products,[10] we find that the Commission lacks jurisdiction to rule on NGL's claims arising as a result of its supply arrangements with Phillips 66.

B. Phillips 66's Proprietary Interconnection at the Williams Terminal

1. Pleadings

13. NGL claims that the Phillips 66 interconnection is subject to Commission jurisdiction. Phillips 66 owns and operates a proprietary interconnection running from the Williams terminal in Conway, Kansas to the Phillips Pipeline. NGL describes the interconnection as

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[8] *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 11 n.8 (2017); *Western Refining Pipeline Co.*, 122 FERC ¶ 61,210, at P 12, *reh'g denied*, 123 FERC ¶ 61,271 (2008) ("the price of the oil commodity itself is beyond the Commission's jurisdiction, which relates to oil pipeline transportation"); *Bridger Pipeline LLC*, 126 FERC ¶ 61,182, at P 16 (2009) (explaining that where "two shippers merely trade crude oil in one location on a pipeline system for barrels of oil located elsewhere on the pipeline and then individually arrange for transportation with the pipeline for the traded volumes . . . the trade . . . occurs separately from the pipeline's jurisdictional transportation services.").

[9] *ConocoPhillips Co. v. Enterprise TE Products Pipeline Co.*, 134 FERC ¶ 61,174, at P 54 (2011).

[10] *Magellan Midstream*, 161 FERC ¶ 61,219 at P 11.

"a few feet of pipeline and some metering facilities."[11] NGL asserts that Phillips 66's interconnection provides interstate transportation service from the Williams terminal to the Phillips Pipeline.[12] NGL argues that a Commission tariff should be filed for the interconnection and that Phillips Pipeline's refusal to permit NGL to use its affiliate Phillip 66's interconnection is unduly discriminatory and violates the ICA.[13] NGL alleges that Phillips 66 and Phillips Pipeline are coordinating to deny it service.

14. The Phillips Cos. respond that the interconnection is part of the terminal facilities and does not provide jurisdictional transportation service.[14] The Phillips Cos. add that NGL may continue to deliver product from the Williams terminal onto Phillips Pipeline using other connections with the ONEOK terminal and the Mid-America Pipeline.

2. Commission Determination

15. We deny the Complaint on this issue and find that the Commission lacks jurisdiction over Phillips 66's proprietary interconnection. The Commission has held that "terminal facilities" consisting of "smaller pipes, metering facilities and storage tanks, [and] truck

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[11] Compl. at 19.

[12] *Id.* at 35-37.

[13] *Id.*

[14] The Phillips Cos. Answer at 38-39 (citing *TE Products Pipeline Co.*, 130 FERC ¶ 61,257, *order on reh'g*, 131 FERC ¶ 61,277, at P 12 (2010) (*TEPPCo*)).

unloading facilities" are non-jurisdictional if they occur "after jurisdictional transportation is completed."[15] Likewise, the same facilities are not jurisdictional if they occur before jurisdictional transportation has commenced.[16] Because Phillips 66 uses the facilities to tender its product to the pipeline for transportation, the facilities are necessarily located before the transportation has commenced.

16. Likewise, although the proprietary interconnection is owned by Phillips 66, an affiliate of Phillips Pipeline, this does not justify asserting Commission jurisdiction over the interconnection.[17] The Commission has explained that the fact that terminal services are provided by an affiliate of the pipeline does not provide a basis for asserting Commission jurisdiction over the services at the terminal.[18]

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[15] *TEPPCO*, 131 FERC ¶ 61,277 at P 12.

[16] *See Tesoro Refining and Marketing Co.*, 135 FERC ¶ 61,116, at P 17 (2011) ("jurisdiction does not begin until the petroleum products enter an interstate pipeline").

[17] Compl. at 41.

[18] *TEPPCO*, 131 FERC ¶ 61,277 at P 12. Similarly, NGL's assertion that Phillips Pipeline's tariff lists "Conway" as an origin and destination point does not give NGL a right to use the non-jurisdictional interconnection owned by Phillips 66 at the Williams terminal. *See* Compl. at 18-19. Moreover, the Phillips Cos. explain that there are other options for shippers to originate propane on the Blue Line at Conway. The Phillips Cos. Answer at 36-39.

C. Phillips Pipeline's Prorationing Policy

1. Pleadings

17. NGL argues that the Phillips Pipeline prorationing policy is unduly discriminatory and not just and reasonable. NGL argues that the Phillips Pipeline prorationing policy fails to provide NGL a meaningful opportunity to become a regular shipper because the policy requires NGL to ship in 12 consecutive months even though the pipeline flows bi-directionally and NGL is unable to ship propane during the summer away from the east end of the Blue Line.[19] NGL states that Phillips Pipeline's prorationing policy is contrary to the Commission's holding in *Colonial*, where the Commission rejected proposed changes to a prorationing methodology because they failed to provide new shippers a meaningful opportunity to become regular shippers.[20] NGL states that because NGL is bidirectional, prorationing should be done on a seasonal basis, citing *Suncor* where the Commission permitted a pipeline with multiple

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[19] Compl. at 25-27. The prorationing policy defines a "Regular Shipper" as "any Shipper who had a record of movements of Petroleum Product(s) in any twelve (12) of the twelve (12) months in the Base Period" and a "New Shipper" as any other shipper. When nominations exceed available capacity, Regular Shippers are allocated capacity based on shipping history in the Base Period. New Shippers are allocated ten percent, not to exceed five percent for any individual shipper. The Phillips Cos. Answer, Ex. B at 1.

[20] Compl. at 26 (citing *Colonial Pipeline Co.*, 156 FERC ¶ 61,001, at PP 18-19 (2016)).

pipeline segments to apply a separate prorationing policy to each segment.[21]

18. The Phillips Cos. assert that Phillips Pipeline's prorationing policy is just and reasonable.[22] The Phillips Cos. state that the Commission has consistently held that pipelines have discretion regarding the design of their prorationing policies. The Phillips Cos. state that the prorationing policy reflects a "legitimate preference" for shippers that pay for service in all 12 months of the year.[23] The Phillips Cos. argue that, by only shipping part of the year, NGL avoided the burden of transporting volumes even during months when demand was low. According to the Phillips Cos., nothing prevents NGL from shipping in all 12 months of the base period and becoming a regular shipper.

2. Commission Determination

19. We deny the Complaint as to claims that Phillips Pipeline's prorationing policy is unjust and unreasonable and unduly discriminatory against NGL, that the prorationing policy fails to provide new shippers a meaningful opportunity to become regular shippers, and that allocations should be done on a seasonal rather than annual basis. We find that NGL has not met its burden to allege reasonable grounds for

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[21] Compl. at 31-32 (citing *Suncor Energy Mktg. Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 140 (2010) (*Suncor*)).

[22] The Phillips Cos. Answer at 11.

[23] *Id.* at 17.

finding that Phillips Pipeline's prorationing policy may be unjust, unreasonable, or unduly discriminatory. The Commission affords pipelines considerable latitude in developing methods for allocating pipeline capacity in periods of excess demand, and there is no single method of allocating capacity in times of excess demand on oil pipelines.[24] Historical prorationing policies are commonplace in the industry and have been repeatedly approved by the Commission.[25] The Commission has explained that historical-based prorationing policies appropriately reward shipper loyalty.[26] The Commission has also approved a

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[24] *Dixie Pipeline Co.*, 140 FERC ¶ 61,127, at P 49 (2012); *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094, at P 14 (2004) (citing *SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,115 (1999)).

[25] *E.g., Suncor*, 132 FERC ¶ 61,242, at P 25 (2010) ("One common prorationing procedure is a historically-based methodology that affords a preference to shippers with a history of shipping on the pipeline. The Commission has accepted this type of prorationing procedure for a number of pipelines."); *ConocoPhillips I*, 112 FERC ¶ 61,213, at P 28 (2005) (dismissing complaint against a pipeline's filing to establish a prorationing policy with a 12-month base period and noting that "prorationing policies based on historical volumes are an acceptable means of allocating capacity on other pipelines"); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 43 (2006) ("The Commission previously permitted pipelines to adopt historically-based prorationing methodologies."); *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at 62,387 n.14 (1999) (noting that the pipeline "uses an historical-based proration methodology, under which access to the pipeline falls to shippers with movements made over the entire year period versus shippers that choose to ship only during peak periods").

[26] *ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,326, at P 19 (2005) (*ConocoPhillips II*); *Suncor*, 132 FERC ¶ 61,242 at

12-month base period for obtaining regular shipper status.[27] Phillips Pipeline's prorationing methodology is consistent with these policies.

20. We reject NGL's argument that Phillips Pipeline's prorationing policy discriminates against NGL. The Commission has rejected challenges to facially neutral prorationing policies based on allegations that the protesting shipper did not receive the amount of capacity it desired based on its own decisions not to ship volumes on the pipeline.[28]

PP 25, 139.

[27] *E.g.*, *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148, at P 29 (2014) (finding proposed historical prorationing policy reasonable and not unduly discriminatory and noting that "a New Shipper can . . . qualify as a Regular Shipper by moving oil in each month during a rolling 12-month period"); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at PP 32, 41 (2012) (approving historical prorationing policy under which "New Shippers that shipped during all 12 months of a Base Period will become Regular Shippers"); *Kinder Morgan Pony Express Pipeline LLC & Hiland Crude, LLC*, 141 FERC ¶ 61,249, at PP 23, 30, 31 (2012) (same); *Saddlehorn Pipeline Co., LLC*, 153 FERC ¶ 61,067, at PP 26, 27, 34 (2015) (same).

[28] *ConocoPhillips I*, 112 FERC ¶ 61,213 at P 27 (denying complaint against historical prorationing policy with 12-month shipping requirement for regular shipper status and noting that the shipper "has the same opportunity as any other shipper to establish its entitlement to future capacity during periods of prorationing" and "can only fault itself if it failed to nominate appropriate volumes"); *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094 at P 13 (rejecting protest where a shipper "having a less favorable capacity entitlement than other shippers may have . . . is the result of [the shipper's] own decisions to ship or not ship volumes of NGLs on [the pipeline]" and noting that "[s]hould [the shipper] desire to

Likewise, the Commission has found that historical prorationing policies are not unduly discriminatory towards shippers that move only on an occasional or seasonal basis because "all have an equal opportunity to become" regular shippers by shipping each month.[29] The same applies to the instant case. NGL's failure to achieve regular-shipper status results from NGL's own business decisions not to obtain alternate propane supplies and not to ship on the Blue Line in 12 consecutive months. NGL and other shippers have an equal opportunity to achieve regular-shipper status.

21. We are unpersuaded by NGL's reliance upon *Colonial Pipeline Co.*,[30] where the Commission rejected proposed changes to a prorationing methodology because they failed to provide new shippers a

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build an allocation entitlement in the future, it has the ability to do so by revising its participation in the program"); *see also Dixie Pipeline Co.*, 140 FERC ¶ 61,127, at P 51 (2012) (rejecting pipeline's proposal to change its prorationing policy and noting that "it appears that Dixie's current tariff provision is neutral because the ability to move propane on Dixie from Mont Belvieu during periods of constraint depends entirely on the shippers' own business decisions"); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296 at P 48 (finding historical prorationing policy reasonable and noting that "the fact that all shippers cannot access the full amount of capacity they wish during periods of prorationing does not render the prorationing methodology unjust and unreasonable").

[29] *ConocoPhillips II*, 112 FERC ¶ 61,326 at P 19 (rejecting claim that a historical prorationing policy had an adverse impact on seasonal shippers and finding "there is no discrimination inherent in the requirements that Regular Shippers must meet to retain that status").

[30] 156 FERC ¶ 61,001, at PP 18-19 (2016) (*Colonial*).

meaningful opportunity to become regular shippers. In that proceeding, due to high shipper demand and capacity constraints, the Commission found that under Colonial's proposal, new shippers making consistent nominations for service had "nearly impossible odds of . . . obtaining sufficient capacity allocations through the lottery to establish a shipper history that confers rights to pro-rationed capacity, the practical effect of Colonial's lottery proposal is to eliminate the lottery as a means of obtaining reasonable access to its system."[31] NGL has made no showing that the concern's prompting the Commission's rejection in *Colonial* are applicable here. NGL is the only new shipper on Phillips Pipeline and thus, there is nothing preventing NGL from becoming a regular shipper if it nominates volumes in 12 consecutive months.[32]

22. NGL also failed to provide support for its claim that the prorationing policy is unjust, unreasonable or unduly discriminatory because allocations are completed on an annual as opposed to seasonal basis. NGL argues that Phillips Pipeline should be prorationed by season just as some pipelines allocate

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[31] *Id*. P 19; *see also id*. P 23 ("the effect of both the proposed lottery changes and the history transfer restrictions work together to effectively preclude New Shippers from ascending to Regular Shipper status").

[32] NGL argues that unlike cases where a shipper's lack of history is a result of its own business decisions, NGL's inability to ship in 12 consecutive months is the result of the Phillips Cos.' conduct, in particular Phillips 66's refusal to sell NGL propane. Compl. at 27-28. As explained above, the Commission lacks jurisdiction over sales of petroleum products.

capacity by segment as approved by the Commission in *Suncor*.[33] However, the facts in *Suncor* are distinguishable from the facts here. First, *Suncor* involved two physical segments of a pipeline system (as opposed to seasonal changes to flow direction) with different capacities.[34] The instant proceeding involves changes in seasonal flow direction.[35] Moreover, even if seasonal flows and different segments were analogous, the Commission in *Suncor* merely *permitted* separate prorationing policies based on different physical segments. *Suncor* does not stand for the proposition that segments would in all instances be unjust, unreasonable and unduly discriminatory.[36]

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[33] *Id*. at 27-30. NGL also argues that "segment" as used in Phillips Pipeline's tariff should be interpreted as seasonal segment to require separate allocations by seasonal line segment. *Id*. at 28-30. However, NGL concedes this interpretation is not consistent with the 12-month eligibility requirement to become a Regular Shipper in the prorationing policy. *Id*. at 30.

[34] *Suncor*, 132 FERC ¶ 61,242 at P 4 (Platte Pipe Line's capacity decreases from approximately 163,000 barrels per day (bpd) on the upstream Casper-Guernsey Segment to approximately 143,000 bpd on the downstream Guernsey-Wood River Segment).

[35] NGL Answer at 11.

[36] *Mid-America*, 106 FERC ¶ 61,094 at P 14 ("There is no single method of allocating capacity in times of excess demand on oil pipelines and pipelines should have some latitude in crafting capacity allocation methods to meet circumstances specific to their operations.").

D. Phillips Pipeline's Transmix Charges

1. Pleadings

23. As provided in the Phillips Pipeline tariff, Item 87, transmix is to be disposed of in a "reasonable commercial manner" and "the net revenue or costs" allocated "in proportion to each Shipper's volume of all [Liquified Petroleum Gas] Products transported over the system." According to NGL, although the tariff describes in general terms how transmix revenues and costs will be allocated, the transmix charges are unlawful because "the actual charges . . . are not stated in the Tariff."[37] Furthermore, NGL states that "[t]here is no explanation in the Tariff of how charges for transmix are derived, how the value of transmix is derived, how the transmix is disposed of, what the costs of such disposal are and how these inputs are calculated to derive a charge, including the volume and price data that form the basis of such calculations."[38] NGL requests that the Commission require Phillips Pipeline to state transmix charges in its tariff and justify the reasonableness of the charge.

24. The Phillips Cos. respond that transmix charges cannot be stated because the charges are unknown until the transmix has been disposed of.[39] The Phillips Cos. state that, after disposal, the resulting charges are reflected in Phillips Pipeline's "Transport4" interface

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[37] Compl. at 43.

[38] *Id.*

[39] The Phillips Cos. Answer at 46.

for shipper information and included in shipper invoices.[40]

2. Commission Determination

25. We find that the Complaint raises issues of material fact regarding Phillips Pipeline's transmix costs and cost allocation procedures that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures that we order below. Although Item 87 of Phillips Pipeline's tariff does contain provisions addressing transmix, the charges themselves are not stated in the tariff. This may be contrary to section 6 of the ICA and section 341.8 of the Commission's regulations requiring carriers to publish in their tariffs "charges . . . which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of service to the shipper."[41] Although Phillips Pipeline provides additional information on its shipper interface (Transport4), it does not submit the specific costs and shipper allocations for review when they are changed. The Commission has found that while all policies and procedures are not required to be stated verbatim in the tariff as long as they are available to shippers, it "also requires that those policies and any subsequent revisions to those policies be filed with the Commission so that the Commission and shippers can review them

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[40] *Id.*

[41] 18 C.F.R. § 341.8 (2019).

before the policies and any changes to them are placed in effect."[42] This issue may be addressed at hearing.

26. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[43] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.[44] The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions

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[42] *Epsilon Trading LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202, at PP 76-77 (2018); *Southwest Airlines v. Colonial*, 147 FERC ¶ 61,024, at P 36 (2014) (citing *Enterprise TE Products Pipeline Co. LLC*, 131 FERC ¶ 61,134, at P 11 (2010)).

[43] 18 C.F.R. § 385.603 (2019).

[44] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) We hereby deny the Complaint regarding the Exchange Agreement, Phillips 66's proprietary line, and Phillips Pipeline's prorationing policy, as discussed in the body of this order.

(B) Pursuant to the authority conferred on the Commission by the ICA and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held for the purpose of determining whether Phillips Pipeline's rates and practices related to transmix are lawful, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the ordering paragraphs below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 60 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the

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

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) Given that the circumstances caused by the COVID-19 pandemic may disrupt, complicate, or otherwise change the ability of participants to engage in normal hearing procedures, the Chief Judge is hereby authorized to set or change the dates for the commencement of the hearing and the issuance of the initial decision as may be appropriate.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1330
FERC-OR20-5-000
September Term, 2021

[Filed March 28, 2022]

NGL Supply Wholesale, LLC, Petitioner	)
v.	)
Federal Energy Regulatory Commission and United States of America, Respondents	)
----------	)
Phillips 66 Company and Phillips 66 Pipeline LLC, Intervenors	)

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson*, Circuit Judges; and Sentelle, Senior Circuit Judge

* Circuit Judge Jackson did not participate in this matter.

O R D E R

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1330
FERC-OR20-5-000
September Term, 2021

[Filed March 28, 2022]

NGL Supply Wholesale, LLC, Petitioner	)
v.	)
Federal Energy Regulatory Commission and United States of America, Respondents	)
----------	)
Phillips 66 Company and Phillips 66 Pipeline LLC, Intervenors	)

BEFORE: Srinivasan, Chief Judge; Rogers, Circuit Judge; and Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's petition for panel rehearing filed on March 11, 2022, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk