UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

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Market Manipulation Rulemaking	)	P082900
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COMMENTS OF THE ASSOCIATION OF OIL PIPE LINES

Pursuant to an Advance Notice of Proposed Rulemaking ("ANOPR") issued by the Federal Trade Commission ("Commission"),[1] the Association of Oil Pipe Lines ("AOPL") submits these initial comments in this proceeding, in which the Commission seeks public comment on the manner in which it should fulfill its responsibilities under Section 811 of the Energy Independence and Security Act of 2007 ("EISA").[2]

For the reasons stated herein, AOPL requests the Commission to clarify that the regulations to be promulgated under Section 811 of the EISA will not apply to crude oil and petroleum products pipelines ("oil pipelines"), which are already regulated by the Federal Energy Regulatory Commission ("FERC") and state regulatory agencies.

Common carrier oil pipelines subject to the Interstate Commerce Act ("ICA") are exempt from the Commission's jurisdiction under the Federal Trade Commission Act ("FTC Act") and thus are also exempt from the Commission's jurisdiction under the EISA. Even if the Commission had jurisdiction over oil pipelines under the EISA, the plain language of that statute limits the scope of the Commission's authority to the regulation of activities involving the wholesale purchase and sale of crude oil and

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[1] 73 Fed. Reg. 25,614 (May 7, 2008).

[2] Pub. L. No. 110-140, § 811, 121 Stat. 1492, 1723 (2007).

petroleum products – not the transportation of those commodities. In any event, it is not in the public interest for the Commission to regulate oil pipelines under the EISA; such regulation would result in inconsistent and overlapping enforcement and in costs to the oil pipeline industry and consumers that produce no benefits and serve no purpose under EISA.

I. COMMUNICATIONS AND SERVICE

All communications and correspondence with respect to these initial comments and this proceeding in general should be served upon the following individuals:

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II. BACKGROUND

A. Association of Oil Pipe Lines

AOPL is an unincorporated trade association that represents 48 common carrier oil pipeline companies. The membership is predominantly composed of U.S. oil pipeline companies but also includes companies affiliated with Canadian pipelines. These companies transport almost 85% of the crude oil and refined petroleum products shipped through pipelines in the United States. The members of AOPL are subject to regulation by FERC under the ICA with respect to their interstate pipeline operations, with state public service commissions generally regulating their intrastate operations. The members of AOPL have a substantial interest in ensuring that the rulemaking record in this proceeding properly clarifies the scope of any regulations to be promulgated under the EISA and otherwise reflects AOPL's concerns regarding those regulations.

B. Overview of Crude Oil and Petroleum Products Pipeline Operations

As the Commission's detailed research into the industry has shown, the oil pipeline industry encompasses a diverse range of products and roles, including pipelines transporting crude oil, synthetic crude oil, petroleum products and natural gas liquids.[3] Within the United States, there are approximately 200,000 miles of crude oil and petroleum products pipelines. These pipelines transport approximately two-thirds of the crude oil and petroleum products that are shipped in the U.S. There are approximately 95,000 miles of petroleum products pipelines alone in the U.S., which transport over 70 different types of refined petroleum products.[4] As the Commission has recognized, "[p]ipelines generally are the most cost-effective way to transport refined petroleum products," and pipeline "transportation rates are a small portion of the price of delivered products."[5]

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[3] *See*, *e.g.*, Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* 30 n.7 (2006)("*Katrina Report*").

[4] *Katrina Report* at 30 n.7 (2006).

[5] *Katrina Report* at *vii* and 32. In addition to efficient and economical transportation, oil pipelines transport crude oil and petroleum products safely. The Pipelines and Hazardous Materials Safety Administration ("PHMSA") of the U.S. Department of Transportation regulates interstate crude oil and petroleum products pipelines to ensure the safe and environmentally responsible operation of those pipelines. *See generally* 49 C.F.R. Part 190 (pipeline safety programs and rulemaking procedures). Oil pipelines also transport crude oil and petroleum products in an environmentally responsible manner. For example, under the Pipeline Performance Tracking System, an AOPL and American Petroleum Institute ("API") initiative established in 1999, the oil pipeline industry has collected extensive pipeline performance data. This data shows a decline of over 40% in the past nine years in both the number of oil pipeline spills and the volume of oil released from pipelines. There has also been a decline in corrosion-related oil spills of almost

Most of these pipelines operate as common carriers that, with minor operationally-related exceptions, do not own, buy or sell the liquids they transport.[6] Pipelines do not participate in wholesale commodity markets. Moreover, it is increasingly common for oil pipelines to be owned by independent pipeline companies that are not affiliated with producers, refiners, marketers or other participants in wholesale physical or futures markets. In contrast to natural gas pipelines and electric transmission facilities, which are not common carriers and whose open access operations commenced only in the 1980s and 1990s, oil pipelines have been engaged in unbundled, "open access" transportation since becoming subject to the ICA more than a century ago.[7]

Many oil pipelines also operate storage and terminal facilities, either as part of their transportation service or as an additional merchant function. Storage facilities can include anything from large tank farms used for long-term storage at a trading hub to small amounts of break-out tankage used by a pipeline as part of its daily operations. Terminal facilities generally provide a certain amount of storage, but are primarily used to deliver product to the pipeline (*e.g.*, from water, rail or other pipeline carriers) or to dispense bulk supplies of petroleum products received from the pipeline to trucks which deliver the product to retailers.

70% in the past eight years. Statement of Tim Felt, President and CEO, Explorer Pipeline, on Behalf of AOPL, Before the Subcommittee on Energy and Air Quality, House Committee on Energy and Commerce (March 12, 2008).

[6] Oil pipelines may engage in certain transactions incidental to their transportation function such as purchasing line fill, selling transmix, or buying and selling volumes needed to settle with shippers for losses in transit.

[7] Hepburn Amendment of 1906, 34 Stat. 584.

Numerous entities other than oil pipelines also own storage and terminal facilities. For example, refiners or marketers may use terminals to meet their own needs or to service their own customers.[8] Other entities that neither refine nor market petroleum products operate terminals that provide storage and dispense product to local marketers, refiners and jobbers for a fee.[9] In general, the overall number of terminals has declined, but of those remaining, an increasing number are terminals operated by entities that neither refine nor market petroleum products.[10] The Commission has determined that "[s]torage costs, throughputting, and other fees contribute relatively little to the final delivered price of gasoline."[11]

C. FERC Regulation of Oil Pipelines Under the Interstate Commerce Act

FERC regulates the transportation of crude oil and petroleum products in interstate and foreign commerce under the ICA. From 1906 to 1977, oil pipelines were regulated by the Interstate Commerce Commission ("ICC") under the ICA. In 1977, the Department of Energy Organization Act created the FERC and transferred jurisdiction over interstate oil pipelines from the ICC to the new agency.[12] The statute that the FERC

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[8] *Katrina Report* at 39-40.

[9] *Id.* at 40.

[10] Federal Trade Commission, Bureau of Economics, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* 222 (Aug. 2004)("*Antitrust Enforcement*").

[11] *Katrina Report* at 40; *see also Antitrust Enforcement* at 9 (explaining that "[t]he contribution of terminals services costs to the total cost of delivered petroleum products is relatively small").

[12] Pub. L. No. 95-91, 91 Stat. 565 (1977); 42 U.S.C. §§ 7155, 7172(b).

has been charged with enforcing, with regard to oil pipelines, is the ICA as it existed on October 1, 1977, the date of enactment of the Department of Energy Organization Act.[13] The version of the ICA that applies to oil pipelines may be found in an appendix to the 1988 version of Title 49 of the United States Code.[14]

FERC's authority under the ICA includes enforcement of a broad array of requirements for oil pipelines, including the following:

- all rates and rules affecting the value of the pipeline's services must be set out in a tariff filed with FERC and provided to shippers, ICA § 6(3);
- all rates and charges must be just and reasonable, ICA § 1(5);
- all regulations, practices and classifications must be just and reasonable, ICA § 1(6);
- no undue preference or discrimination may be made among shippers, locations, traffic, etc., not only as to rates but also as to the terms of service, ICA §§ 2, 3(1);
- transportation must be provided upon reasonable request, ICA § 1(4); and
- information about a shipper's movements that may improperly disclose the shipper's business transactions to its competitors must be kept confidential, ICA § 15(13).

FERC has promulgated extensive regulations to implement these and other pipeline obligations. *See*, *e.g*., 18 C.F.R. Part 341 (tariff filing obligations); 18 C.F.R. Part 342 (regulations governing rate changes); 18 C.F.R. Part 343 (procedures and standards for protests and complaints against oil pipeline rates, tariff provisions and practices); 18 C.F.R. Parts 346-348 (filing requirements for cost of service and market-based rates, and requirements for depreciation studies, respectively); and 18 C.F.R. Part

[13] Pub. L. No. 95-473, § 4(c), 92 Stat. 1337 (1978).

[13] 49 U.S.C. app. § 1, *et seq.* (1988).

349 (procedures for contested audits). FERC also provides for significant transparency regarding pipeline operations by imposing extensive reporting obligations pursuant to its broad power under ICA § 20, including annual,[15] and quarterly,[16] financial reports of operations as to costs and revenues of pipelines.

FERC enforces its extensive oil pipeline regulations in several ways. First, FERC maintains an increasingly proactive Office of Enforcement to ensure compliance in all industries subject to its jurisdiction, and maintains a Hot Line for informal tips and complaints regarding compliance. Oil pipeline shippers also have the right to file protests against any tariff change that they believe to be unreasonable, unduly discriminatory or otherwise unlawful. Upon receipt of a protest or on its own motion, FERC can suspend the tariff change for up to seven months while undertaking an investigation.[17] Parties can also file complaints against existing rates and practices. Shippers that demonstrate they were damaged by unlawful pipeline rates or practices can seek both prospective changes and reparations for up to two years prior to the filing of the complaint.[18]

Moreover, FERC's oversight goes beyond prescribing rates and common carrier access. FERC's authority to address claims of unreasonable or unduly discriminatory

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[15] 18 C.F.R. § 357.2 (FERC Form No. 6, Annual Report of Oil Pipeline Companies).

[16] 18 C.F.R. § 357.4 (FERC Form No. 6-Q, Quarterly Report of Oil Pipeline Companies).

[17] ICA § 15(7). *See*, *e.g.*, *SFPP, L.P*, Docket No. IS08-28-000; *BP Pipelines (Alaska) Inc., et al.*, Docket Nos. IS08-78-000, *et al.; Mid-America Pipeline Company, LLC*, Docket No. IS08-182-000; *Rio Grande Pipeline Company*, Docket No. IS08-168-000.

[18] ICA §§ 16(1), 16(3). *See*, *e.g.*, *Valero Marketing and Supply Company v. Longhorn Partners Pipeline, L.P. and Flying J, Inc.*, Docket No. OR08-4-000; *ExxonMobil Oil Corp., et al.*, *v. Calnev Pipe Line LLC., et al.,* Docket Nos. OR07-5-000, *et al.*; *ExxonMobil Oil Corp., et al., v. SFPP, L.P.*, Docket Nos. OR07-11-000, *et al.*

practices empowers FERC to consider allegations that a pipeline's administration of its tariff or its operations in providing transportation service unduly prefer one shipper – or class of shippers – over another.

III. THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007 AND THE COMMISSION'S QUESTIONS RELATED TO OIL PIPELINES AND RELATED FACILITIES

Section 811 of EISA directs the Commission to promulgate regulations that prohibit manipulative or deceptive devices or contrivances in the purchase or sale at wholesale of crude oil or refined petroleum products:

> It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.[19]

Section 813 of EISA provides that [Section 811] "shall be enforced by the [Commission] in the same manner, by the same means, and with the same jurisdiction as though all applicable terms of the Federal Trade Commission Act were incorporated into and made a part of this subtitle."[20]

While the proposed definition of market manipulation set forth by the Commission does not on its face evince an intent by the Commission to regulate oil pipelines under the EISA,[21] certain comments in the ANOPR raise questions about the scope of the proposed regulations. For example, "[t]he Commission seeks comment on

[19] 42 U.S.C. § 17301.

[20] 42 U.S.C. § 17303(a) (citation omitted).

[21] ANOPR at 23.

whether preannouncements that pipelines are approaching capacity constraints may be a conduit for market manipulation or deceit under Section 811, and on whether applying the rule to this behavior is likely to result in benefits that outweigh the costs."[22] The ANOPR also seeks public comment on the promulgation of regulations under the statute that would appear to apply to storage or terminal facilities owned and operated by oil pipelines.

"Potential Practices" of relevance to oil pipelines and for which the Commission has specifically sought comments are addressed below in Section V.E. However, for the reasons explained further below, AOPL asks the Commission as a general matter to clarify that its proposed regulations are not intended to apply to oil pipelines regulated by the FERC or similar state regulatory agencies.

IV. COMMENTS

A. Interstate Common Carrier Oil Pipelines Are Exempt from the Commission's Jurisdiction Under the EISA.

The Commission's jurisdiction to enforce the EISA is limited by its jurisdiction under the Federal Trade Commission Act ("FTC Act").[23] The FTC Act expressly exempts from the Commission's jurisdiction "common carriers subject to the Acts to regulate commerce."[24] The phrase "Acts to regulate commerce" includes the ICA.[25] Since, as explained above, interstate oil pipelines are common carriers subject to the ICA, they are exempt from the Commission's jurisdiction under the FTC Act and the EISA.

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[22] ANOPR at 31.

[23] EISA § 813; ANOPR at 4.

[24] 15 U.S.C. § 45(a)(2); ANOPR at 4, n.3.

[25] *See, e.g., FTC v. Miller*, 549 F.2d 452, 454-55, n.1 (7th Cir. 1977).

The FTC Act's exemption for common carriers is a broad one and applies to the entity's "*status* as a common carrier subject to the Interstate Commerce Act, not *activities* subject to regulation under that Act."[26] Thus, the Commission should clarify that its proposed regulations are not intended to apply to common carrier oil pipelines subject to the ICA.[27]

B. The Scope of the EISA is Limited to Activities Involving Wholesale Purchase and Sale of Crude Oil and Petroleum Products – Not the Transportation of those Commodities.

Even if the Commission had jurisdiction under the EISA to regulate oil pipelines, the plain language of the EISA reveals no intent by Congress that it do so. Section 811 of EISA prohibits the use of manipulation or deception "in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale…." There is no mention of the transportation and related services provided by oil pipelines.

Had Congress intended for the EISA to govern transportation of crude oil and petroleum products it would have stated so explicitly in the statute as it did in similar market manipulation statutes related to the electric and natural gas industries. For

[26] *Id.* at 455 (emphasis added).

[27] Many states also regulate oil pipelines. *See*, *e.g.*, Cal. Public Utility Code § 216 (2007); Wash. Rev. Code §§ 81.88.030, 81.16.010 (2008); Wyo. Stat. § 37-1-101(a)(vi)(G); 52 Okla. Stat. § 56 (2008); Kan. Stat. Ann. § 55-501 (2006). As explained above, to the extent an oil pipeline is regulated by the ICA, it is exempt from regulation under the FTC Act and the EISA even if it also provides intrastate transportation service not otherwise regulated by the FERC. To the extent an oil pipeline offers only intrastate transportation service, the FTC Act exemption would not directly apply. However, for the reasons set forth in Sections IV.B. and IV.C. of these comments, the Commission should not regulate intrastate-only oil pipelines under the EISA.

example, Section 222 of the Federal Power Act,[28] enacted by Section 1283 of the Energy Policy Act of 2005 (EPACT),[29] states:

> It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy *or the purchase or sale of transmission services subject to the jurisdiction of the Commission*, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers."

Similar amendments to the Natural Gas Act ("NGA") related to market manipulation also explicitly refer to transportation services.[30] The fact that Congress did *not* choose to address transportation in EISA Section 811 is further evidence that the Commission does not have authority under Section 811 to regulate crude oil and petroleum products pipelines under the EISA.

C. It Is Not in the Public Interest for the Commission to Regulate Oil Pipelines Under the EISA.

Even if the Commission had jurisdiction and the EISA permitted it, the Commission still should not regulate oil pipelines. Regulation of oil pipelines by the Commission under the EISA would not be "necessary or appropriate in the public interest or for the protection of United States citizens."[31] Instead, such regulation would result in

[28] 16 U.S.C. § 824v.

[29] Pub. L. No. 109-58, § 1283, 119 Stat. 594, 979 (Aug. 8, 2005)(emphasis added).

[30] *See also* 15 U.S.C. § 717c-1 ("It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.")(Section 4A of the Natural Gas Act).

[31] 49 U.S.C. § 17301.

inconsistent and overlapping enforcement and in costs to the oil pipeline industry and consumers that produce no significant benefits and serve no legitimate purpose under EISA.

1. Oil Pipelines Already Are Regulated By FERC and State Regulatory Agencies.

As described above, the rates and charges, rules, practices and other aspects of transportation service offered by common carrier oil pipelines are subject to extensive regulation by FERC and state regulatory agencies. Any shipper denied access to a common carrier pipeline, or subjected to unjust, unreasonable or unduly discriminatory practices, rates or conditions, may seek relief from FERC or a state agency.

In the ANOPR, the Commission properly asks whether the promulgation of new anti-manipulation regulations would impose costs as well as benefits.[32] In this case, the cost of potentially inconsistent and overlapping enforcement standards would be substantial. If shippers are permitted to challenge oil pipeline rates and practices at the Commission as well as the FERC, the result will be confusion and increased litigation, which will do nothing to lower transportation costs. Overlapping regulation may also create uncertainty regarding the ability of oil pipelines to recover their full cost-of-service under existing FERC standards, which in turn could adversely affect the building of additional pipeline infrastructure. In sum, any potential benefits from Commission regulation under the EISA would be outweighed by the loss of efficiencies that further regulation by the Commission would entail for the functioning of the pipeline transportation market and for the petroleum markets as a whole.

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[32] *See*, *e.g.*, ANOPR at 29-33.

2. Oil Pipelines Have Little Potential to Manipulate the Price of Crude Oil or Petroleum Products.

a. The Commission Has Previously Found Little Potential for Market Manipulation by Oil Pipelines.

In the *Katrina Report*, the Commission determined that "regulation and competition provide important constraints on pipeline owners' ability to raise tariffs or otherwise engage in anticompetitive conduct."[33] In reaching that conclusion, the Commission examined the extent to which firms have manipulated prices through control over bulk distribution facilities, *i.e.*, pipelines and marine vessels used to transport bulk quantities of gasoline and other petroleum products to product storage terminals, from which those products are dispensed to retail outlets. The Commission also examined four variables that could influence the likelihood of price manipulation by a party in control of bulk distribution facilities – (i) regulation, (ii) curtailment of discounts on tariffs, (iii) pipeline expansion decisions, and (iv) vertical foreclosure.

With respect to the first variable, the *Katrina Report* explained that federal (and, to a lesser extent, state) regulation "plays a key role" in determining the likelihood of price manipulation by oil pipelines:

> Pipelines subject to FERC rate regulation cannot increase rates over the published tariff except under limited circumstances. Pipelines can offer discounts on the tariffs (usually based on volume), but FERC rules prohibit common-carrier pipelines from discriminating among customers. Accordingly, pipelines must offer the same rate to all customers that meet stipulated requirements (*e.g.*, a minimum volume requirement).[34]

[33] *Katrina Report* at 30.

[34] *Katrina Report* at 32 (note omitted).

The *Katrina Report* concluded that "[p]ipeline regulation limits the ability of pipelines to exercise market power by charging higher tariffs or by withholding existing capacity from nominating shippers."[35]

With respect to the second variable, oil pipelines may offer discounts for, *inter alia*, volume commitments. The *Katrina Report* examined the likelihood of price manipulation through the suspension or curtailment of discounts for pipeline transportation and concluded that pipelines cannot, under the ICA, discriminate among shippers, and the effect of any elimination of a discount on the price of delivered gasoline would be "relatively small."[36] It should also be noted that any discount offered by a FERC-regulated oil pipeline is by definition below the ceiling rates that oil pipelines are permitted to charge under the FERC's general ratemaking standards.[37] Since pipelines are not required to offer discounts below the ceiling rate, the FERC permits pipelines to cancel discounts at any time.[38] The elimination of a discount is thus consistent with a pipeline's rate obligations at the FERC and cannot be considered "manipulative" or "deceptive."

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[35] *Katrina Report* at 32.

[36] *Katrina Report* at 32.

[37] Under FERC's ratemaking regulations, oil pipelines are generally required to keep their rates at or below certain inflation-adjusted rate ceilings. 18 C.F.R. § 342.3(a) ("A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established [by the Commission's inflation-indexing regulations].").

[38] *Dome Pipeline Corp.*, 117 FERC ¶ 61,364 at P 11 (2006) (holding that "a pipeline can end a discounted rate at any time"), *aff'd on reh'g*, 118 FERC ¶ 61,132 (2007); *Shell Pipeline Co, L.P.*, 100 FERC ¶ 61,139 at P 6 (2002) (holding that pipeline was "under no obligation to continue offering [a] discount" and could "choose to end the discount at any time . . . ."), *aff'd on reh'g*, 100 FERC ¶ 61,330 (2002).

As for pipeline expansion decisions, the third variable, there was no indication that pipelines might decline to expand their capacity in an attempt to manipulate prices. "Staff did not find evidence of such conduct plausibly linked to an incentive to raise product prices."[39]

Finally, the Commission found no evidence that pipelines might engage in vertical foreclosure, *i.e.*, limit deliveries to downstream markets in an attempt to raise prices in those downstream markets.[40]

The *Katrina Report* reflects similar conclusions with respect to oil storage and terminal operations. "[C]ontrol over product terminals (and the storage they provide) seems unlikely to contribute significantly either to anticompetitive conduct or to price manipulation in most geographic areas."[41] Product terminal competition and capacity in most areas appear to be sufficient to limit the potential for anticompetitive behavior.

In the *Katrina Report*, therefore, the Commission determined that there is little potential for market manipulation by oil pipelines, storage facilities or terminals:

> Staff investigated constraints on access to transportation (pipelines and ships) and to terminal storage in order to identify factors that could facilitate price manipulation. Staff found no evidence of such manipulation. Further, staff found, in general, very limited potential for firms to manipulate gasoline prices by exploiting systemic infrastructure constraints in pipelines, marine vessels, or product terminals.[42]

[39] *Katrina Report* at 32-33.

[40] *Katrina Report* at 34.

[41] *Katrina Report* at 39.

[42] *Katrina Report* at 43.

In light of these *Katrina Report* conclusions, it clearly is not necessary or appropriate in the public interest or for the protection of U.S. citizens for the Commission to promulgate regulations applicable to oil pipelines either with respect to transportation or any storage and terminal services that may be offered by oil pipelines.[43]

b. The Pipeline Industry is Competitive.

There is little concentration of ownership of crude oil and petroleum products pipelines, and pipelines face significant competition from other pipelines as well as alternative modes of transportation.[44] Under existing federal statutes, the Commission has devoted substantial resources to investigate, and to assess the potential for anticompetitive behavior on the part of, the oil pipeline industry and the petroleum industry in general. Repeated Commission investigations, reports, and antitrust reviews of proposed petroleum industry mergers have served to ensure that the structure of the pipeline industry and the petroleum industry in general do not become susceptible to anticompetitive behavior.

c. Pipelines Must Compete With Other Modes of Oil Transportation.

In addition to competition from other pipelines, crude oil and petroleum products transportation is subject to inter-modal competition (in contrast, for example, to electric power transmission). Crude oil and petroleum products can be transported via pipeline,

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[43] As the trade association representing oil pipeline companies, AOPL's comments are focused on oil pipelines and the services that they provide. However, AOPL notes that many of the reasons set forth in Sections IV.B. and IV.C. of these comments as to why the Commission should not regulate the storage and terminal services of oil pipelines also apply to storage and terminal operations offered by companies other than oil pipelines.

[44] *See* Report of the U.S. Department of Justice on Oil Pipeline Deregulation (May 1986) (finding the great majority of crude and products pipelines face significant competition).

over water, by rail or by truck. In the past thirty years, the flow of refined petroleum products via pipeline has increased and that over water has decreased. Nonetheless, water shipment in 2001 still totaled 146 billion ton miles.[45] Approximately thirty percent of crude oil and petroleum products consumed in this country is transported via barge or ship.[46]

3. The Price Of Pipeline Transportation Is An Immaterial Part of the Retail Cost of Gasoline and Other Petroleum Products.

In the *Katrina Report*, the Commission concluded that "[d]irect infrastructure costs (such as pipeline tariffs, marine vessel shipping rates, and terminaling fees) constitute a relatively small portion of the total delivered cost of gasoline. Even a relatively large percentage price increase in the costs of transportation and storage services likely would have only a small percentage effect on the quantity of product delivered to a market and on delivered product prices."[47]

A primary reason for this is that "[p]ipelines are generally the lowest-cost method of transporting large quantities of refined petroleum products."[48] Indeed, the approximate cost for pipeline transportation from Houston to New York for a gallon of gasoline is just three cents.[49]

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[45] *Antitrust Enforcement* at 210.

[46] Statement of Benjamin S. Cooper, Executive Director, Association of Oil Pipe Lines, on Behalf of the American Petroleum Institute and the Association of Oil Pipe Lines, Before the Federal Trade Commission (Aug. 2, 2001).

[47] *Katrina Report* at 29.

[48] *Katrina Report* at 30.

[49] *Katrina Report* at 30.

A Commission investigation in 2005 confirmed that gasoline prices, and gasoline price increases, are not attributable to pipeline transportation costs.[50] This investigation also confirmed that gasoline price increases were attributable to market forces and not to market manipulation.[51]

The price of crude oil, not the price of oil pipeline transportation, accounts in large measure for the price of gasoline and refined petroleum products. "Over the last twenty years, changes in crude oil prices have explained 85 percent of the changes in the price of gasoline in the U.S."[52] The report resulting from this 2005 investigation attributes the market price for crude oil to the Organization of Petroleum Exporting Countries, the significant increase in crude oil demand in the past twenty years, and the unanticipated increase in crude oil demand in 2004.[53]

V. RESPONSES TO QUESTIONS POSED IN ANOPR PERTINENT TO OIL PIPELINES

A. In Connection With: "Commenters are encouraged to discuss how the phrase 'in connection with the sale or purchase of crude oil, gasoline, or petroleum distillates at wholesale' should be interpreted."

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[50] *See generally* Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition* (2005)(*Gasoline Price Changes*).

[51] *Gasoline Price Changes* at ii.

[52] *Gasoline Price Changes* at iv.

[53] Taxes also contribute to the price of gasoline. Between 1991 and 2004, taxes on average made up 30.3 percent of the annual average retail price of gasoline. *Gasoline Price Changes* at viii. Increased environmental requirements since 1992 also have raised the retail price of gasoline. "Estimates of the increased costs of environmentally mandated gasoline range from $0.03 to $0.11 per gallon and affect some areas of the country more than others." *Id.* at *x*.

Commission regulations promulgated under Section 811 of EISA should construe strictly the term "in connection with the purchase or sale of crude oil[,] gasoline[,] or petroleum distillates at wholesale." In particular, and as discussed above, the Commission should not interpret the phrase to apply to oil pipelines.

B. In the Public Interest or for the Protection of U.S. Citizens: "Establishing a violation of Section 811 also requires a showing that the practices 'used or employed' violate a rule that the Commission has prescribed 'as necessary or appropriate in the public interest or for the protection of United States citizens.' Commenters are encouraged to address how the Commission may best ensure that a Section 811 rule satisfies this standard."

To conform to the "public interest" requirement of Section 811, the Commission regulations promulgated under the statute should be justified as necessary to protect consumers and resulting in benefits that exceed the costs of such regulation. As explained above, even if the EISA gave the Commission jurisdiction and scope to regulate oil pipelines, the costs of doing so would outweigh the benefits and thus would not be in the public interest.

C. Penalties: "The Commission seeks comment on whether any potential chilling effect of these penalties on legitimate business behavior should affect the interpretation of, or required state of mind for, a 'manipulative deceptive device or contrivance.'"

Penalties of up to $1 million, in conjunction with a broad anti-manipulation regulation applied to components of the petroleum distribution chain separate from wholesale transactions, *e.g.*, oil pipelines and terminals, could have a significant chilling effect on legitimate business practices. Therefore, the Commission's rules should be narrowly tailored to serve the specific Congressional purpose of regulating the wholesale crude oil and petroleum products market. The Commission's rules should also identify with specificity which entities are – and are not – subject to the regulations and clearly set forth the obligations of the entities to be regulated. With respect to state of mind, given the severity of the penalties imposed by the EISA, the Commission should require a showing of specific intent to engage in the prohibited activities.

D. Overlapping Jurisdiction: "Congress has provided anti-manipulation authority to FERC and the CFTC to reach behavior previously not regulated by those agencies. In some cases, this authority may lead to a shared jurisdiction over the same behavior. The manipulation authority provided by Section 811 may subject market participants to similar overlapping agency oversight, and create the potential for market participants to be subject to differing standards of conduct and multiple levels of liability. The Commission seeks comment on the possible effects of this type of overlapping jurisdiction."

As discussed above, the Commission should avoid conflicts of jurisdiction with respect to regulation of common carrier oil pipelines by FERC and similar state regulatory agencies. To that end, Congress has given primary regulatory responsibility for interstate common carrier oil pipelines to the FERC, and has specifically exempted interstate oil pipelines from the Commission's jurisdiction under the FTC Act and the EISA. The same policy reasons for this exemption and the other reasons set forth in Sections IV.B. and IV.C. above also militate in favor of exempting intrastate-only oil pipelines from any regulations under the EISA.

E. Potential Practices: "The Commission requests comment on the following topic list, but encourages commenters to present any other proposals for formal rule provisions that they may wish to suggest."

As explained above, the Commission does not have jurisdiction under the EISA to regulate interstate oil pipelines, including any storage or terminal services they may provide. Nor does the plain language of the statute evidence any Congressional intent to regulate transportation, storage or terminalling services under the EISA. The discussion below, however, demonstrates that, in addition, sound factual grounds exist for concluding that the public interest would not be served by such regulation.

1. Refinery Announcements of Planned Reductions in Utilization

The ANOPR expresses concern that refiners may engage in advance public announcements of reductions in the utilization of refinery plants, which in turn might be considered to be manipulative, and asks, *inter alia*, what business justifications might "balance the perceived harm."[54]

AOPL defers to others to address the broader issues for the crude oil or petroleum products markets resulting from refinery announcements of output changes. However, AOPL urges the Commission to keep in mind the important role that output information plays in pipeline planning. Pipelines rely for planning purposes on information regarding future volumes and markets. Regulating refinery announcements of this type could hinder efficient pipeline planning and affect reliability of service.

The infrastructure of the oil pipeline industry is undergoing significant changes to meet expanded demand and changes in market dynamics.[55] At a national level, demand continues to increase for petroleum products generally and for crude oil to be refined domestically.[56] Increased demand must be met by increased crude oil and petroleum

[54] ANOPR at 29-30.

[55] The projected 2008 investment in crude oil and refined petroleum products pipeline projects in the U.S. is approximately $6.6 billion, an increase of 29% over the previous year. Marilyn Radler, *Capital Budgets Grow in U.S., Drop in Canada,* OIL AND GAS JOURNAL, April 28, 2008, p. 22, Table 1.

[56] Projected U.S. demand for petroleum products increases by as much as 0.4% per year or more for the next decade. *Revised Energy Outlook: Hearing Before the Senate*

product imports as well as by increased refining capacity.[57] As refinery capacity increases, crude oil and refined product pipeline capacity will also need to increase.[58]

In addition to overall demand growth, patterns of demand and supply are changing, *e.g.*, crude oil and synthetic crude oil production from Western Canada is projected to increase significantly, and refineries are changing to accommodate altered supplies – again requiring additional pipeline infrastructure.[59] Similarly, for petroleum products, population growth in certain areas has required expanded pipeline capacity.[60]

In this context, public information regarding refinery operations – expansion or reduction in output – assists pipelines in meeting market demand. Major oil pipeline construction requires long lead time and is often preceded by requests to FERC for rate

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Committee on Energy and Natural Resources, 110th Cong., 2nd Sess. 9 (2008) (prepared statement of Guy Caruso, Administrator, Energy Information Administration, DOE).

[57] *See, e.g., The Refinery Permit Process Schedule Act: Hearing Before the Senate Committee on Energy and Natural Resources*, 109th Cong., 2nd Sess. 18 (2006) (prepared statement of Glenn McGinnis, CEO, Arizona Clean Fuels Yuma), 2006 WL 1991952.

[58] *Petroleum Refineries: Will Record Profits Spur Investment in New Capacity? Hearing Before the Subcommittee on Energy and Resources of the House Government Reform Committee*, 109th Cong., 1st Sess. 74 (2005)(prepared statement of Thomas O'Conner, Project Manager, ICF Consulting, LLC), 2005 WL 2699346.

[59] NATIONAL ENERGY BOARD, CANADA'S OIL SANDS, OPPORTUNITIES AND CHALLENGES TO 2015: AN UPDATE viii (2006), *available at* http://www.neb-one.gc.ca/clf-nsi/rnrgynfmtn/nrgyrprt/lsnd/pprtntsndchllngs20152006/pprtntsndchllngs20152006-eng.pdf

[60] *Energy Prices and Profits: Joint Hearing Before the Senate Committee on Commerce, Science and Transportation and the Senate Committee on Energy and Natural Resources*, 109th Cong., 1st Sess. 111 (2005) (prepared statement of Terry Goddard, Attorney General, State of Arizona), 2005 WL 3008876.

assurances and development of long-term contracts with shippers.[61] Pipelines contemplating construction (or abandonment) of facilities benefit from having information about refinery plans, and will amend or even cancel projects in response to changing market circumstances. It is important that planned reductions in utilization be scheduled and announced in order to ensure that the maximum amount of crude oil and products get to market and are not trapped in markets where they cannot be used. Moreover, as explained further below, information regarding shorter-term expansions or reductions in refinery operations is useful for efficient pipeline operations. Prohibiting the release of such information would greatly complicate pipeline planning.

2. Refinery Announcements of Turnarounds for Planned Maintenance

The ANOPR also raises the question whether public announcements of refinery turnarounds for maintenance or other scheduled downtime may enable collusion, and whether the practice has offsetting benefits.[62] From the perspective of operating oil pipelines, notification of scheduled refinery turnarounds is of direct and substantial benefit to oil pipelines and shippers. It is once again important that turnarounds be scheduled and announced in order to ensure that the maximum amount of crude oil and products get to market and are not trapped in markets where they cannot be used.

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[61] *See, e.g., SFPP, L.P.*, 102 FERC ¶ 61,089 (2003); *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 (1995); *Rio Grande Pipeline Co.*, 100 FERC ¶ 61,022 (2002); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Colonial Pipeline Co.*, 89 FERC ¶ 61,095 (1999), *order on reh'g*, 95 FERC ¶ 61,355 (2001); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006); *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007).

[62] ANOPR at 30.

Refinery output affects both crude pipelines supplying refineries and products pipelines distributing refinery production. Turnarounds can have a significant effect on pipeline utilization, affecting the scope and application of prorationing provisions. For example, a refinery turnaround in one market can cause crude oil shippers to shift volumes to other markets, thus causing increased volumes and even prorationing of capacity on a pipeline that does not necessarily serve the refinery undergoing the turnaround. [63] In such situations, both pipelines and shippers need as much notice as possible to prepare operationally for the change in volumes and, if necessary, develop alternative plans for disposition of the crude oil or petroleum products.

The effects of refinery turnarounds are sometimes incorporated into pipeline tariffs, because of the significant and unavoidable impact on shipper commitments or minimum volume qualifications[64] or prorationing procedures.[65] Plant turnarounds may have sufficient impact on pipeline operations to require discussion in a pipeline's Form 6 Annual Reports or 10-K filings, emphasizing the importance of advance information to the pipelines. [66] The Commission should not prohibit advance notification of information

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[63] *See, e.g., Platte Pipe Line Co.*, 117 FERC ¶ 61,296 at P 7 (2006).

[64] *See*, *e.g.*, *Kinder Morgan Wink Pipeline LLC*, F.E.R.C. No. 3, August 13, 2007, Item No. 10, Credit Barrels; *Osage Pipe Line Company LLC*, F.E.R.C. No. 6, May 9, 2007, Item A(5), Turnaround Month; *LDH Energy Hastings, LLC*, F.E.R.C. No. 2, Nov. 29, 2007, Item 95, Turnaround Event; *Tesoro High Plains Pipeline Co.*, Supplement 1 to F.E.R.C. No. 3, August 22, 2003, Temporary Alternate Movement Table.

[65] *See*, *e.g.*, *Osage Pipe Line Company LLC*, F.E.R.C. No. 7, May 24, 2007; *Enbridge Pipelines (North Dakota) LLC*, F.E.R.C. No. 52, August 1, 2007; *Marathon Pipe Line LLC*, F.E.R.C. No. 176, May 30, 2007; *Explorer Pipeline Company*, F.E.R.C. No. 90, April 4, 2008.

[66] *See*, *e.g.*, *T.E. Products Pipeline Co., L.P.*, Sept. 5, 2007, Supplements to Form 6.

that is integral to the efficient operation of pipelines and the effective responses of pipeline shippers to changes in markets and potential pipeline capacity.

3. Access to Storage Terminals Required for Use of Common Carrier Pipelines

The ANOPR expressed the concern that "[i]n some circumstances, prospective shippers on a given common carrier pipeline may lack the ability to access that pipeline due to an inability to place product in a terminal from which to enter the pipeline system, or because those shippers lack a terminal from which to exit the pipeline system."[67] The Commission asked whether "a denial of access to a non-regulated terminal may be an act of market manipulation subject to Section 811," and whether the costs of imposing such a regulation would outweigh the benefits.[68] In the context of the ICA, FERC's authority, and the long-standing development of the industry's structure, the Commission should refrain from proposing such a regulation on both legal and practical grounds.

As the ANOPR recognizes, FERC already regulates access to common carrier oil pipelines pursuant to ICA § 1(4), which requires, *inter alia*, that, "[i]t shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefore . . . ." The Supreme Court has recognized that the meaning of this obligation is a broad one and heavily fact dependent.[69] FERC has not been reluctant to apply this provision of the ICA or to require pipelines to provide services that are a necessary adjunct to transportation. Thus, where breakout storage was found to be

[67] ANOPR at 31.

[68] ANOPR at 31.

[69] *See, e.g, Penn. R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *see also Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150 at 61,281 (1984).

an "integral part of the overall transmission function," FERC required the pipeline to provide such storage services to its shippers.[70]

In determining which services a pipeline must offer, FERC is able to rely on a long line of ICA precedent.[71] FERC has also recognized the importance of taking into account existing industry practice.[72] Thus, consistent with ICA precedent, an array of arrangements has evolved commercially in a competitive environment to meet the longstanding "reasonable tender" requirements for oil pipelines.

The Commission should not attempt to supplant the established "reasonable tender" standards enforced by FERC for common carriers, around which the industry has evolved, with a second layer of access regulation. This additional layer of regulation presumes that FERC has failed adequately to ensure that ICA § 1(4) is met, or that the long-standing ICA precedents regarding common carrier obligations are inadequate. The concept that a shipper's difficulty in securing tankage amounts to "market manipulation" by the operator of a storage facility would stretch Section 811 into a fundamental expansion of the ICA. AOPL submits that this is unnecessary and counterproductive.

There is no evidence that Congress intended Section 811 to create a major expansion in the long-standing common carrier rules and industry structures for oil pipelines and

[70] Opinion No. 397, *Lakehead Pipe Line Co., L.P.*, 71 FERC ¶ 61,338 at 62,325 (1996), *reh'g denied*, Opinion No. 397-A, 75 FERC ¶ 61,181 (1996).

[71] *See, e.g., Burkley Prod. Co. v. Penn R.R. Co.*, 277 I.C.C. 319 (1950); *Practices of Carriers Affecting Operating Revenues and Expenses*, 198 I.C.C. 134 (1933); *Thompson v. Chicago, Burlington & Quincy R.R. Co.*, 157 I.C.C. 775, 778 (1929); *Guarantee Claim of the Central Elevator & Warehouse Co.*, 72 I.C.C. 169 (1922); *Reconsignment and Storage of Lumber and Shingles*, 27 I.C.C. 451 (1913).

[72] *See, e.g., Tipco Crude Oil Co. v. Shell Pipe Line Corp.*, 19 FERC ¶ 61,105 at 61,198 (1982).

related storage and terminalling services. Such a second layer of regulation on pipeline access would generate particular burdens on pipelines that lease or otherwise provide origin or destination storage to shippers. These pipelines would face dual and potentially conflicting regulation by two agencies: the Commission and FERC. Significant potential would also exist for certain market participants to use the threat of resort to this Commission as a bargaining tool in commercial negotiations.

In any event, there is no evidence that shippers have been unable to obtain pipeline service because they were excluded from origin or destination tankage or that existing remedies available from the FERC under the ICA are inadequate to cure any such exclusion from service if it did occur. Speculation that a shipper *might* be excluded from common carrier access by an inability to secure tankage does not support the imposition of an overlapping regime of regulation by a different federal agency than the agency that regulates the common carrier pipeline. The costs and burdens of such regulation would clearly outweigh the benefits.

4. Announcements to Shippers of Impending Prorationing

In the ANOPR, the Commission expresses the concern that "[r]egulated pipelines may not allow new shippers a share of a pipeline's capacity when historical shippers seek to transport more petroleum products than the pipeline is capable of transporting."[73] The Commission seeks comments on whether "pre-announcements" of approaching prorationing "may be a conduit for market manipulation or deceit under Section 811,"

[73] ANOPR at 31.

and whether promulgating a rule to regulate such behavior would result in more costs than benefits.[74]

Pipeline prorationing is the subject of comprehensive FERC jurisdiction. FERC scrutinizes all proposed changes to prorationing rules, recognizing that different pipelines may implement different rules for prorationing.[75] Although in the ANOPR the Commission expresses concern regarding the historical prorationing approach, FERC has found that such a prorationing method can be just and reasonable in light of operating circumstances and shipper reliance on access to, and shipper support for, the pipeline.[76]

Moreover, contrary to the apparent assumption in the ANOPR, a historically-based proration policy does not mean that new shippers will be denied access to the pipeline. FERC's approval of historically-based proration policies is always conditioned upon the pipeline reserving a certain amount of capacity for new shippers.[77] FERC has not approved prorationing proposals that could be deemed potentially unreasonable or discriminatory.[78] In exercising its authority over prorationing rules and practices, FERC

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[74] ANOPR at 31.

[75] *ConocoPhillips Transportation Alaska, Inc.* 112 FERC ¶ 61,326 (2005).

[76] *See generally Platte Pipe Line Co*., 117 FERC ¶ 61,296 (2006); *Explorer Pipeline Co*., 87 FERC ¶ 61,374 at 62,387 n.14 (1999); Opinion No. 435, *SFPP, L.P*., 86 FERC ¶ 61,022 at 61,115 (1999) *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164, 61,947 (1996).

[77] *See, e.g., Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040 at P 24 (2006); *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC 61,235 at P 46-47 (2007); *see also Texaco Pipeline Inc*., 74 FERC ¶ 61,071 at 61,201 & n.5 (1996) (declaring unlawful any policy that "takes the form of a guarantee of service, which, in effect, denies access to other shippers").

[78] *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,025 (2007).

has considered a wide range of issues, including claims that pipelines have used prorationing plans to favor particular markets or create market power.[79] Given FERC's broad oversight over the prorationing practices of oil pipelines, any regulation of those programs, including the issue of advance announcements, should be addressed by FERC as a matter within its exclusive jurisdiction in order to prevent duplicative and inconsistent regulation by two federal agencies.

Moreover, there is no factual basis for the proposed regulation. None of the earlier Commission studies – and none of the various FERC cases – suggest that announcements of prorationing have either been used with intent to manipulate prices, or have had the effect of doing so. To the contrary, the record in the cases suggests that pipelines may need to notify shippers of the impending prorationing in order to advance planning and preparation for both pipelines and the shippers. Pipelines have used the opportunity to negotiate with shippers regarding any changes to the prorationing rules that might be filed at FERC[80] – making the pre-announcement an integral part of the FERC regulatory process.

Regulating what pipelines may disclose regarding upcoming prorationing could also create severe practical difficulties for both pipelines and shippers. The actual sequence of events is crucial to understanding the impact on shippers. Prorationing provisions and procedures vary greatly; the following scenario describes a common sequence of events.

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[79] *Platte Pipe Line Co.*, 117 FERC ¶ 61,296.

[80] *See generally Enbridge Pipelines (North Dakota) LLC*; 120 FERC ¶ 61,025; *Platte Pipe Line Co.*, 117 FERC ¶ 61,296.

- Typically, a pipeline would provide formal notice of prorationing – as opposed to informal predictions of likely prorationing expected to occur in the future -- upon determining that timely shipper nominations exceed available capacity during the following month.

- Nominations for a given month are often received at the end of the prior month – commonly on the 25th day, but generally in the latter half of the month.[81]

- The pipeline would then notify shippers of prorationing. Pipelines sometimes give the shippers a chance to provide revised, final nominations prior to prorationing. The final notification of volumes for each shipper therefore are often issued during the last days of the prior month – often only days before issuing the pumping schedule for the prorated month.

- Shippers then must plan alternative routes or dispositions of their crude oil or petroleum products. Shippers would have to make these alternative plans after the close of most commodity transactions for the next month, thus reducing their opportunities to buy or sell in the principal monthly market. These contingency plans would also have to be made after the deadline for submission of timely nominations to other pipelines – another potential disadvantage. Shippers could encounter other significant

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[81] See, *e.g.*, *Belle Fourche Pipeline Co.*, Supplement No. 7 to F.E.R.C. No. 83, Feb. 1, 2008; *Cyprus Pipeline Co.*, F.E.R.C. No. 12, May 31, 2007; *BP Pipelines (North America)*, F.E.R.C. No. 221, May 31, 2007.

marketplace disadvantages, including the need to incur additional storage charges, or other unfavorable contingency steps.

Although the ANOPR appears to assume that advance notice of prorationing works to the advantage of certain market participants, reducing the notice of prorationing to a time immediately prior to the month in which prorationing will occur would likely provide more leverage to certain shippers – those with more extensive transportation alternatives, or those with superior rights in prorationing. In contrast, if a pipeline is able to provide more advance notice of prorationing, including the expected level of prorationing, all shippers generally benefit from the increased opportunity to plan for alternatives, including shippers with fewer options, and shippers without established prorationing rights.

5. Reporting Obligations for "Pipeline Outage Data"

The ANOPR states that "cost and volume data for wholesale transactions at all levels of trade, refinery or pipeline outage data . . . are frequently difficult to construct or are unavailable."[82] The Commission asks whether it has the authority under Section 811 to require submission of such data to itself "or any other government entity," and what information should be required.

Common carrier oil pipelines are already subject to reporting obligations under the ICA pursuant to FERC's regulations. *See* 18 C.F.R. Part 357 (requiring annual and quarterly financial reports, depreciation studies and cash management filings). Oil pipelines are also required to file tariffs that set forth the services they provide. 18 C.F.R.

[82] ANOPR at 32.

§ 341.0(b). To the extent a pipeline is unable to provide the service posted in its tariff due to a pipeline outage or for some other reason, pipelines generally publish embargo tariffs notifying shippers of the suspension of service. Oil pipelines also are already subject to reporting obligations under PHMSA regulations. *See generally* 49 C.F.R. §§ 195.49 to 195.63 (annual, accident, and safety-related condition reporting). Any further reporting obligations for interstate oil pipelines should be promulgated by FERC or PHMSA.

The ANOPR also fails to suggest any nexus between "pipeline outages" and the goal of Section 811, which is to prevent and punish deceptive or manipulative devices for wholesale petroleum markets. Nothing in the prior reports of the Commission (including the *Katrina Report*), nothing in FERC's records, and nothing in the ANOPR suggests that oil pipeline outages are related to any known efforts to manipulate petroleum markets. Significant oil pipeline service interruptions, like those affecting Arizona markets in 2003 or incidents affecting the North Slope production flowing on TAPS,[83] are quite infrequent and when they occur receive widespread notice in the professional trade press and even popular press outlets.

Moreover, unlike transmission services provided by gas and electric companies, service "outages" by oil pipelines do not necessarily have an immediate effect on markets. Crude oil and petroleum products typically are tendered from, and delivered into, substantial storage terminals. Thus, for most pipelines, "outages" of short duration would not have a significant market impact, and reporting such operational developments

[83] *See, e.g.*, *Gas Shortage Eases in Phoenix as Pipeline Resumes Pumping*, N.Y. TIMES, Aug. 25, 2003, at A13; Wesley Loy & Richard Richtmyer, *Massive Repairs on the North Slope*, ANCHORAGE DAILY NEWS, Aug. 8, 2006.

would not provide useful information. Requiring a further layer of reporting on oil pipelines would place a significant burden without any countervailing benefits.

VI. CONCLUSION

For the reasons set forth above, AOPL requests that the Commission clarify that the regulations to be promulgated under Section 811 of the EISA will not apply to crude oil and petroleum products pipelines.

Respectfully submitted,

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