ALBANY
AMSTERDAM
ATLANTA
AUSTIN
BOSTON
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
HOUSTON
LAS VEGAS
LONDON*
LOS ANGELES
MEXICO CITY+
MIAMI
NEW JERSEY
NEW YORK
ORANGE COUNTY
ORLANDO
PALM BEACH COUNTY
PHILADELPHIA
PHOENIX
SACRAMENTO
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
TALLAHASSEE
TAMPA
TEL AVIV^
TYSONS CORNER
WARSAW~
WASHINGTON, D.C.
WHITE PLAINS

*Strategic Alliances with Independent Law Firms***
MILAN
ROME

FERC Issues Series of Orders Addressing Allocation of Capacity and Rates Charged by Oil Pipelines

During the last week of June, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a series of orders addressing the allocation of capacity and rates charged by oil pipelines. Five of those orders are summarized below. In one case, the Commission applied principles from its natural gas pipeline precedents for the first time to govern the allocation of capacity on oil pipelines.

First, on June 21, 2012, FERC issued a declaratory order in *Shell Pipeline Co. LP*, in Docket No. OR12-11-000. Shell sought advance approval for the rates, terms and conditions of a new project from Houston, Texas to Houma, Louisiana in order to obtain regulatory certainty and to address issues outside the compressed timetable of normal tariff filings. Specifically, Shell offered committed (or contract) rates to all shippers in a widely publicized open season. The Commission found that because all shippers had the opportunity to take advantage of competitive rates based on volume commitment and contract term, there was no issue of undue discrimination or undue preference among the resulting classes of shippers. The Commission concluded that such shippers were not similarly situated. In addition, the Commission found Shell's proposed priority rights for Committed Shippers (contract shippers) for up to 90 percent of the capacity was consistent with Commission precedent. In reaching its conclusion, the Commission noted that preferential prorationing rights were offered during an open season, there was an appropriate amount of capacity (10 percent) made available to Uncommitted Shippers, and Committed Shippers were paying a premium rate, i.e., at least one cent higher, compared to Uncommitted Shippers.

Importantly, the Commission determined that Shell's proposed use of a net present value ("NPV") allocation methodology to ration oversubscribed capacity during an open season was appropriate. While the Commission has approved the use of an NPV allocation methodology in natural gas pipeline open seasons, it stated that it has not previously addressed the same issue with respect to oil pipelines. The Commission noted that the use of the NPV methodology presented no issue of discrimination because all shippers had notice of the use of the NPV approach, the ability to determine how their contracts would be structured based on volume and term, and knew in advance what the impact of the contract terms would be for the purpose of evaluating their bid. Moreover, the Commission found that the NPV approach ensures full utilization of the capacity of the pipeline by those shippers that value it most and who provide the greatest financial value to the system. The Commission also stated the NPV methodology avoids the possibility of certain pipeline segments being undersubscribed or underutilized, thus furthering the principle of allocative efficiency.

Second, on June 28, 2012, FERC issued a declaratory order in *Sunoco Pipeline L.P.*, Docket No. OR12-12-000. Sunoco sought an order affirming that it may provide up to 90 percent of the capacity created through a proposed pipeline as priority committed space at a premium rate for shippers that commit to move volumes on a ship-or-pay basis through open seasons. Intended to minimize the risk that the project would not move forward, and to provide financial assurance, Sunoco proposed to require shippers to contractually commit to ship-or-pay contracts at premium rates. In exchange for these commitments, the transportation agreements provide that the committed shipments will not be subject to prorationing. In finding that Sunoco's proposal was consistent with Commission policy and precedent, the Commission noted that Sunoco provided an appropriate amount of capacity for Uncommitted Shippers, at least ten percent, while affording protection to the Committed Shippers who enter into long-term transportation agreements. Further, the Commission stated that Sunoco's open seasons appropriately gave all potential shippers the opportunity to become Committed Shippers by entering into transportation agreements.

Third, on June 28, 2012, FERC issued an unusual order in *Enterprise Products Partners L.P. and Enbridge Inc.*, Docket No. OR12-4-000, in which it opened the door to reconsideration of a prior order. The Commission had previously rejected the market power application of Enterprise/Enbridge to charge market-based rates on the reversed Seaway pipeline. However, in light of the Court of Appeals for the District of Columbia Circuit's issuance of *Mobil Pipeline Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012) ("*Mobil*"), which reversed a Commission denial of market-based rate authority for Mobil's Pegasus pipeline, the Commission *sua sponte* granted rehearing for the purpose of reconsideration of the effect of the Court's *Mobil* decision on the Commission's review of Enterprise/Enbridge's market-based rates application. The Commission re-opened the record in part to seek comments from the parties concerning the proper interpretation of the *Mobil* decision and how it should be applied to Enterprise/Enbridge's market power application.

Finally, on June 29, 2012, FERC issued two orders utilizing the percentage comparison test to analyze oil pipeline tariff filings, in *Plains Pipeline, L.P.*, Docket No. IS12-362-000, and *NuStar Logistics, L.P.*, Docket No. IS12-314-000. Plains and NuStar filed tariffs to increase their rates in accordance with the indexing methodology established in section 342.3 of the Commission's regulations. Valero Marketing and Supply Company ("Valero") protested both filings. FERC rejected one protest but accepted the other, based on the different facts of each case and the application of the percentage comparison test. The percentage comparison test analyzes costs and proposed rate changes from one year to another to determine the proposed revenue increase. A 10 percent or more magnitude of divergence between the pipeline's change in costs and the proposed rate increase raises an issue of reasonableness that the Commission will investigate.

Specifically, with respect to Plains, Valero claimed that Plains' FERC Form No. 6, Page 700, showed a rate increase substantially in excess of cost changes, as adjusted. In response, Plains argued that the deviation between the 8.6011 percent 2012 index and its actual increase in its cost of service of 5.1823 percent is below the threshold level used by the Commission for determining when it will accept a protest to an index-based rate filing. In dismissing Valero's protest and accepting the tariffs, the Commission found that Plains correctly calculated its ceiling level rates, and, as indicated on Plains' FERC Form No. 6, Page 700, the 5.18 percent increase in cost of service between 2010 and 2011 did not demonstrate a substantial over-recovery by Plains. The Commission reiterated that it evaluates a protest to an index-based tariff filing using the data reported in the carrier's FERC Form No. 6, Page 700 data in a percentage comparison test. The Commission stated the percentage comparison test is a very narrow test that compares the Page 700 cost data contained in the company's annual FERC Form No. 6 to the data that is reflected in the index filing for a given year with the data for the prior year. The Commission reconfirmed this test is the "preliminary screening tool for pipeline index-based rate filings," and is the sole means by which the Commission determines whether a protest meets the section 343.2(c)(1) standard.

With respect to NuStar, Valero argued that NuStar experienced a cost decrease of 1.56 percent, and that it proposed to increase its rates by 8.6 percent, resulting in an actual revenue increase of 10.16 percent. While NuStar acknowledged that its costs diminished very slightly, it contended that its revenues had decreased and that it was under-recovering its costs. The Commission found that a 1.56 percent decrease in costs combined with the proposed index-based rate increase of 8.6 percent would provide NuStar an approximately 10.16 percent revenue increase, greater than the 10 percent threshold. Thus, the Commission found that application of the percentage comparison test showed that NuStar's index adjustment might be unjust and unreasonable and, therefore, worthy of further scrutiny, necessitating a hearing and settlement judge procedures.

This *GT Alert* was prepared by **Ken Minesinger**, **Howard Nelson** and **Francesca Ciliberti-Ayres**. Questions about this information can be directed to:

- **Ken Minesinger** | 202.530.8572 | minesingerk@gtlaw.com
- **Howard Nelson** | 202.331.3163 | nelsonh@gtlaw.com
- **Francesca Ciliberti-Ayres** | 202.331.3113 | ayresf@gtlaw.com
- Any member of Greenberg Traurig's Global Energy & Infrastructure Practice
- Or your Greenberg Traurig attorney

Albany 518.689.1400	**Delaware** 302.661.7000	**Mexico City+** +52 55 5029.0000	**Palm Beach County S.** 561.955.7600	**Tallahassee** 850.222.6891
Amsterdam + 31 20 301 7300	**Denver** 303.572.6500	**Miami** 305.579.0500	**Philadelphia** 215.988.7800	**Tampa** 813.318.5700
Atlanta 678.553.2100	**Fort Lauderdale** 954.765.0500	**New Jersey** 973.360.7900	**Phoenix** 602.445.8000	**Tel Aviv^** +03.636.6000
Austin 512.320.7200	**Houston** 713.374.3500	**New York** 212.801.9200	**Sacramento** 916.442.1111	**Tysons Corner** 703.749.1300
Boston 617.310.6000	**Las Vegas** 702.792.3773	**Orange County** 949.732.6500	**San Francisco** 415.655.1300	**Warsaw~** +48 22 690 6100
Chicago 312.456.8400	**London*** +44 (0)203 349 8700	**Orlando** 407.420.1000	**Shanghai** +86 21 6391 6633	**Washington, D.C.** 202.331.3100
Dallas 214.665.3600	**Los Angeles** 310.586.7700	**Palm Beach County N.** 561.650.7900	**Silicon Valley** 650.328.8500	**White Plains** 914.286.2900

This Greenberg Traurig Client Advisory *is issued for informational purposes only and is not intended to be construed or used as general legal advice. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2012 Greenberg Traurig, LLP. All rights reserved. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A.*