**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| **Petition For Rulemaking of Airlines for America and the National Propane Gas Association** | **)**<br>**)**<br>**)** | **Docket No. RM18-10-000** |

# MOTION TO REJECT PETITIONER REPLY COMMENTS OR, ALTERNATIVELY, FOR LEAVE TO FILE REPLY COMMENTS AND REPLY COMMENTS OF THE ASSOCIATION OF OIL PIPE LINES

Pursuant to the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. Section 385.212 *et seq.*, and to the "Notice Inviting Comments" issued on February 12, 2018, in the above-referenced proceeding ("Notice"), the Association of Oil Pipe Lines ("AOPL") respectfully submits this Motion to Reject Petitioner Reply Comments or, Alternatively, for Leave to File Reply Comments and Reply Comments ("Reply Comments") in response to the "Reply Comments of Airlines For America and the National Propane Gas Association," filed May 11, 2018, in the above-referenced proceeding ("Petitioner Reply Comments").

## I. Motion to Reject Petitioner Reply Comments or, Alternatively, for Leave to File Reply Comments.

On February 1, 2018, Airlines For America and the National Propane Gas Association ("Petitioners") filed a "Petition for Rulemaking of Airlines for America and the National Propane Gas Association for Adoption of Affiliate Standards of Conduct" ("Petition"). On February 12, 2018, the Commission issued the "Notice Inviting

Comments," with comments to be filed no later than 30 days thereafter, by March 14, 2018. The Notice did not provide for reply comments.

On March 14, 2018, AOPL submitted its comments ("AOPL Comments") in response to the Notice, regarding the Petition. Numerous other parties, primarily a number of pipelines, similarly provided comments on that date, as requested by the Notice. Noticeably absent from the record herein are any comments filed by oil pipeline shippers that provide substantive support for the Petition.[1] Perhaps recognizing the lack of support for their Petition, fifty-eight days after comments were filed, Airlines For America and the National Propane Gas Association ("Petitioners") filed the Petitioner Reply Comments in support of their own Petition, answering AOPL and other parties.

The Petitioner Reply Comments were submitted with a nod to the fact that the Notice did not request or contemplate reply comments,[2] but asserted that good cause existed for the Commission to accept their reply comments to "correct factual misstatements" and "provide useful and relevant information to the Commission" to assist its decision-making.[3] The Petitioner Reply Comments, while quite lengthy, add no new support to the Petition. Instead, they do little more than rehash arguments in an apparent attempt to have the last word on the issues, despite a lack of factual support in the record and the lack of support from the shipper community. Because the Petitioner Reply Comments were not contemplated by the Notice, because the Petitioner Reply Comments

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1 One shipper association, the Canadian Association of Petroleum Producers ("CAPP"), filed limited comments in support of the Petition that failed to provide any examples of actual affiliate abuse.

2 Petitioner Reply Comments at p. 1, fn. 1.

3 *Id*. at p. 2.

were filed so extraordinarily out of time, and because the Petitioner Reply Comments are merely a rehash of their Petition, the Petitoner Reply Comments should be rejected.

Should the Commission accept the Petitioner Reply Comments, as a matter of fundamental equity and consistent with Commission precedents,[4] AOPL submits that the Commission should accept the instant Reply Comments. These Reply Comments are limited in scope and are being filed to address certain mischaracterizations in the Petitioner Reply Comments and do not seek to provide a comprehensive rebuttal to all of the points addressed by Petitioners, as the Petitioners raise nothing new or compelling.

## II. Reply Comments.

### A. The Record Provides No Basis for the Proposed Standards of Conduct.

As explained in the AOPL Comments, the Petition is a "solution in search of a problem," and both the comments filed on March 14 and the Petitioner Reply Comments reinforce that point. The Commission issued its Notice on February 12 inviting comments from the public regarding the Petition and its allegation that the Commission should promulgate a form of regulations for liquids pipelines based on the Standards of Conduct imposed on other industries. On March 14, comments/protests were filed by a total of 14 pipeline companies, two pipeline associations, and one shipper association.

- Not a single liquids shipper filed individual comments.
- The lone commenting shipper association, CAPP, supported the Petition on the basis of the potential for affiliate abuse, and on the basis of a policy preference for treating liquids pipelines like natural gas or electric transmission providers

[4] *See, e.g.*, *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163 at P 13 (2015); *Northern Natural Gas Company*, 107 FERC ¶ 61,213 (2004); *New Energy Ventures, Inc. v. Southern California Edison Company and Edison Source*, 82 FERC ¶ 61,335 (1998); *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224 (1998); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,137 at 61,381 (1999).

(which "policy preference" ignores the material differences between the Commission's jurisdiction under the Interstate Commerce Act on the one hand, and under the the Natural Gas Act and Federal Power Act on the other hand).

- Not a single specific example of a preference to a marketing affiliate was alleged by any commenting party.

Despite the Commission's invitation to the industry and the public, the record after the submission of comments provides no support for the Petitioners' claims that a problem with affiliate abuses exists in the liquids pipeline industry. This vacuum in the record alone should persuade the Commission to terminate the docket and deny the Petition.

Seemingly aware of this starkly negative record, the Petitioners now seek to take a "second bite at the apple" and file their own comments in support of their own Petition. Strikingly, however, even after more than three months since the Petition was filed, and even after the comments filed by pipeline parties highlighted the legal requirement for actual examples of widespread harm to support the imposition of Standards of Conduct, Petitioners failed to adduce any new examples of alleged affiliate abuse.

Instead, Petitioners attempt to prop up their proposal by providing a long-winded discussion revisiting the same three alleged illustrations of abuse that had been proffered in the Petition – allegations rebutted in detail in the various pipeline comments.[5] Yet, after all that has been filed in this proceeding, at the end of the day, and despite industry-wide invitation by the Commission, no examples, illustrations, or even any unfounded specific

[5] AOPL disagrees with the Petitioners' attempted rehabilitation of these claims, but sees no reason to respond to these unsupported allegations here, as they were already shown to be unfounded in the March 14 comments filed by the individual companies.

allegations of abuse have been placed in the record by either the Petitioners or any other shipper interests, other than the three refuted claims in the original Petition.

Petitioners now also raise the specter that the absence of evidence of abuse may be caused by alleged "secret dealings of carriers and their affiliates."[6] These inflammatory and purely speculative claims should be disregarded as nothing more than unsupported innuendo. Petitioners also argue that *National Fuel Gas Supply Corporation v. FERC*, 468 F. 3d 831 (D.C. Cir. 2006) ("*National Fuel*") leaves open the *potential* for a regulation to be justified solely on the basis of potential harm, not just evidence of actual harm,[7] but any fair reading of both *National Fuel* and *Tenneco Gas Co. v. FERC*, 969 F. 2d 1187 (D.C. Cir. 1992) ("*Tenneco*") makes it clear that in light of the costs of the regulations, the presence of actual harm was critical to the Court. Further, Petitioners go to considerable lengths to characterize the Petition as a means to address the issues pending in the Petition for Declaratory Order proceeding initiated by Magellan Midestream Partners, L.P., in Docket No. OR17-2-000, *et al*. That proceeding is a contested matter in which the Commission has already issued an order.[8] With rehearing requests pending in that docket, the Commission has a ready forum to address the issues and, in any case, that petition does not even include alleged facts that would be addressed by Standards of Conduct.[9]

AOPL submits that this silence in the record powerfully supports denying the Petition. Indeed, the record falls far short of the kind of support that the Commission

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6 Petitioner Reply Comments at 22, *see also id*. at 44, 47.

7 Petitioner Reply Comments at 24-25.

8 *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219 (2017).

9 *See* "Comments of Magellan Midstream Partners, L.P." at 6-7 (Docket No. RM18-10-000, March 14, 2018).

requires to justify the imposition of Standards Conduct, as pointed out by the U.S. Court of Appeals for the D.C. Circuit, requiring: "a factual record consisting of complaints by other sellers who were competing with pipelines' marketing affiliates *and of documented abuses by pipelines and their marketing affiliates*."[10]

The absence of this needed support also demonstrates that the Petitioners' underlying narrative is untrue. Petitioners claim that the industry has undergone dramatic changes in recent years that have spawned many marketing affiliates and increased the motive and opportunity for favoring them. If that were true, and if it were an actual, not a hypothetical, problem in the industry, presumably disadvantaged unaffiliated shippers would have many specific allegations of harm and favoritism to affiliates, or at least *suspected* favoritism. No such evidence has been presented, however. Instead, the record is barren of any such support for the Petitioners' theory. Accordingly, the Petition should be denied as unfounded.

### B. The Commission Should Reject Petitioners' Argument that a Rulemaking Should be Held Even in the Absence of Any Supporting Evidence.

The Petition requested that the Commission issue a proposed rule based on the allegations therein.[11] In response to the Petition, the Commission issued the Notice Inviting Comments, which did not result in any substantive support for the Petition. Having reviewed the record, the Petitioners now make a strained, alternative argument: that judicial precedent requiring a record of actual affiliate abuse before imposing Standards of

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[10] *National Fuel*, 468 F. 3d at 833 (emphasis added).

[11] Petition at 38-39.

Conduct[12] only relates to requirements to support the adoption of regulations, not the initiation of a rulemaking proceeding.[13] Specifically, Petitioners contend that,[14]

> The Petition for Rulemaking was a request that the Commission establish a rulemaking proceeding on the proposed Standards of Conduct so that all interested parties would have the opportunity to present comments and evidence either for or against the proposed regulations to provide the Commission with the information necessary to make a reasoned decision regarding the proposed affiliate Standards of Conduct's necessity, costs, and content.

Petitioners ignore the fact that the Notice in this case provided precisely this opportunity for interested persons to "present comments and evidence either for or against the proposed regulations" – given that Petitioners provided draft regulations for just such a purpose in their Petition. Under these circumstances, there is every reason for the Commission to reject the Petition and not require the expenditure of any additional Commission (and industry) resources on an unsubstantiated request. The absence of any evidence of actual affiliate abuses would also support the Commission in denying the petition based on its rational choice to rely on other, existing means of preventing any such abuses.[15]

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12 *See National Fuel Gas*; *Tenneco*.

13 Petitioner Reply Comments at 44-45.

14 Petitioner Reply Comments at 23,

15 *See e.g.*, *EMR Network v. FCC*, 391 F.3d 269, 271-74 (D.C. Cir. 2004)("*EMR*") (an agency is justified in declining to grant a petition for rulemaking when it is not supported by the facts). Moreover, given the many other issues being addressed by the Commission in liquids pipeline matters and in other industries, the Commission would be justified in denying the Petition in light of its need to set priorities and on the reasonableness of relying on other means of preventing any such potential abuses. *See e.g.*, *Digiovanni v. FAA*, 249 Fed. Appx. 842, 843 (2nd Cir. 2007); *see also EMR* 391 F.3d at 273 (agency authority to consider priorities in declining to institute a rulemaking); *New York v. United States NRC*, 589 F.3d 551, 555 (2nd Cir. 2009)(agency authority to rely upon other means of preventing problems, in preference to a new regulation).

The Commission should also reject Petitioners' attempt to support their request for a rulemaking by attacking the effectiveness of complaints[16] and the audit process.[17] Petitioners are mistaken regarding the effectiveness of these elements of Commission oversight. Complaints, for example, have been filed by a number of liquids shippers in recent years; moreover, as a result of the right to seek reparations for damages for up to two years in the past, the complaint provisions of the Interstate Commerce Act provide (a) shippers with an incentive to file complaints and (b) a deterrent to unlawful pipeline preferences.[18] In addition, Petitioners err in their belittlement of, and casual dismissal of, the Commission's audit process for liquids pipelines. Petitioners wrongly claim that the audit process fails to address undue discrimination and affiliate abuses,[19] and that the audits are too few and proceed too slowly.[20] The audits address the full range of Commission regulations for liquids pipelines and the audit process involves a strenuous review of pipeline operations and procedures, including matters ranging far beyond the accounting issues mentioned by Petitioners.[21] Furthermore, the audits have addressed issues relating to tariff administration – a key issue in ensuring that pipelines are not acting in an unduly discriminatory manner – including detailed analysis of capacity allocation in the Explorer

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16 Petitioner Reply Comments at 45-48.

17 Petitioner Reply Comments at 48-53.

18 *See e.g.*, 49 U.S.C.A. App. Sections 13(1) (complaint authority) and 16(3)(two year limitations of actions for damages).

19 Petitioner Reply Comments at 49.

20 *Id*.

21 As a single illustrative example, the Audit Report for Explorer Pipeline Company, Docket No. FA16-5-000, January 12, 2018, p. 16, in addition to data requests, preliminary meetings with management, and other data collection, the scope of the Site Visits was broad in scope and granular in detail sought.

Pipeline Company audit.[22] The audits are comprehensive in scope, and have continued to expand in the range of issues being addressed. In criticizing the number and pace of audits, Petitioners fail to recognize not only the comprehensive work being conducted by the audit staff, but also that the Commission's first series of audits of liquids pipelines involved a number of the very largest oil pipeline companies.[23]

### C. Petitioners' Proposal Would Extend the Scope of the Current Standards of Conduct.

AOPL does not seek to burden the record by responding to each of the unsupported arguments in the Petitioner Reply Comments, but believes it is important to correct the record with respect to Petitioners' contention that they do not seek to extend the scope of the current Standards of Conduct in their proposed new liquids pipelines regulations. Petitioners' claim that they are only seeking to regulate relations between common carriers and non-jurisdictional affiliates, not extend the scope of the regulations, cannot be squared with a fair reading of the Petition.[24] As explained in detail in the AOPL Comments (and not rebutted by the Petitioner Reply Comments),[25] the Petitioners' proposed regulation differs dramatically from the scope of the Standards of Conduct for gas and electric transmission providers.[26] The Petitioner Reply Comments pervasively use the term

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22 Audit Report, Docket No. FA16-5-000, pp. 27-33.

23 AOPL notes as well that despite making a wholly inaccurate attack on the storage leasing arrangements of Marathon Pipe Line, Petitioner Reply Brief at 51-52, Petitioners do not recognize that they had previously argued that their proposed regulations were needed because of the invisibility of affiliate preferences, yet their concerns about the Marathon storage lease could be brought to the Commission based on the publication of the audit report – not a result that comports with Petitioners' claims of secrecy and concealment.

24 Petitioner Reply Comments at 40-43.

25 AOPL Comments at 23-36.

26 *National Fuel*, 468 F.3d at 833.

"marketing affiliate" to encompass all affiliates of the pipeline engaged in commercial activities involving liquids,[27] a claim which is flatly inconsistent with the meaning of "marketing" under the Standards of Conduct applicable to natural gas transmission providers (which does not include the commercial activities of upstream or downstream entities that are not engaged in commodity sales). The Petition therefore does propose to radically expand the nature and scope of the Standards of Conduct proposed for liquids common carriers.[28] In addition, as explained in the AOPL Comments, the Petition proposes to extend the regulations to activities that are beyond Commission jurisdiction under the Interstate Commerce Act.[29]

## III. Conclusion.

For the reasons provided in detail above, the Association of Oil Pipe Lines respectfully requests that the Commission reject the Petitioner Reply Comments, or, if the Petitioner Reply Comments are considered, accept and consider these Reply Comments, and deny the Petition filed in this docket.

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27 Petitioner Reply Comments at 31.

28 Tellingly, Petitioners never respond to the point made by AOPL and others that prohibiting communications between pipelines and affiliated terminal companies would in effect prohibit affiliated terminal companies, because terminal companies function as upstream and downstream counterparties to the pipelines, with whom pipelines must coordinate, just as they would with an upstream or downstream pipeline. The Commission should not similarly ignore this absurd proposed result.

29 AOPL Comments at 23-26.

Respectfully submitted,

/s/

Steven M. Kramer
Senior Vice President, General Counsel
and Corporate Secretary
Association of Oil Pipe Lines
1808 Eye Street, N.W., Suite 300
Washington, D.C. 20006
(202) 292-4502

Christopher J. Barr
Jessica R. Rogers
Post & Schell, PC
607 14th St., N.W.
Suite 600
Washington, DC 20005-2006
(202) 661-6950

*Counsel for the Association of Oil Pipe Lines*

Dated: June 4, 2018

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served by electronic mail the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R § 385.2010 (2015).

Dated this 4th Day of June 2018, in Washington, D.C.

/s/ Merritt W. Allaun
Merritt W. Allaun
Paralegal
Association of Oil Pipelines
900 17th Street, NW, Suite 600
Washington, D.C. 20006