UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Big West Oil Company	Docket Nos. OR01-2-000 OR01-2-003
Frontier Pipeline Company and Express Pipeline Partnership	
Chevron Products Company	OR01-4-000 OR01-4-002
v.	
Frontier Pipeline Company and Express Pipeline Partnership	

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued August 10, 2004)

1. On February 18, 2004, the Commission issued an Order Rejecting Compliance Filing in this proceeding (February 18, 2004 Order).[1] In that order, the Commission resolved the final issue in consolidated complaint proceedings filed by Big West Oil Company (Big West) and Chevron Products Company (Chevron)[2] against Frontier Pipeline Company (Frontier) and Express Pipeline Partnership (Express) challenging, *inter alia*, the lawfulness of Frontier's local rates and Frontier's "portion" of certain joint

[1] Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171 (2004).

[2] Big West and Chevron are referred to jointly in this order as Complainants.

rates filed by Express for the transportation of crude oil and syncrude.[3] Prior to the February 18, 2004 Order, and at the request of the parties, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision Terminating the Proceeding insofar as it pertained to the local rates.[4] Thus, in the February 18, 2004 Order, the only issue before the Commission was the amount of reparations arising from payments under the joint rates. Specifically, the Commission stated that the question was "whether it should base the calculation of the reparations on the sum of the local rates on file with the Commission or the sum of the indexed ceiling levels applicable to the local rates."[5] In the February 18, 2004 Order, the Commission concluded that reparations must be calculated using the sum of the local rates on file with the Commission "because it is the Commission's policy that a joint rate must be equal to or less than the sum of the intermediate local rates on file with the Commission, not on the sum of the ceiling levels applicable to those rates."[6] Additionally, the Commission rejected Complainants' request for reparations applicable to shipments by third parties for which Complainants claimed to have paid the transportation charges.

2. On March 19, 2004, Complainants and Frontier filed requests for rehearing of the February 18, 2004 Order. Complainants seek rehearing of the Commission's determination that they are not entitled to reparations applicable to shipments via third parties on the pipeline system. Frontier challenges the Commission's ruling that reparations must be calculated based on the sum of the local rates on file with the

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[3] In previous orders in this proceeding, the Commission found that, although the complaints were directed at both local and joint interstate tariffs, the Complainants actually challenged only the local rates that were used to determine the joint rates. Big West Oil Co. v. Frontier Pipeline Co., 94 FERC ¶ 61,339, at 62,259 (2001) (March 28, 2001 Order), *order on reh'g*, 95 FERC ¶ 61,281 (2001); Big West Oil Co. v. Frontier Pipeline Co., 95 FERC ¶ 61,229, at 61,793 (2001) (May 17, 2001 Order).

[4] Big West Oil Co. v. Frontier Pipeline Co., 98 FERC ¶ 63,013 (2002).

[5] Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171, at P 9 (2004).

[6] *Id*.

Commission. On April 5, 2004, Express filed a motion for reconsideration of the February 18, 2004 Order. Express supports Frontier's request for rehearing. As discussed below, the Commission denies both requests for rehearing, as well as the request for reconsideration.[7]

3. As required by the February 18, 2004 Order, Frontier submitted a revised compliance filing on March 4, 2004. Frontier calculates the reparations and interest in accordance with the February 18, 2004 Order, subject to the outcome of its request for rehearing of that order. However, Frontier also contends that reparations, if any, should be applicable from January 5, 1999 (two years prior to the date when Big West filed its original complaint), rather than from January 1, 1999, as the Commission determined in the February 18, 2004 Order. As discussed below, the Commission accepts the revised compliance filing and finds that reparations should be calculated from two years prior to January 5, 2001, as Frontier requests.

4. This order is in the public interest because it resolves this proceeding in a manner that is consistent with the Commission's policies and applicable law.

[7] The parties filed a number of other pleadings in response to the requests for rehearing. Although such responsive filings generally are not permitted, with three exceptions, the Commission accepts those filings because they have provided additional information and argument relevant to the Commission's analysis. However, the Commission denies Complainants' April 6, 2004 motion to file a brief in response to certain issues raised by Frontier's request for rehearing. The Commission also denies the June 10, 2004 Association of Oil Pipe Lines' Motion for Leave to Intervene as a Party for Limited Purpose, Motion for Leave to File *Amicus* Brief and *Amicus* Brief. The Association of Oil Pipelines (AOPL) seeks to address two issues: (1) how a joint rate should be calculated in determining if reparations are due when the local rates for one segment of the joint rate movement is reduced, and (2) whether the Commission should affirm that only a shipper/complainant in privity with a carrier is entitled to reparations. The Commission denies these motions because the parties' previous filings in this proceeding have provided a full analysis of the issues before the Commission. Accordingly, the Commission also denies the June 24, 2004 Answer of Big West Oil LLC and Chevron Products Company to Motions of AOPL to Intervene as a Party and to File an *Amicus* Brief and Response of Big West And Chevron to AOPL *Amicus* Brief.

Motions to Intervene Out of Time

5. On March 19, 2004, Sinclair Oil Corporation (Sinclair) filed a motion to intervene for the limited purpose of requesting rehearing of one aspect of the February 18, 2004 Order. The Commission's determination that a refiner may not receive reparations for shipments via third parties on an interstate pipeline.

6. Frontier opposes Sinclair's motion. Frontier contends, *inter alia*, that Sinclair filed its motion to intervene nearly three years out of time and after the Commission had issued a dispositive order in this proceeding. Frontier argues that Sinclair will suffer no prejudice if its motion to intervene is denied because it can raise its arguments in the separate complaint proceeding in Docket No. OR02-6-000, to which it is a party. BP Pipelines (North America) Inc. (BP) filed a conditional motion to intervene out of time should the Commission grant Sinclair's motion to intervene.

7. The Commission denies the motions of Sinclair and BP to intervene out of time in this proceeding. Sinclair had ample opportunity to raise its arguments in Docket No. OR02-6-000, which the parties resolved by a settlement.[8] At any rate, Sinclair's motion to intervene at this late date has no merit because Sinclair acknowledges that its sole purpose is to seek a ruling that would support its position in that other proceeding. As stated earlier, the Commission also denies the motion of AOPL to intervene out of time for the purpose of filing an *amicus* brief.

Disscussion

I. Requests for Rehearing and Reconsideration

8. The February 18, 2004 Order and earlier orders in this proceeding fully describe the history of the proceeding, which will not be repeated here.[9] As discussed below, the Commission denies the requests for rehearing and reconsideration. The Commission affirms that it properly based its calculation of reparations on the carriers' filed local rates at the time of the shipments rather than on the applicable ceiling levels. The Commission also affirms that Complainants may not receive reparations applicable to third-party shipments.

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[8] On April 30, 2004, the Presiding ALJ in Docket OR02-6-002 issued an Order Suspending Procedural Schedule, stating that the parties to that proceeding had reached a settlement in principle.

[9] *See supra* note 3.

A. Calculation of Reparations

9. In the Energy Policy Act of 1992 (EPAct),[10] Congress required the Commission to adopt a simplified, generally applicable ratemaking methodology for oil pipelines. Subsequently, the Commission issued Order Nos. 561 and 561-A,[11] implementing an indexing methodology that, *inter alia*, permits oil pipelines to adjust their rates within ceiling levels calculated with reference to the Producer Price Index for Finished Goods. As discussed in greater detail below, in calculating reparations, the "filed rate" doctrine requires use of the rates that are on file with the Commission rather than ceiling levels to which those rates could be, but have not been, raised.

1. Express' Motion for Reconsideration

10. Express contends that Order No. 561 recognized that many filed rates actually being charged would be discounted from the maximum ceiling levels due to competitive pressures, and it would be inconsistent with that concept to determine just and reasonable joint rates on the basis of local filed rates that are lower than applicable ceiling levels. In any event, continues Express, the policy established in the February 18, 2004 Order prevents consistent application of the "filed rates actually being charged" requirement. Moreover, adds Express, the Commission did not justify its departure from the standard established in *Texaco Pipeline, Inc.* (*Texaco*)[12] and its application of that standard in other orders.[13]

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[10] 42 U.S.C.A. § 7172 (West Supp. 1993).

[11] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶ 30,985 (1993), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶ 31,000 (1994).

[12] 72 FERC ¶ 61,313 (1995).

[13] Express cites Plantation Pipe Line Co., 98 FERC ¶ 61,219 (2002); Big West Oil Co., 94 FERC ¶ 61,339 (2001). Express states that, if the Commission changes its policies, it must supply a reasoned analysis for such changes. Express cites Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983); City of Charlottesville v. FERC, 661 F. 2d 945, 950 (D.C. Cir. 1981); Cross-Sound Ferry Services, Inc. v. ICC, 873 F.2d 395, 398 (D.C. Cir. 1989).

11. Express cites the following statement in *Texaco*:

> This is the first occasion the Commission has had to interpret its oil pipeline indexing regulations in the context of a proposal to assess a joint rate. The applicable regulation, section 342.3(a) provides:
>
> > A rate charged by a carrier may be changed at any time, to a level which does not exceed the ceiling level …
>
> We interpret this section of the regulations to mean, in the context of a joint rate proposal, that the ceiling level for a joint rate is the sum of the ceiling levels associated with individual tariff rates currently on file.[14]

12. Express challenges the Commission's interpretation of the *Texaco* standard in the instant proceeding, contending that, in *Texaco*, the Commission did not confuse "ceiling" with "rate on file," and it did not use the term "ceiling" as unnecessary surplusage. According to Express, if the Commission had applied its standard consistently in this case, the "sum of the local rates on file with the Commission and actually being charged for transportation" would include the $1.51 per barrel rate for Frontier rather than the stipulated $0.57 rate -- stipulated only in lieu of a cost-of-service rate that would have resulted from litigation.[15] Express contends that the new standard allows shippers to "cherry pick" one or more vulnerable carriers' rates for litigation. Thus, Express maintains that the issue should be whether the Commission would reject a challenge to a discounted local rate when it is below the ceiling level.[16] Further, contends Express, while the *Texaco* standard is rooted in Order No. 561, the February 18, 2004 Order fails to mention that order, relying instead solely on section 4 of the Interstate Commerce Act (ICA).[17] Finally, Express contends that the Commission's determination in the February 18, 2004 Order may cause carriers to avoid joint rate arrangements because they would fear exposure to more litigation and the possibility that their own discounted local rates may reduce the effective ceiling rate applicable to the joint rates.

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[14] Texaco Pipeline, Inc., 72 FERC ¶ 61,313, at 62,310 (1995).

[15] Express cites Big West Oil Co. v. Frontier Pipeline Co., 94 FERC ¶ 61,339, at 62,260 (2001).

[16] Express cites 18 C.F.R. § 342.3 (2003).

[17] 49 U.S.C. App. § 4 (1988).

2. **Commission Analysis**

13. The Commission denies the motion for reconsideration and reaffirms that its prior conclusions were not a change in policy. The issue here is whether the local rates on file and actually charged for transportation, or ceiling levels to which those rates could be, but were not, raised must be employed in calculating the reparations in this case. The Commission again affirms that a joint rate is just and reasonable if it is less than or equal to the sum of the local rates on file with the Commission during the applicable period. Because the parties have stipulated to Frontier's local rate, the Commission must base the calculation of reparations due Complainants on the sum of the unchallenged and unchanged local rates of the other joint carriers on file at the time of the shipments and the reduced local rate that the parties stipulated for Frontier.[18]

14. The Commission regulates pipelines under the provisions of the ICA.[19] The Commission's decision in the instant case, as well as its decision in *Texaco*, is consistent with this cornerstone of the ICA -- the filed rate doctrine -- which the Supreme Court emphatically affirmed in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* (*Maislin*).[20]

15. In *Maislin*, the Court invalidated an Interstate Commerce Commission (ICC) policy that allowed a carrier to charge a shipper a rate other than the carrier's filed rate even though the parties had negotiated a different rate. The Court held that the negotiated rate could not be charged because it was not filed with the ICC. The Court cited the ICA, which provided in part:

> [A] carrier providing transportation service … shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff….[21]

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[18] In the absence of the parties' stipulated rate of $0.57, the $1.51 rate on file during the period in question would be used as Frontier's rate in calculating reparations, but because the parties stipulated to the lower rate, the stipulated rate is the appropriate rate to be employed in the reparations calculation.

[19] 49 U.S.C. App. § 1 *et seq*. (1988).

[20] 497 U.S. 116 (1990).

[21] *Id*. at 120.

16. The Court cited its long understanding that the filed rate governs the legal relationship between the shipper and the carrier.[22] The Court also stated that, despite the occasional harsh results that may result from strict application of this doctrine, the Court has "read the [ICA] to create strict filed rate requirements and to forbid equitable defenses to collection of the filed rate."[23] Citing a number of cases dating to the early years of the ICA, the Court stated repeatedly that the carrier's rate on file with the ICC governs the legal relationship between the shipper and carrier, and the carrier cannot provide services at any other rate unless the filed rate is found to be unreasonable.[24] The Court recognized that an administrative agency has the authority and expertise to adopt new policies when faced with new developments in the industry, but the Court concluded that an agency does not have the power to adopt a policy that conflicts with its governing statute.[25]

17. ICA section 6(7) provides in part that carriers cannot:

> engage or participate in the transportation of … property … unless the rates, fares, and charges upon which the same [is] transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation ….[26]

18. Order Nos. 561 and 561-A, and the regulations promulgated by those orders, demonstrate the Commission's adherence to the filed rate doctrine. Numerous statements in the orders and the regulations distinguish filed rates from ceiling levels that establish limits on rates but are not rates on file.

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[22] *Id*. at 126.

[23] *Id*. at 127.

[24] *Id*. at 129.

[25] *Id*. at 134-35.

[26] Although slightly different from the wording of the statutory provision addressed in *Maislin*, the filed rate doctrine governing the case now before the Commission is embodied in ICA section 6(7) and is properly construed in accordance with *Maislin*.

19. In Order No. 561, the Commission stated that the approach it adopted "is an indexing system which will establish ceiling levels for such rates."[27] The Commission continued:

> Under the indexing methodology oil pipeline rates may be adjusted pursuant to the Commission's regulations, so long as they comply with ceiling levels under the indexing system adopted here…. Individual rates will be subject to these ceiling levels, which may increase or decrease, according to the index. Rates will be permitted to increase (or decrease) within the range capped by the ceiling level established pursuant to this index.[28]

In discussing the benefits of the indexing methodology, the Commission stated unambiguously that "the index establishes a *ceiling* on rates -- it does not establish the rate itself."[29] In reiterating that pipelines must establish annual ceiling levels for each of their rates in accordance with the prescribed indexing methodology, the Commission also stated: "Since this is an annual *ceiling level*, it is not necessarily the rate which will actually be charged…."[30] The Commission again recognized that ceiling levels could be reduced in certain circumstances, stating, "If deflationary pressures push the ceiling level below the filed rate in any year, those filed rates that exceed the new, lower ceiling must be lowered to the new ceiling within 60 days…."[31]

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[27] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶ 30,985, at 30,940-41 (October 22, 1993).

[28] *Id*. at 30,941.

[29] *Id*. at 30,949 (emphasis in original).

[30] *Id*. at 30,953 (emphasis in original).

[31] *Id*. at 30,954.

20. The Commission affirmed the distinction between ceiling levels and rates in Order No. 561-A.[32] In that order, the Commission stated, "Under the indexed rate-cap approach, rates are allowed to change so long as the resulting rate is at or below a ceiling level established by the index."[33] Finally, the Commission stated, "In filing for a rate change under the indexing system, a pipeline must file a proposed rate that is no higher than the ceiling derived from application of the index."[34] The cited provisions of Order Nos. 561 and 561-A thus make it abundantly clear that the Commission intended that ceilings function only as caps on the filed rates of pipelines and not as the filed rates themselves.

21. The Commission's regulations established by Order No. 561 confirm this distinction between filed rates actually charged and ceiling levels. For example, section 342.3 provides in part that "[a] rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established by paragraph (d) of this section."[35] The regulations also require that "[a] carrier must compute the ceiling level each index year without regard to the actual rates filed pursuant to this section."[36] Significantly, there is no requirement that rates must be re-computed each year so long as they remain within applicable ceiling levels. The annual determination of the ceiling level for each rate thus is simply a mechanical calculation that limits what a pipeline can charge.

22. *Texaco* is consistent with the filed rate doctrine and the Commission's policies because the underlying filed local rates were coincidentally at the ceiling levels. Thus the Commission's statement in *Texaco* regarding the ceiling level of a joint rate is consistent with the Commission's often-stated policy that a joint rate must be less than or equal to the sum of the local rates on file with the Commission. And, despite the claims of Frontier and Express, the February 18, 2004 Order does not depart from *Texaco* and implement a new policy. In fact, the Commission's ruling in the February 18, 2004

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[32] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561-A, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶ 31,000 (July 28, 1994).

[33] *Id*. at 31,092.

[34] *Id*. at 31,099.

[35] 18 C.F.R. § 342.3(a) (2003).

[36] 18 C.F.R. § 342.3(d)(3) (2003).

Order is consistent with its unchallenged statements in earlier orders in this proceeding. In the March 28, 2001 Order, for example, the Commission stated, "Our policy has been that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file with the Commission."[37] On rehearing, the Commission reiterated that it had confirmed its joint rate policy in the March 28, 2001 Order: "The order described the Commission's policy that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file with the Commission…."[38]

23. Express incorrectly claims that the March 28, 2001 Order[39] and *Plantation Pipeline Co.* (*Plantation*)[40] support its interpretation of *Texaco*. As stated above, in the March 28, 2001 Order, the Commission cited *Texaco* but articulated its standard for assessing the justness and reasonableness of the joint rates as follows: "Our policy has been that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file with the Commission."[41]

24. Further, *Plantation* should not be read to support Express' position.[42] Some confusion may arise from a statement in *Plantation* that Commission policy "has been that a joint rate is just and reasonable if it is less than or equal to the sum of the ceiling levels associated with the individual local interstate rates currently on file with the

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[37] Big West Oil Co. v. Frontier Pipeline Co., 94 FERC ¶ 61,339, at 62,259 (2001).

[38] Big West Oil Co. v. Frontier Pipeline Co., 95 FERC ¶ 61,281, at 61,984 (2001).

[39] Big West Oil Co. v. Frontier Pipeline Co., 94 FERC ¶ 61,339 (2001).

[40] 98 FERC ¶ 61,219 (2002).

[41] *Id*. at 62,259.

[42] *Plantation* involved a request for a declaratory order regarding proposed joint rate arrangements that were never placed in effect. The proposed joint rates were to be equal to or less than Plantation's then-current through rates, (*i.e.*, filed rates). The proposed joint rates in *Plantation* would have been based on the filed local rates rather than on the ceiling levels applicable to those rates, and thus would have been consistent with Commission policy.

Commission."[43] As authority for that statement, however, the *Plantation* order cited *Texaco* which, as already explained, involved rates on file that were coincidentally at Texaco's ceiling levels.

25. Finally, as stated earlier, the suggestion that the local rate for Frontier at the time of the shipments -- $1.51 per barrel -- rather than the stipulated just and reasonable local rate of $0.57 per barrel should be used in calculating the reparations is illogical on its face. When a filed local rate is determined to be unjust and unreasonable, reparations are based on the appropriately reduced local rate that would have been the just and reasonable rate on file during the period at issue. In this case, the parties agreed as part of their settlement regarding Frontier's local rates that Frontier's local rate on file during the period in question was unjust and unreasonable and that the stipulated $0.57 rate should be used for the purpose of calculating reparations.[44] Express cannot have it both ways; therefore, it is appropriate to utilize that stipulated rate in determining reparations.

26. Accordingly, the Commission denies Express' motion for reconsideration.

3. Frontier's Request for Rehearing

27. Frontier also seeks rehearing of the February 18, 2004 Order insofar as the Commission determined to base the calculation of reparations on the sum of the local rates on file rather than on the sum of the applicable ceiling levels. To the extent that Frontier's request for rehearing raises arguments other than those advanced by Express and rejected above, the Commission's analysis here addresses and rejects those additional arguments.

28. Frontier argues that the Commission never has relied on ICA section 4 in applying the "sum of the local rates" principle, and in any event, the new rule applied in this case contradicts the historical interpretation of ICA section 4.[45] Instead, submits Frontier, this

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[43] Plantation Pipe Line Co., 98 FERC ¶ 61,219, at 61,866 (2002).

[44] "As part of the settlement, Frontier stipulated that its just and reasonable local rate for that period was 57 cents per barrel rather than the approximately $1.51 per barrel rate that was actually in effect during that period." Request for Rehearing of Frontier Pipeline Company at p. 3 (March 19, 2004). Despite that, Frontier contended that this reduced rate should not be employed in calculating the sum of the local rates.

[45] Section 4 provides, as pertinent: "It shall be unlawful for any common carrier … to charge any greater compensation as a through rate than the aggregate of the intermediate rates…."

case is governed by the rule that a joint rate can be challenged only as a whole and not on the basis of its components.[46] In the instant case, continues Frontier, Complainants have not shown that the entire joint rate is too high in comparison to the collective cost-of-service of the participating carriers.

29. Frontier asserts that the ICC consistently interpreted the "aggregate of the intermediates" clause as applying to the local rates contemporaneously in effect, not to local rates later determined to be the lawful rates for a particular movement.[47] In Frontier's view, retroactive application of the "aggregate of the intermediates" test is inconsistent with the provision of ICA section 4 that allows a carrier to submit a prior application to depart from the limitations of that section.[48] Specifically, Frontier points out that ICA section 4 recognizes that a joint rate exceeding the sum of the local rates may be reasonable if one or more of the local rates is depressed or unduly low, and it allows the Commission to authorize a carrier to depart from the rule.[49]

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[46] Frontier cites Great Northern Ry. v. Sullivan, 294 U.S. 458 (1935) (Great Northern).

[47] Frontier cites Humphreys-Godwin Co. v. Yahoo & Mississippi Valley Railroad Co., 31 ICC 25, 26 (1914); Omaha Chamber of Commerce v. Atlanta, Birmingham & Atlantic Ry. Co. 95 ICC 583, 585 (1924); American Sumatra Tobacco Corp. v. Louisville & Nashville R.R., 174 ICC 257, 258 (1931); Cities of Marshall and Jefferson, Tex. v. Texas & Pacific Ry. Co., 120 ICC 455, 461-62 (1927); D.L. Alderman v. Alabama & Vicksburg Ry. Co., 120 ICC 387, 388 (1926); Layne and Bowler Co. v. Director General, 87 ICC 86 (1923); Railroad Comm'n of Nevada v. Nevada-California-Oregon Ry., 22 ICC 205, 208 (1912); White Brothers v. Atchison, Topeka, & Santa Fe Ry., 17 ICC 288, 289 (1909); Humphreys-Godwin Co. v. Yazoo & Mississippi Valley Railroad Co., 31 ICC 25, 28 (1914).

[48] Frontier cites Patterson v. Louisville & N.R. Co., 269 U.S. 1, 12 (1925); Baker-Lockwood Mfg Co. v. Alabama Great Southern Railroad Co., 198 ICC 401, 406-07 (1933); Quiroga & Co., Inc. v. Atchison, Topeka, and Santa Fe Ry. Co., 152 ICC 674, 679 (1929).

[49] Frontier cites Baltimore & O.S.W.R. Co. v. Seattle, 260 U.S. 166, 171-72 (1922).

30. Frontier next argues that ICA section 4 does not create an independent right of action for reparations.[50] Because the Commission's new rule limits the hearing to the validity of the local rate rather than the lawfulness of the joint rate, claims Frontier, the Commission has eliminated the ICA section 16 right to a hearing before awarding reparations.

31. Frontier contends that, in *Great Northern*,[51] a combination rate applied, consisting of the sum of the carriers' proportional rates,[52] but the shipper attacked only one of the proportional rates, and the ICC awarded reparations only on that rate.[53] However, Frontier explains that the Supreme Court reversed, holding that the combination of proportional rates should be treated as if it were a joint rate, and the component parts of the combination rate must be regarded as if they were divisions of a joint rate.[54]

32. Frontier maintains that the ICC affirmed the *Great Northern* rule in *Metropolitan Edison v. Conrail* (*Metropolitan Edison*),[55] holding that only the through or joint rate in its entirety may be challenged as excessive. In that case, asserts Frontier, a shipper challenged a joint rate after it entered into a settlement with one of the participating carriers. According to Frontier, the shipper sought to show that the carrier's revenue from the traffic was excessive and argued that the burden shifted to the carrier to demonstrate that the overall rate was not unreasonable.[56] Frontier states that the ICC

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[50] Frontier cites Iten Biscuit Co. v. Chicago B.&Q. R.R., 53 ICC 729, 732-33 (1919).

[51] Frontier cites Great Northern Ry. v. Sullivan, 294 U.S. 458, 459 (1935); Louisville & Nashville R.R. v. Sloss-Sheffield Co., 269 U.S. 217 (1925); Abilene & Southern Ry. Co., 265 U.S. 274, 283 (1924).

[52] Frontier cites Great Northern Ry. v. Sullivan, 294 U.S. 458, 459-60 (1935); Commonwealth of Pennsylvania, 561 F.2d 278, 282 (D.C. Cir. 1977); Seaboard Coast Line R.R. v. United States, 724 F.2d 1482, 1485 (11th Cir. 1984).

[53] Frontier cites Great Northern Ry. v. Sullivan, 294 U.S. 458, 461 (1935).

[54] *Id*. at 462-63, 475.

[55] 5 ICC 2d 385, 400-10 (1989).

[56] *Id*. at 405.

rejected that position and concluded that "unlawfulness of one indivisible joint rate is not proven (nor may the burden of proof shift) with evidence that only a portion of it that does not stand alone is unreasonable."[57] Yet, continues Frontier, the ICC recognized that this rule does not preclude all challenges to components of a joint rate, stating, for example, that "a shipper may challenge any separately published rate and obtain reparations and future prescription upon a showing that the rate is unreasonable."[58] Frontier also observes that the ICC stated that "[e]ven joint rates, when added together to produce the overall change, may be separately challenged,"[59] but found that the complainant could not "establish the unreasonableness of the entire joint rate by showing the [carrier's] division to be above a reasonable level, nor may it obtain a prescription for a [carrier's] proportional rate on this basis."[60]

33. Next, Frontier maintains that the Commission also improperly excluded the posted tariff rate of Platte Pipe Line Company (Platte) from the "aggregate of the intermediate rates," although it has acknowledged that the movement at issue requires the use of Platte's facilities. Frontier argues that, under section 4, the statutory standard is not a comparison of the joint rate to the local rates of the participating carriers; rather, it is that the through rate may not exceed the aggregate of the intermediate rates.[61] Frontier contends that ICC precedent is consistent with that standard, referring to the sum of the locals "between the same points."[62] Because the movement from the US/Canada border to Salt Lake City could not have been made without incurring the Platte local filed rate,[63]

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[57] *Id*. at 408.

[58] *Id*.

[59] *Id*.

[60] *Id*. Frontier also cites Ford Motor Co. v. Union Pacific Co., 365 ICC 630, 632 (1982), *rev'd on other grounds*, Ford Motor Co. v. ICC, 714 F.2d 1157, 1164 n.19, 1170 n.34 (D.C. Cir. 1983). Although Frontier acknowledges that *Metropolitan Edison* was decided under the Staggers Act, Frontier maintains that the ICC based its reasoning on *Sloss-Sheffield* and *Great Northern* finding that those cases "continue to have vitality after the Staggers Act for a number of reasons." Metropolitan Edison Co. v. Conrail, 5 ICC 2d 385, 408-09 (1989).

[61] Frontier cites 49 U.S.C. App. § 4(1) (1988).

[62] Frontier cites Through Rates to Points in Louisiana and Texas, 38 ICC 153, 164 (1916).

Frontier maintains that it is unimportant that Platte was not a separately named participant in the joint rate.[64] Indeed, adds Frontier, in considering whether to permit Express to cancel the joint rates, the Commission found in another proceeding that shippers would continue to have local service available at rates no higher than the previously-available through rate.[65]

34. Frontier next asserts that the Commission also misapplied the "sum of the local rates" rule by including the local discounted term rates posted by Express rather than the undiscounted rates applicable to uncommitted volumes. While the Commission stated that the Complainants made no shipments under the uncommitted joint rate,[66] Frontier contends that the issue is not what Complainants actually paid, but rather the maximum rate they would have paid if they had moved under the sum of the local rates. Otherwise, concludes Frontier, it would be required to pay greater reparations under the joint rate solely because Express chose to offer discounted rates for local service in which Frontier did not even participate. Frontier also observes that the Commission stated that the "decisions cited by Frontier do not require the result that Frontier seeks,"[67] but Frontier asserts that it only argued that prior Commission decisions have looked to the maximum reasonable rate and not to voluntary discounts as the measure of a lawful rate.

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[63] Frontier cites Big West Oil, LLC v. Alberta Energy Co., Ltd., 100 FERC ¶ 61,171 at P 6 (2002).

[64] Frontier states that, at the relevant time, Platte was an affiliate of Express. *See* Affidavit of Robert G. Van Hoecke, at ¶ 5, attached to Frontier's Compliance Filing (Aug. 9, 2002). Thus, argues Frontier, as a participant in the joint tariffs, Express was in a position to make service available to through shippers using the Platte facilities without Platte having to be a named participant in the joint tariff. *See* Response of Complainants Big West Oil LLC and Chevron Products Company to Compliance Filing of Frontier Pipeline Company at 23 (Sept. 9, 2002). Nonetheless, a shipper using the local rates necessarily would have incurred the Platte charge.

[65] Frontier cites Express Pipeline LLC, 99 FERC ¶ 61,229 at P 9 and n.8 (2002).

[66] Frontier cites Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171, at P 20 (2004).

[67] *Id*.

35. Finally, Frontier contends that Complainants voluntarily shipped under the discounted term rates, which essentially were contract rates included in the tariff. According to Frontier, the Commission's award of reparations would amount to the Commission retroactively rewriting a contract between sophisticated parties.[68] Frontier asserts that the Commission failed to address this point in the February 18, 2004 Order.

4. Commission Analysis

36. The Commission denies Frontier's request for rehearing. In its effort to avoid payment of any reparations, Frontier raises arguments not applicable here and primarily relies on cases decided long before the Commission implemented the indexing methodology and ceiling levels. In any event, the cases do not support Frontier's position.

37. The Commission ruled above that the filed rate doctrine embodied in ICA section 6 prevents calculating the justness and reasonableness of the joint rate on the basis of the ceiling levels applicable to the filed local rates. In this section, the Commission addresses the application of ICA section 4 to this case and affirms its policy that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates on file with the Commission.

38. Frontier maintains that the Commission never has relied on ICA section 4 in applying its "aggregate of the local rates" policy, but even if true, that would not preclude application of section 4 in this case. That section clearly applies to the determination of reparations under the joint rates at issue here, and the Commission has not applied a "new" rule retroactively. Instead, as discussed above, the Commission applied the policy announced in *Texaco*. Moreover, in its request for rehearing, Frontier acknowledges the applicability of the *Texaco* standard and its applicability to filed rates, stating as follows: "In the original joint tariff and successive issuances in the same series, Express… informed the Commission that the proposed rates were justified as being less than the sum of the individual rates *posted* by each carrier, relying on the policy established by the Commission in *Texaco*."[69] Significantly, Frontier does not claim that Express relied on the sum of the applicable ceiling levels.

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[68] Frontier cites SFPP, L.P., Opinion No. 435, 86 FERC ¶ 61,022, at 61,075 (1999); 18 C.F.R. § 342.4(c) (2003).

[69] Request for Rehearing of Frontier Pipeline Company, at 5 (March 19, 2004) (emphasis supplied).

39. Further, the bulk of Frontier's rehearing request does not challenge the applicability of section 4, but rather seeks to persuade the Commission to apply the section in a different manner. Frontier argues that the justness and reasonableness of a joint rate can be challenged only as a whole and not on the basis of its components. However, as the Commission determined in the March 28, 2004 Order, while the complaints were nominally directed at the joint rates, Complainants actually challenged only Frontier's local rates, which were used to determine the joint rates.[70] Because the parties stipulated that $0.57 per barrel would have been the just and reasonable local rate for Frontier during the period in question, there is no need for a cost-of-service analysis of the local rates of the participating joint carriers. In fact, as previously noted, Complainants did not challenge the underlying local rates of the other participating carriers.

40. Additionally, while Frontier asserts that the Commission cannot award reparations without a hearing, the Commission originally set the complaints for settlement procedures and directed the establishment of hearing procedures should the settlement procedures fail to achieve a settlement. By reaching a settlement in this case, the parties eliminated the need for a hearing. A requirement that the Commission could award reparations only after a hearing would be contrary to the Commission's policy that favors settlements and would allow the parties to re-define the bargain they struck.

41. As Frontier points out, ICA section 4 also provides that carriers can submit applications for relief from that section so that they can charge a joint rate that exceeds the sum of the intermediate rates. Relief under that provision and the corresponding Commission regulation,[71] however, is prospective only. Order No. 561 allows for a process to demonstrate that that rates above the existing ceilings could be just and reasonable, but a carrier must make a cost-of-service showing to justify such a departure from the indexing requirements.[72] Despite Frontier's reference to certain cases that involve applications for relief from section 4, however, these prior application provisions are not applicable to the instant case and are unaffected by the Commission's rulings in the February 18, 2004 Order. Carriers retain their right to seek prospective relief from ICA section 4 upon a proper showing.

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[70] Big West Oil Co. v. Frontier Pipeline Co., 94 FERC ¶ 61,339, at 62,259 (2001).

[71] 18 C.F.R. § 341.15 (2003).

[72] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶ 30,985, at 30,957 (October 22, 1993).

42. *Great Northern* is distinguishable from the instant case in that it addressed combination rates based on the sum of proportional rates, not on the sum of local rates. The Supreme Court explained the difference between the types of rates by stating, "A proportional differs from a local rate in that it covers only terminal service at place of receipt or at place of delivery but cannot, as does the local rate, cover both."[73] The Court in *Great Northern* specifically recognized that there was no applicable joint rate at issue.[74]

43. Likewise, *Metropolitan Edison* does not support Frontier's position. In that case, the ICC summarized the complainant's challenge as follows:

> Met Ed measures the relief it seeks by the difference between those [stand-alone railroad] costs and Conrail's division of the joint rate…. In short, Met Ed contends that the joint through rate is excessive because Conrail's division is excessive. It has introduced evidence to show that Conrail's revenue from this traffic is excessive, but has made no attempt to show that the overall rate it has paid is excessive.[75]

44. In the instant case, Complainants have not challenged Frontier's division of the joint rate -- "the unlawfulness of one indivisible joint rate." As the ICC recognized in *Metropolitan Edison*, "a shipper may challenge any separately published rate and obtain reparations and future prescription upon a showing that the rate is unreasonable." The Commission stated in the February 18, 2004 Order and affirmed above that Complainants in this case, while purporting to challenge the joint rates, actually challenged only Frontier's local rate on file because it was used in determining the joint rate. Complainants did not challenge Frontier's division of the joint rates, as Metropolitan Edison challenged Conrail's division.

45. Moreover, other cases cited by Frontier do not persuade the Commission to adopt Frontier's position. These cases are of limited value because they generally were decided long before this Commission implemented the indexing methodology and ceiling levels for rates and are thus factually distinguishable from the position urged by Frontier. In fact, the decisions support the Commission's ruling that the calculation of reparations under a joint tariff must be made with reference to underlying filed local rates.

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[73] Great Northern Ry. Co. v. Sullivan, 294 U.S. 458, 460 (1935).

[74] *Id*. at 460-61 (1935) (citations omitted).

[75] Metropolitan Edison Company v. Conrail, 5 ICC 2d 385, 405 (1989).

46. Frontier maintains that *Windsor Turned Goods Co. v. Chesapeake & Ohio Ry. Co.*[76] and *Michigan Buggy Co. v. Grand Rapids & Indiana Ry. Co.*[77] stand for the proposition that joint rates can exceed the sum of the local rates on file for service between the same points. However, Frontier cannot justify this position merely by showing that the underlying local rates are lower than the sum of the applicable ceiling levels as it has sought to do. As stated above, to justify a departure from the "aggregate of the intermediates" rule, carriers must seek leave of the Commission as required by ICA section 4 and section 341.15 of the Commission's regulations.

47. In *White Brothers v. Atchison, Topeka & Santa Fe Ry.* (*White Brothers*),[78] complainants sought reparations because the published through rate exceeded the combination of the local rates between the same points, but the ICC concluded that there was not sufficient evidence to show that the through rates charged were unreasonable. The ICC did not rule on the merits of the issues; therefore, *White Brothers* cannot be considered valid precedent applicable to the case now before this Commission.

48. In *Robinson Clay Product Co. v. Baltimore & Ohio R.R. Co.* (*Robinson*),[79] the tariff provided that any rate in excess of the aggregate of the intermediate rates would be reduced to the basis of such aggregate and that the defendants would seek ICC authority to refund down to that basis. The ICC observed that defendants were required to comply with ICA section 4 unless the ICC had granted relief from its provisions and that the shipments at issue were moved under a rate that did not comply with section 4. The ICC enforced the tariff provision and awarded reparations. Although the instant case does not involve such a tariff "promise" by Frontier, the Commission views the tariff agreement in *Robinson* as analogous to the settlement agreement reached by the parties with respect to the just and reasonable local rate for Frontier during the period when the shipments were made.

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[76] 18 ICC 162 (1910).

[77] 15 ICC 297 (1909).

[78] 17 ICC 288 (1909).

[79] 208 ICC 147 (1935).

49. Other cases cited by Frontier are equally unpersuasive. For example, in *Humphreys-Godwin Co. v. Yazoo & Mississippi Valley R.R. Co.*,[80] the ICC found that the joint through rate higher than the aggregate of the intermediate rates was protected by a pending application for relief from the provision of section 4. As stated above, the joint carriers in this case have not sought relief from the requirements of section 4, although they are not precluded from seeking prospective relief. *Patterson v. Louisville & Nashville R.R. Co.*[81] also involved a situation in which an application for relief from section 4 was pending, so it too is distinguishable from the instant case.

50. Frontier also relies on *Davis v. Portland Seed Co*.[82] That case involved the long/short haul provision of section 4,[83] and thus, it does not control the Commission's decision here. However, in that case, the Supreme Court pointed to *Southern Pacific Co. v. Darnell-Taenzer Lumber Co*. (*Darnell-Taenzer),* [84] stating as follows: "There the shipper paid a published rate which the Commission afterwards found to be unreasonable. This Court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable."[85] In the instant case, the lower just and reasonable rate for Frontier was established by a settlement rather than prescribed by the Commission, and the result is the same. Complainants here are entitled to recover as reparations the difference between the amounts they paid under the joint rate and the recalculated maximum just and reasonable joint rate that is based on the sum of the underlying local rates of the other carriers that were on file with the Commission, except that the just and reasonable local rate for Frontier is the $0.57 stipulated by the parties.

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[80] 31 ICC 25 (1914).

[81] 269 U.S. 1 (1925).

[82] 264 U.S. 403 (1924).

[83] The long/short haul clause of ICA section 4 provides in part that that "It shall be unlawful for any common carrier … to charge or receive any greater compensation in the aggregate for … transportation … for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer…."

[84] 245 U.S. 531 (1918).

[85] Davis v. Portland Seed Co., 264 U.S. 403, 421-22 (1924).

51. Frontier asserts that the Commission erred in omitting Platte's "posted tariff rate"[86] from the calculation of the just and reasonable joint rate. However, the Commission affirms that it properly excluded Platte's rates from the aggregate of the intermediates in this case. As stated in the February 18, 2004 Order, Platte is not listed on the tariff sheets as a participant in the joint rates. For that reason, Platte would not share in the revenue from the joint rates, nor would it be liable for any reparations due under the joint rates; therefore, its rate cannot be included in the calculation of the joint rates. Although Frontier maintains that Platte was an affiliate of Express, which allowed it to make service available by using the Platte facilities, that does not require a different result. Platte's posted rate was not part of the joint rates established in the joint tariffs.

52. Frontier also contends that, in determining the appropriate joint rates, the Commission improperly used the local discounted term rates posted by Express instead of the undiscounted rates applicable to uncommitted volumes. This is essentially the same as arguing that ceiling levels should be applied in calculating the just and reasonable joint rate, and it lacks merit for similar reasons. Frontier acknowledges that Complainants made no shipments under the uncommitted joint rates, and the Commission finds it unjust and unreasonable to calculate reparations with reference to rates that shippers did not pay. Additionally, Frontier complains that the decision by Express to offer discounted rates for local service will require Frontier to pay greater reparations. The Commission only determines reparations within the limits of the established facts of a case and cannot consider whether the reparations are more or less than they would have been in a different context. Further, it is well-established that the Commission does not inquire into the contractual arrangements surrounding the division of joint rates, including any agreements among the joint carriers relating to payment of any reparations that may be awarded.

53. Accordingly, the Commission denies Frontier's request for rehearing. The Commission's policy remains as stated in the February 18, 2004 Order: "[A] rate for a joint movement may not exceed the sum of the local rates on file with the Commission and actually being charged for transportation…."[87] This is the only fair measure of reparations.

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[86] Platte's posted rate during the relevant period was an initial rate that had not been increased in accordance with the index.

[87] Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171, at P 12 (2004).

B. Reparations for Third-Party Shipments

1. Legal Issues

a. Positions of the Parties

54. Complainants assert that the Commission erred by refusing to award reparations for shipments made via third parties. They argue that reparations are appropriate because the contracts with the third-party shippers required Complainants to pay the charges. While they acknowledge that the ICA originally did not regulate oil pipelines, Complainants argue that allowing a firm to receive reparations when it utilizes third-party shippers and bears responsibility for paying the tariff charges would be consistent with the statute's original purpose of protecting all firms that utilize interstate carriers.[88] In response, Frontier and Express contend that the Commission properly denied reparations applicable to third-party shipments.

55. Complainants first cite *Gabbert v. Atchison, T. & S.F.Ry. Co*. (*Gabbert*),[89] involving a firm that purchased coal in Colorado, then consigned it to another firm, which in turn shipped the coal as the agent of the purchaser and paid the shipping charges to the carrier. Complainants argue that the court did not require the coal purchasers to be in privity with the carrier.[90] Further, continue Complainants, the *Gabbert* court rejected the contention that *Darnell-Taenzer* and *Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co*. (*Sloss-Sheffield*)[91] require privity for an award of reparations.[92]

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[88] Complainants cite 18 Cong. Rec. 3470-73 (April 14, 1886).

[89] 93 F.2d 562 (5th Cir. 1937).

[90] *Id*. at 563.

[91] 269 U.S. 217 (1925).

[92] Gabbert v. Atchison, T. & S.F. Ry Co., 93 F.2d 562, 563 (5th Cir. 1938).

56. However, Complainants maintain that the Commission misinterpreted *Gabbert* in the February 18, 2004 Order by focusing on the party holding title to the coal instead of the party paying the carrier for the shipment. Instead, assert Complainants, the *Gabbert* court looked to the fact that the ultimate owner of the goods incurred the overcharges, even though it did not pay the transportation charges directly to the carrier.[93]

57. In response, Frontier argues that the *Gabbert* court focused on the agency relationship between the owner of the coal and the shipper, which paid the tariff rates as the coal owner's agent. Specifically, Frontier points to the court's statement that *Sloss-Sheffield* "clearly decides that one who bears the burden of the illegal charges that are paid for his account by an agent may sue to recover the damages awarded him by a reparation order."[94] Frontier distinguishes *Gabbert* from the instant case because Complainants here took title to the oil after it reached its destination in Salt Lake City. In fact, continues Frontier, *Gabbert* is consistent with a line of ICC decisions holding that the "true consignor" who actually bears the freight charge paid by an agent "does not come within the rule which prohibits an award of reparation to a stranger to the transportation record."[95]

58. Frontier emphasizes that the Complainants did not nominate the oil to the joint tariff carriers, they had no legal obligation to pay the tariff charges directly to the joint carriers, and in fact they did not pay those charges directly to the carriers. Frontier further emphasizes that Complainants have presented no evidence that any of the sellers of crude oil acted as agents for Complainants in shipping the oil. Indeed, explains Frontier, the joint tariff rules and regulations require shippers to warrant that they hold clear title to the oil while it is in the carriers' possession, whereas Complainants as the ultimate purchasers had no such obligation.[96]

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[93] *Id.*

[94] *Id.*

[95] Frontier cites Morgan's Louisiana & Texas R.R. & Steamship Co., 39 ICC 483, 484 (1916). *See also* Missouri Portland Cement Co. v. Director General, 88 ICC 492, 496 (1924); Consolidated Cut Stone Co. v. Atchison, T. & S.F. Ry., 39 F.2d 661, 662 (N.D. Okla. 1930).

[96] Frontier cites Motion for Leave to File Response and Response of Frontier Pipeline Company to Request for Rehearing of Complainants, Van Hoecke Affidavit at ¶ 3 n.1 *citing* Express, FERC Tariff No. 1, Item 17.2 (April 6, 2004).

59. Frontier asserts that, in *Baer Bros. Mercantile Co. v. Denver & Rio Grande R.R.* (*Baer Bros*.),[97] the Supreme Court found that, while non-shipper parties had standing to file complaints seeking new rates for the future, such parties did not have standing to seek reparations for excessive past rates.[98] Frontier also asserts that the Court affirmed the *Baer Bros*. holding in *Darnell-Taenzer*, stating that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step."[99] According to Frontier, the Court held in *Darnell-Taenzer* that only the party actually liable for the tariff charge could recover reparations.[100] But Frontier also points out that the Court cautioned that "[b]ehind the technical mode of statement is the consideration, well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result."[101]

60. Frontier next argues that *Sloss-Sheffield* is consistent with *Darnell-Taenzer* in that it upholds an award of reparations to a consignor despite the claim that the subsequent purchaser ultimately bore the tariff charge. Frontier states that the Supreme Court pointed out that the consignor had the freight delivered on an "f.o.b. destination" basis and that it was "settled by [*Darnell-Taenzer*] that where goods are sold f.o.b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who consequently is entitled to sue."[102] Additionally, Frontier maintains that, contrary to Complainants' suggestion, *Darnell-Taenzer* and *Sloss-Sheffield* remain good

[97] 233 U.S. 479 (1914).

[98] *Id*. at 487-88. ("On the application of [non-shippers], old rates might be declared unjust and new rates established, but, of course, no reparation would be given, for the reason that such complainants were not shippers and, therefore, not entitled to an award of pecuniary damages.")

[99] Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918).

[100] *Id*. at 534.

[101] *Id*.

[102] Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 235, 237 (1925).

law, because three Supreme Court justices recently cited *Darnell-Taenzer* approvingly in a concurring opinion, quoting "Justice Holmes' observation that the 'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'"[103]

61. Complainants next cite *McCarty Farms, Inc. v. Burlington Northern Inc.* (*McCarty Farms*),[104] involving elevator operators that shipped consigned wheat and also paid the shipping charges to the railroad. Complainants maintain that the court in that case rejected the railroad's privity defense.[105]

62. In response, Frontier distinguishes *McCarty Farms*, stating that it did not involve the purchase of the commodity at the destination, in contrast to the facts of the instant case. Frontier also argues that *McCarty Farms* did not overrule the privity rule of *Darnell-Taenzer* and *Sloss-Sheffield*, but rather is consistent with the well-established line of cases that the "true consignor" can recover reparations where the freight charge is paid on its behalf by another party acting as its agent.

63. Complainants further contend that the Commission previously has allowed recovery of reparations by companies that engage third parties to ship on their behalf. Complainants cite *Gaviota Terminal Co.* (*Gaviota*),[106] claiming that the Commission there rejected a privity argument and recognized the Producer Group's standing to seek reparations.[107] However, Complainants submit that, in the February 18, 2004 Order, the

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[103] Frontier cites Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S.Ct. 872, 884 (2004) (Stevens, J., concurring).

[104] 91 F.R.D. 486 (D. Mont. 1981).

[105] *Id*. at 488 (citations omitted). Complainants also assert that cases decided under the antitrust laws reflect a judicial concern that complicated analyses of the price and output decisions of a direct purchaser would be necessary to determine how much of the illegal overcharges it absorbed and how much it passed on to its direct customers. Complainants cite Hanover Shoe Inc. v. United Shoe Machinery Corp, 392 U.S. 481 (1968); Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977). In contrast, however, argue Complainants, such complex analyses are rarely if ever required in oil pipeline cases. For example, Complainants point out that the record in the instant case includes only a few contracts and invoices among a few parties that purchased and shipped crude oil and, therefore, lack of privity should not prevent an award of reparations here.

[106] 67 FERC ¶ 61,358 (1994).

[107] *Id*. at 62,248.

Commission failed to distinguish *Gaviota* in a reasoned manner.[108] Complainants maintain that the Commission held in that case that lack of privity did not prevent the Producers Group from receiving reparations for shipments made on their behalf, and it is irrelevant that the Commission resolved *Gaviota* without a reparations award.

64. Frontier, on the other hand, supports the Commission's interpretation of *Gaviota* in the February 18, 2004 Order. Frontier further asserts that *Gaviota* is consistent with *Baer Bros*.,[109] in which the Supreme Court distinguished between standing to maintain a complaint and standing to claim reparations, specifically determining that non-shippers could file complaints seeking new rates, but lacked standing to claim reparations. While it agrees that *Gaviota* originally involved both kinds of claims, Frontier points out that the Commission did not need to reach the question of reparations to allow the complaint to proceed on the issue of future rates. Thus, argues Frontier, because *Gaviota* did not decide the issue presented here, the Commission had no obligation to explain its alleged departure from its ruling in that case.

65. Frontier submits that Complainants have failed to cite a case in which the ICC or this Commission have awarded reparations to a party whose sole connection to the transportation in question was that it purchased delivered product for a price that incorporated the tariff charge. Frontier also asserts that antitrust cases, such as those cited by Complainants, are not relevant here and that the Commission should consider as precedent only cases decided under the long-standing privity rule developed under the ICA.[110]

b. Commission Analysis

66. The Commission denies Complainants' request for rehearing on the issue of reparations applicable to third-party shipments. Complainants fail to acknowledge the critical distinction in the cases they cite: those cases involve owners that were in privity

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[108] Complainants cite Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171 (2004).

[109] Baer Bros. Mercantile Co . v. Denver & Rio Grande R.R., 233 U.S. 479, 487-88 (1914).

[110] Frontier cites Nicola, Stone & Myers Co. v. Louisville & Nashville R.R., 14 ICC 199, 207-09 (1908); Davis v. Mobile & Ohio R.R., 194 F. 374, 375-76 (5th Cir. 1912); *In re* Wool, Hides & Pelts, 25 ICC 675, 677 (1913).

with the carriers because the shippers were acting as agents for the owners in arranging with the carriers for transportation of the commodities. For example, in *Gabbert*, the coal purchasers took title to the coal when it was loaded onto cars at the shipping points in Colorado, but the coal purchasers were not the shippers of record and did not pay the carrier. Instead, third parties holding contracts with the carrier served as agents for the coal purchasers.[111] Further, in *Gabbert*, the court cited *Sloss-Sheffield*, stating as follows: "That case clearly decides that one who bears the burden of the illegal charges that are *paid for his account by an agent* may sue to recover the damages awarded him by a reparation order."[112] The instant case differs from cases cited by Complainants because, as the purchase contracts for the crude oil clearly show, Complainants did not take title to the crude oil until it reached Salt Lake City.[113] Moreover, the Complainants have not established that the third-party shippers acted as their agents.[114]

67. The Commission also finds that *Darnell-Taenzer* and *Sloss-Sheffield* do not support Complainants' position. In the first case, the Supreme Court stated as follows:

> The only question before us is … whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.

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[111] Gabbert v. Atchison, T. & S.F. Ry. Co., 93 F.2d 562 (5th Cir. 1937).

[112] *Id*. at 563 (emphasis supplied).

[113] *See* Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171, at P 26 (2004).

[114] In Consolidated Cut Stone Co. v. Atchison, T. & S.F. Ry. Co., 39 F.2d 661, 662 (N.D. Okla. 1930), the court found that "[t]itle to the stone passed to consignee when loaded on the cars at the quarries and was billed to the consignee." Thus, the purchaser of the commodity held title during transit, which distinguishes it from the instant case. In Davis v. Mobile & O.R. Co., 194 F. 374, 376 (5th Cir. 1912), the court explained that the plaintiff based its claim to recover damages on the theory that the increased freight rate diminished the price and value of its lumber. The court found that claim "too remote, contingent, and speculative to form a basis for a judgment." In Morgan's Louisiana & Texas R.R. & Steamship Co., 39 ICC 483 (1916), the conductor was the agent of the owners of the commodity. In Missouri Portland Cement Co. v. Director General, 88 ICC 492, 496 (1924), the ICC found that the complainant made the shipments and paid the charges; therefore, it was entitled to reparations.

> The answer is not difficult. The general tendency of the law, in regard to damages at lease, is not to go beyond the first step…. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier…. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum…. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result.[115]

68. In *Sloss-Sheffield*, the carrier argued in part that a sale at a delivered price of $14.85 was the legal equivalent of a sale at $10.50 plus freight.[116] However, the Court rejected that argument, reasoning as follows:

> The construction urged ignores the commercial significance of selling at a delivered price. When a seller enters a competitive market with a standard article he must meet offerings from other sources. On goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the consignor under the bill of lading, … as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. With the rights of equities as between seller and purchaser it had and has no concern….[117]

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[115] Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533-34 (1918) (citations omitted).

[116] In *Sloss-Sheffield*, the Court also recognized that all shipments were made under a standard form of contract that applied to sales for future delivery in installments. The form contract contained a provision specifically addressing increases or decreases in the tariff rate, requiring the buyer to have the benefit of any decline or to pay any advances in the rate. Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 236-37 (1925).

[117] *Id*. at 237-38.

69. The Commission also rejects Complainants' interpretation of *McCarty Farms*. In that case, as in *Gabbert*, the owners of the commodity consigned it to agents who shipped on their behalf. The court in *McCarty Farms* found that the owners had standing to seek reparations, but declined to afford the "pass-on" theory the same effect it bears in antitrust proceedings. In the case now before the Commission, Complainants assert that the contracts and invoices show that they paid the tariff rates, but the Commission finds their status differs from that of the grain owners in *McCarty Farms*. In the instant case, Complainants did not hold title to the crude oil when the carrier received it. Although the *McCarty Farms* court did not require privity as a precondition to recovering reparations, the grain owners' status during the transit distinguishes their standing from that of Complainants here. As the Commission previously emphasized, Complainants merely purchased the crude oil subsequent to the transportation.[118]

70. Finally, the Commission rejects Complainants' interpretation of *Gaviota*. As the Commission explained in the February 18, 2004 Order, that case did not involve an award of reparations. In fact, in *Gaviota*, where the Producer Group sought reduced future rates as well as a refund of allegedly improper past rates, the Commission held only that the Producer Group had standing to file the complaint seeking reduced future rates. The Commission did not rule on the Producer Group's entitlement to refunds. In this respect, *Gaviota* and the February 18, 2004 Order are consistent with *Baer Bros*., in which the Supreme Court distinguished between the right to seek prospective relief and the right to reparations.

[118] In Nicola Stone & Myers Co. v. Louisville & Nashville R.R. Co., 14 ICC 199, 208-09 (1908), the ICC rejected the claim that the producer/consignor of the commodity could recover the transportation costs in the price it received for sale of the commodity to the public meant that the consignor sustained no damage. The ICC found that seeking the party actually damaged by the freight charges could lead "into another field of inquiry impossible of definite and satisfactory results and this could only be regarded as undertaking to deal with indefinite and remote consequences." Further, the ICC stated that, "[I]n making orders of reparations … [the ICC must] make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation."

2. Policy Considerations

a. Positions of the Parties

71. Complainants assert that it is often advantageous for them to purchase crude oil at the destination rather than purchasing it prior to shipment and paying the tariff rates directly to the carrier. In those cases, argue Complainants, it would be inefficient to ship the crude oil on a long haul solely to preserve their right to fair transportation rates. Complainants insist that a decision in this case limiting use of third-party shippers will lead to market inefficiencies.[119]

72. Complainants also contend that the Commission will serve the public interest by awarding reparations to firms that utilize third-party shippers. Complainants maintain that the firm on whose behalf shipments are made is the only one with an economic incentive to seek reparations. Further, continue Complainants, allowing pipelines to retain illegal revenues undermines the pipelines' incentive to comply with the ICA.

73. Express responds that "incentive rates" typically are available to all shippers willing to make the required long-term commitment. In fact, continues Express, it offered discounted rates to all interested shippers, including Complainants, during a new project open season. However, states Express, Complainants' decision to forego a direct relationship with the carriers and the security of guaranteed discounted rates stemmed from the Complainants' own commercial decisions. Express points out that the Commission previously recognized that the original shippers and those who decided not to make term commitments were not "similarly situated" under the ICA.[120]

74. Express points out that shippers assume many obligations under a pipeline's tariff, such as (1) duties concerning product quality, (2) compliance with the pipeline's tender and nomination requirements, (3) assumption of a lien for payment, (4) warranties of good title and financial ability, and (5) the obligation to maintain a "line fill balance." Correspondingly, continues Express, the shipper has certain rights, including *inter alia*, (1) performance of common carrier duties by the pipeline and (2) a guarantee of the quality of the product at delivery. Both Express and Frontier emphasize that the mutual obligations of the pipeline and the shipper do not bind a subsequent purchaser.

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[119] Complainants cite Sworn Declaration of Peter K. Ashton in Support of Big West Oil LLC and Chevron Products Company's Request for Rehearing, ¶ 7 (March 18, 2004).

[120] Express cites Express Pipeline Partnership, 76 FERC ¶ 61,245 (1996).

75. Further, argues Express, there is no evidence that the Commission's decision in the February 18, 2004 Order will free pipelines from their incentive to comply with the ICA and Commission regulations. Instead, assert Express and Frontier, the privity rule is consistent with the Commission's policy of relying on shipper/pipeline cooperation in establishing rates and settling Commission proceedings,[121] which would be hampered by a policy allowing subsequent third-party purchasers the same rights as shippers to file complaints and demand reparations.[122]

76. Express also challenges Complainant's assertion that the privity rule would discourage third-party shipments and thereby decrease pipeline throughput. Additionally, Express disputes the claim that prorationing forces purchasers to buy at the destination rather than shipping. Express explains that either a pipeline is full and the pipeline cannot increase efficiency, or the pipeline is not full, and Complainants could ship on their own account. Express also points out that a shipper can acquire term shipper rights by taking an assignment of rights from another shipper. Express maintains that many of the other concerns voiced by Complainants are speculative and unsupported.

77. Frontier and Express submit that the rule against reparations for third-party shipments serves a number of public policy goals, including: (1) avoiding the risk of multiple liabilities on the part of the carrier; (2) preventing endless and unproductive inquiries into the "economic incidence" of tariff rates beyond the party legally obligated to pay the rates; and (3) simplifying administration of the ICA by keeping the Commission's focus on the transaction (transportation under a tariff) that falls within its statutory jurisdiction, rather than the myriad of unregulated commercial transactions involved in buying and selling oil after it has been transported by a pipeline.[123]

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[121] Express cites, *e.g.*, 18 C.F.R. 342.4(c), 343.3(d) (2003).

[122] Frontier cites Trailblazer Pipeline Co., 106 FERC ¶ 61,034, at P 25 (2004); Sinclair Oil Corp. v. Rocky Mountain Pipeline System, LLC, 103 FERC ¶ 63,018 (2003); American Electric Power Service Corp., 98 FERC ¶ 61,156 at P 1 (2002); Southern Pacific Pipe Lines Partnership, L.P., 49 FERC ¶ 61,081 (1989).

[123] Frontier argues that mere policy reasons cannot justify the adoption of a rule of law that is inconsistent with the interpretation of the governing statute by the U.S. Supreme Court. *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); *see also* Norfolk Southern Railway Co. v. Shaklin, 529 U.S. 344, 356 (2000).

78. According to Frontier, the Supreme Court recognized in *Darnell-Taenzer* the importance of simplifying administration of the statute, stating that the alternative would be "the endlessness and futility of the effort to follow every transaction to its ultimate result."[124] Frontier also points out that the ICC observed early on that departing from the rule of privity would lead the Commission into the murky realm of indirect and remote consequences.[125]

79. Frontier contends that the face of a contract, even when supported by invoices, does not necessarily reflect where the economic burden of the tariff charge actually falls. According to Frontier, when the product is sold at the destination point, the transportation charge ordinarily will be part of the seller's cost structure, not the buyer's.[126] However, in other cases, explain Frontier and Express, the burden of the tariff charge may be shared between the seller and the buyer, because the seller may reduce or increase its selling price to reflect the value of providing the product at the destination market. Additionally, Frontier and Express contend that, even if a purchaser absorbs the transportation costs under its purchase contracts, the complex and dynamic nature of the crude oil market makes it difficult to determine who actually bears the transportation charges.[127]

80. Further, argues Frontier, the privity rule assures that the Commission's remedial processes are focused on the transaction over which the Commission has statutory jurisdiction, *i.e.*, transportation of oil by pipeline.[128] Finally, Frontier maintains that

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[124] Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534 (1918).

[125] Frontier cites Nicola, Stone & Myers v. Louisville & Nashville R.R., 14 ICC 199, 207-08 (1908).

[126] Frontier cites Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel and Iron Co., 269 U.S. 217, 238 (1925) ("On goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production.")

[127] Frontier contends that these are the considerations that underlie the Supreme Court's refusal to grant standing to indirect purchasers to claim damages in an antitrust context. *See* Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Illinois Brick Co. v. State of Illinois, 431 U.S.720 (1977).

[128] Frontier cites Rocky Mountain Natural Gas Co., 80 FERC ¶ 61,163, at 61,709 (1997); Transcontinental Gas Pipeline Corp., 43 FERC ¶ 61,207, at 61,542 (1988).

ample incentives exist for direct shippers to seek reparations.[129] For example, states Frontier, direct shippers typically will have a strong interest in seeking reparations because an excessive rate will raise the delivered price of the sellers' products in the marketplace.

81. Complainants counter that the problems alleged by Frontier and Express could be eliminated by providing notice to a shipper that an overcharge proceeding has been initiated by the firm on whose behalf the shipments were made. Complainants point out that the Commission's regulations already contain notice procedures, and the Commission could require shippers of record to intervene if they wish to claim reparations.

b. Commission Analysis

82. Complainants' asserted policy considerations for allowing reparations applicable to third-party shipments generally lack support and merit. Moreover, they would complicate unnecessarily the Commission's administration of the ICA. In contrast, Express and Frontier cite a variety of considerations that illustrate the practicality of the privity rule.

83. As the Commission found in the February 18, 2004 Order and confirms here, Complainants purchased crude oil at the destination. Thus, the tariff rates became part of the sellers' delivered prices.[130] The Commission will not establish a policy of attempting to isolate transportation costs so that it can grant reparations to a party that purchases a commodity at the destination or perhaps even to a subsequent purchaser that claims it bears the transportation costs.

84. The difficulties of isolating transportation costs in such situations can be illustrated easily. For example, if two sellers of crude oil offer it for sale at different prices following transportation on the same pipeline at the same rate on the same day, it would be problematic to attempt to determine whether the seller offering the lower price had absorbed a portion of the transportation rate or some other cost. Further, if a single purchaser acquired the crude oil at the same destination on different days when a single seller offered different prices to meet market conditions, one faces the complexity of

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[129] Frontier cites SFPP, L.P., Opinion No. 435, SFPP, L.P., 86 FERC ¶ 61,022 (1999); Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918); Adams v. Mills, 286 U.S. 397 (1932).

[130] *See* Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171, at P 26 (2004).

trying to determine what portions of the different sales prices are attributable to transportation. Moreover, a subsequent purchaser may acquire the crude oil at yet a different price and claim that it actually bore the expense of the transportation.

85. The privity rule developed under the ICA avoids these complexities. However, the Commission observes that the privity rule at issue here does not prohibit private agreements by shippers and pipelines to share responsibility for transportation or any other costs, nor does the rule bar judicial actions by a buyer to obtain some portion of any reparations that the Commission might award to the seller/shipper that paid the tariff rate to the carrier. Of course, any such potential agreements or actions are beyond the scope of the Commission's jurisdiction.

86. The Commission also finds no merit in Complainants' assertion that the privity rule will remove the pipelines' incentive to comply with the ICA and applicable regulations. Complainants' argument is unsupported and speculative and presumes a broad range of conduct that the Commission cannot presume. Likewise, the Commission rejects the call to require additional notice procedures. Adding additional steps to the existing administrative process is inconsistent with the Congressional mandate and Commission policy favoring simplified regulation of oil pipelines.

87. The Commission recognizes that refiners such as Complainants may find it financially advantageous from time-to-time to purchase crude oil at the destination rather than prior to shipment on the pipeline. However, such refiners cannot have it both ways. They cannot seek the benefit of reparations without having assumed the legal and financial obligations inherent in contracting directly with the pipeline for shipment on the system.

88. The Commission concludes that jurisdictional limitations, judicial and agency decisions, as well as commercial practicalities support the Commission's determination in the February 18, 2004 Order. Accordingly, the Commission denies rehearing and again rejects Complainants' claim for reparations applicable to shipments via third parties.

II. Revised Compliance Filing

89. On March 4, 2004, Frontier submitted its revised compliance filing as required by the February 18, 2004 Order. Frontier calculates the reparations due Complainants in accordance with the February 18, 2004 Order, subject to the outcome of its request for rehearing of that order. The Commission finds that Frontier has complied with the rulings in the February 18, 2004 Order. Frontier also has correctly pointed out that reparations should be computed from January 5, 1999, rather than from January 1, 1999. Accordingly, the Commission accepts the revised compliance filing.

The Commission orders:

(A) Rehearing and reconsideration of the February 18, 2004 Order are denied.

(B) Frontier's revised compliance filing is accepted. Within 15 days of the date of issuance of this order, Frontier must report to the Commission that it has paid reparations to Complainants as required by this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.