



**RAILROAD COMMISSION OF TEXAS**  
**HEARINGS DIVISION**  
**PROPOSAL FOR DECISION**

**OIL & GAS DOCKET NO. 20-0292777**

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**COMPLAINT OF TARGA LIQUIDS MARKETING AND TRADE LLC  
AGAINST WEST TEXAS LPG LIMITED PARTNERSHIP AS OWNER OF  
WEST TEXAS LPG PIPELINE SYSTEM**

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**APPEARANCES:**

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**PROCEDURAL HISTORY:**

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Heard By:

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Gene Montes, Hearings Examiner  
Christina Poole, Technical Examiner

Docket Reassigned:  
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John Dodson, Hearings Examiner  
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### **STATEMENT OF THE CASE**

The complainant in this proceeding, Targa Liquids Marketing & Trade, LLC, is a shipper of natural gas liquids on a pipeline system owned by the respondent, West Texas LPG Pipeline Limited Partnership, a common carrier. Prior to January 2014, certain pipeline tariffs that set rates for this pipeline were on file with the Railroad Commission. In December 2013, believing that it was no longer subject to the Commission's jurisdiction under Chapter 111 (Common Carrier Act) of the Natural Resources Code, West Texas LPG Pipeline Limited Partnership issued cancellation notices for its governing tariffs on file, effective January 1, 2014. Thereafter, West Texas LPG Pipeline Limited Partnership began charging rates for this pipeline under new tariffs, which the respondent did not file with the Commission for nearly 10 months. In its complaint, Targa Liquids Marketing & Trade, LLC, argues that common carrier tariffs are invalid unless filed with the Commission, and therefore all rates that it paid while the respondent's new tariffs remained unfiled were unauthorized and invalid. Targa Liquids Marketing & Trade, LLC, seeks reimbursement of approximately \$827,000, plus interest, that represents the difference between what it paid under the unfiled new tariffs and what it would have paid under the previous, cancelled tariffs during the 10-month period during which the new tariffs were not on file with the Commission.

In response, West Texas LPG Pipeline Limited Partnership argues that it was under no duty to file its new tariffs with the Commission because the Commission's jurisdiction under the Common Carrier Act does not extend to common carriers of natural gas liquids, and because there is no statute or Commission rule requiring common carriers to file their tariffs with the Commission.

There are no factual disputes in this proceeding. Rather, the parties ask the Commission to make legal determinations as to (1) whether West Texas LPG Pipeline Limited Partnership, as a common carrier of natural gas liquids, is subject to the Commission's jurisdiction under the Common Carrier Act, and (2) whether rates charged under West Texas LPG Pipeline Limited Partnership's unfiled new tariffs were valid. The parties submitted a joint evidentiary record, which includes six exhibits and stipulated facts, and briefings on the legal issues.

### **SUMMARY OF FINDINGS**

The Examiners find that (1) the Commission recently clarified that all common carriers are subject to all provisions of the Common Carrier Act, and therefore West Texas LPG Pipeline Limited Partnership, as a common carrier, is subject to all provisions of the Common Carrier Act and cannot avoid the Commission's jurisdiction to hear and determine the questions at issue in this proceeding, and (2) the rates charged under West Texas LPG Pipeline Limited Partnership's unfiled new tariffs were valid because neither the Common Carrier Act nor any Commission rule requires that pipeline tariffs be filed.

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## PROPOSAL FOR DECISION

### I. Factual and Procedural Background

Prior to December 2013, three tariffs on file with the Commission—Tariff Nos. 65, 94, and 96 (the “Cancelled Tariffs”)—governed the shipments of natural gas liquids (“NGLs”) on the West Texas LPG Pipeline System (“WTPL” or the “Pipeline”) between the Pipeline’s owner, West Texas LPG Pipeline Limited Partnership (“WTXP”), and shipper Targa Liquids Marketing and Trade LLC (“Targa” or the “Complainant”).<sup>1</sup> On December 19, 2013, WTXP filed with the Commission cancellation notices for the Cancelled Tariffs, with cancellation effective as of January 1, 2014.<sup>2</sup> On January 1, 2014, WTXP issued new tariffs for the Pipeline, labeled “Texas Common Carrier No. 1.0.0” (a rules sheet with general terms and conditions of service), “Texas Common Carrier No. 2.0.0” (a rate sheet with local and volume incentive rates), and “Texas Common Carrier No. 3.0.0” (a rate sheet with local rates) (collectively, the “New Tariffs”).<sup>3</sup> The New Tariffs were not filed with the Commission at the time.

On May 8, 2014, Targa sent a letter to the then-operator of the Pipeline, Chevron Pipeline Company (“Chevron”), informing Chevron that Targa believed that WTXP was required to file its New Tariffs with the Commission, objecting to the increased charges under the New Tariffs, and requesting that WTXP provide the legal basis for its actions by May 14, 2014.<sup>4</sup> On June 11, 2014, Chevron responded with its legal basis for canceling the Cancelled Tariffs and implementing the New Tariffs—because NGLs are not among the specifically listed materials in Chapter 111 (Common Carrier Act) of the Texas Natural Resources Code, WTXP was not subject to the requirements that apply to the types of pipelines that are regulated as common carriers under that chapter.<sup>5</sup>

On August 15, 2014, Targa filed a complaint against WTXP as owner of the Pipeline, alleging that WTXP had improperly charged rates to Targa under the New Tariffs because the New Tariffs were never filed with the Commission (the “Complaint”). The Commission docketed that matter as Oil and Gas Docket No. 20-0292777. On October 23, 2014, the Examiners then-assigned to this docket issued Examiners’ Letter No. 2, which adopted a joint proposed procedural schedule and set this matter for prehearing conference on October 30, 2014.

On November 7, 2014, the Examiners then-assigned to this docket issued Examiners’ Letter No. 3, which directed WTXP to charge the rate reflected in the Cancelled Tariffs pending

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<sup>1</sup> Joint Ex. 1, Stipulated Facts, Oil and Gas Docket No. 20-0292777, jointly filed by WTXP and Targa on November 21, 2014, and amended orally at the hearing on February 18, 2015 (“Stipulated Facts”) ¶¶ 1, 11.

<sup>2</sup> *Id.* ¶ 13; see also Joint Ex. 2, Letter to the Railroad Commission from Mary Anne Collins, regulatory manager for WTXP, dated December 11, 2013, and file-stamped December 19, 2013 (“December 11, 2013 Letter”).

<sup>3</sup> Joint Ex. 1 (Stipulated Facts) ¶ 14.

<sup>4</sup> Joint Ex. 3, Letter to Chevron from Steven Harris, counsel for Targa, dated May 8, 2014 (“May 8, 2014 Letter”).

<sup>5</sup> Joint Ex. 4, Letter to Targa from Rob McMillin, senior counsel for Chevron, dated June 11, 2014 (“June 11, 2014 Letter”).

resolution of this proceeding or until WTXP filed with the Commission its New Tariffs. On November 21, 2014, WTXP filed the New Tariffs with the following jurisdictional disclaimer on the cover pages:

This tariff is filed with the Texas Railroad Commission for the information of shippers and potential shippers of West Texas LPG Pipeline Limited Partnership, a Texas intrastate common carrier. By filing this tariff, West Texas LPG Pipeline Limited Partnership does not submit to the jurisdiction of the Texas Railroad Commission under Chapter 111 of the Texas Natural Resources Code.<sup>6</sup>

In December 2014, Oneok Partners, LP (“Oneok”) acquired Chevron’s interest in WTXP and began operating the Pipeline on behalf of WTXP.<sup>7</sup>

On November 14, 2014, WTXP appealed the November 7, 2014 interim ruling to the Commission. WTXP’s Motion for Rehearing was overruled as a matter of law on January 2, 2015, when the Commission took no action on it. Notice of hearing was issued on December 22, 2014, and the hearing on the merits was held on February 18, 2015. The evidentiary record in this docket consists of six exhibits, which were jointly submitted by the parties on November 21, 2014, and February 18, 2015, and admitted into evidence at the hearing on February 18, 2015, as orally modified at the hearing. The parties filed post-hearing briefs and post-hearing reply briefs on March 13, 2015, and April 6, 2015, respectively. No party has moved to intervene in this docket.

Subsequent to the hearing on the merits and post-hearing submissions by the parties, the docket was reassigned to the undersigned Examiners. The undersigned Examiners have read the record.

## **II. Jurisdiction and Notice**

The Commission has jurisdiction over any person on any question relating to the enforcement of Subchapters C (Public Utilities), D (Common Purchasers), and F (Rates) of TEX. NAT. RES. CODE Chapter 111, along with Sections 111.004, 111.025, 111.131 through 111.133, 111.136, 111.137, and 111.140 of this code.<sup>8</sup> The Commission has jurisdiction over the issues raised in Targa’s Complaint, except as noted below. The statutes and rules involved in this proceeding include, but are not limited to, all sections of TEX. NAT. RES. CODE Chapters 81 and 111, all Commission rules in 16 TEX. ADMIN. CODE, Chapter 1, and 16 TEX. ADMIN. CODE §§ 3.71 and 3.107.

A Notice of Hearing was issued in this Docket on December 22, 2014, and January 9, 2015, to all parties of record and satisfied all of the statutory and Commission requirements of 16

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<sup>6</sup> Joint Ex. 5 (New Tariffs, filed with the Commission on November 21, 2014), p. 1.

<sup>7</sup> Joint Ex. 1 (Stipulated Facts) ¶ 2.

<sup>8</sup> Tex. Nat. Res. Code § 111.221 (Complaints; Jurisdiction to Hear Complaints).

TEX. ADMIN. CODE § 1.45 and TEX. GOV'T CODE ANN. § 2001.052. There are no contested issues of notice in this proceeding.

### III. Discussion of the Evidence

WTPX and Targa seek legal, not factual, determinations in this proceeding. There are no disputed issues of fact. The evidentiary record in this docket consists of six exhibits, which were jointly submitted by the parties on November 21, 2014, and February 18, 2015, and admitted into evidence, as orally modified, at the hearing on February 18, 2015.<sup>9</sup>

WTPX owns the Pipeline, which is approximately 2,245 miles in length and traverses 47 counties throughout the State of Texas.<sup>10</sup> Through November 2014, Chevron operated the Pipeline on behalf of WTPX.<sup>11</sup> Chevron (directly or through its affiliates) also owned an 80 percent interest in WTPX, which Chevron contracted to sell to affiliates of Oneok, subject to certain closing conditions.<sup>12</sup> Since December 2014, Oneok has owned an 80 percent interest in WTPX and operates the Pipeline on behalf of WTPX.<sup>13</sup>

The applicable T-4 permit number is 00963.<sup>14</sup> That form T-4 permit application represents in Section 1(d) that the Pipeline will be operated as a common carrier rather than a private line, in Section 1(e) that it does use common carrier rights-of-way, and in Section 1(f) that the Pipeline will carry liquids purchased and transported for others.<sup>15</sup>

The Pipeline is a common carrier pipeline, engaged in the business of transporting NGLs for hire from one place to another within the State of Texas.<sup>16</sup> WTPX claims that it has the right to use, and in the past has used, eminent domain to acquire rights-of-way for the Pipeline and claims the right to lay, maintain, and operate the Pipeline across, and under public streams and

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<sup>9</sup> Joint Ex. 1 (Stipulated Facts and attached exhibits: (1) a map of the Pipeline; (2) WTPX's Form T-4 application, filed with the Commission on April 12, 2011; (3) Required Documentation of Eminent Domain Authority in Texas form, filed by WTPX with the Texas Comptroller of Public Accounts on December 19, 2012; (4) R.R.C. Tariff No. 65 (titled "General Rules and Regulations Tariff," effective February 1, 2008), R.R.C. Tariff No. 94 (titled "Local and Volume Incentive Tariff," effective August 1, 2012), and R.R.C. Tariff No. 96 (titled "Local Tariff," effective April 15, 2013); (5) Cancellation notices for R.R.C. Tariff Nos. 65, 94, and 96 (effective January 1, 2014), all filed with the Commission on December 19, 2013; and (6) Common Carrier Tariff No. 1.0.0 (titled "General Terms and Conditions of Service Rules Sheet," replacing R.R.C. Tariff No. 65), Common Carrier Tariff No. 2.0.0 (titled "Local and Volume Incentive Rate Sheet," replacing R.R.C. Tariff No. 94), and Common Carrier Tariff No. 3.0.0 (titled "Local Rate Sheet," replacing R.R.C. Tariff No. 96), all effective January 1, 2014); Joint Ex. 2 (December 11, 2013 Letter); Joint Ex. 3 (May 8, 2014 Letter); Joint Ex. 4 (June 11, 2014 Letter); Joint Ex. 5 (New Tariffs, filed with the Commission on November 21, 2014); and Joint Ex. 6 (map of the Pipeline).

<sup>10</sup> Joint Ex. 1 (Stipulated Facts) ¶ 1; *see also* Joint Ex. 1, exh. 1 (map of the Pipeline).

<sup>11</sup> Joint Ex. 1 (Stipulated Facts) ¶ 2 (as orally modified at the February 18, 2015 hearing).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 3.

<sup>15</sup> *Id.* ¶ 4; *see also* Joint Ex. 1, exh. 2 (WTPX's Form T-4 application, filed with the Commission on April 12, 2011).

<sup>16</sup> Joint Ex. 1 (Stipulated Facts) ¶ 5.

highways in this State.<sup>17</sup> The Pipeline, or segments thereof, has transported crude petroleum, refined products, and most recently (and currently), Y-grade NGLs. Crude petroleum transportation service began in approximately 1904; refined products service began in approximately 1953; and Y-grade NGLs service began in approximately 1957.<sup>18</sup> The Pipeline currently transports only Y-grade NGLs.<sup>19</sup> The Pipeline does not transport coal (or any mixture of coal), carbon dioxide or hydrogen, feedstocks for carbon gasification, or any derivative products of carbon gasification.<sup>20</sup>

On December 19, 2012, WTXP filed its “Required Documentation of Eminent Domain Authority in Texas” document with the Texas Comptroller of Public Accounts, citing the following as the applicable provisions of state law that grant it eminent domain authority: Tex. Util. Code Sec. 186.054 (common carriers, energy transporters, railroad right of way); Tex. Nat. Res. Code Sec. 111.019 (common carriers); Tex. Bus. Org. Code Sec. 2.105 (common carriers); Tex. Nat. Res. Code Secs. 111.002 and 111.003 (definition of common carrier); Tex. Nat. Res. Code Sec. 11.079 (lessees of school fund land); Texas Constitution Article 1, Sec. 17.<sup>21</sup>

WTXP currently provides Targa and other shippers (whose identities WTXP maintains are to be kept confidential) intrastate transportation services for NGLs from West Texas to Mont Belvieu, Texas.<sup>22</sup> Targa is currently the largest intrastate shipper of NGLs on the Pipeline.<sup>23</sup>

Until December 2013, WTXP’s filed tariffs—R.R.C. Tariff Nos. 65, 94, and 96—as filed with the Commission and published on Chevron’s website, governed NGL shipments by Targa and similarly situated shippers on the Pipeline.<sup>24</sup> These tariffs could previously be obtained by requesting a copy from the Commission or by downloading a copy from Chevron’s website, <http://www.chevronpipeline.com/customers/shippers/tariffs.aspx>.<sup>25</sup> These tariffs were not previously published by the Commission.<sup>26</sup> On December 19, 2013, WTXP filed cancellation notices with the Commission for these tariffs, with cancellation effective as of January 1, 2014.<sup>27</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* ¶ 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 7.

<sup>21</sup> *Id.* ¶ 8; *see also* Joint Ex. 1, exh. 3 (Required Documentation of Eminent Domain Authority in Texas form, filed by WTXP with the Texas Comptroller of Public Accounts on December 19, 2012).

<sup>22</sup> Joint Ex. 1 (Stipulated Facts) ¶ 9.

<sup>23</sup> *Id.* ¶ 10.

<sup>24</sup> *Id.* ¶ 11; *see also* Joint Ex. 1, exh. 4 (R.R.C. Tariff No. 65 (titled “General Rules and Regulations Tariff,” effective February 1, 2008), R.R.C. Tariff No. 94 (titled “Local and Volume Incentive Tariff,” effective August 1, 2012), and R.R.C. Tariff No. 96 (titled “Local Tariff,” effective April 15, 2013)).

<sup>25</sup> Joint Ex. 1 (Stipulated Facts) ¶ 12.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ¶ 13; *see also* Joint Ex. 1, exh. 5 (Cancellation notices for R.R.C. Tariff Nos. 65, 94, and 96 (effective January 1, 2014), all filed with the Commission on December 19, 2013).

On January 1, 2014, WTXP issued new tariffs for the Pipeline, labeled “Texas Common Carrier No. 1.0.0” (a rules sheet with general terms and conditions of service), “Texas Common Carrier No. 2.0.0” (a rate sheet with local and volume incentive rates), and “Texas Common Carrier No. 3.0.0” (a rate sheet with local rates).<sup>28</sup> The New Tariffs were not filed with the Commission.<sup>29</sup> Effective January 1, 2014, the New Tariffs were posted to and available on the Chevron website, [http://www.chevronpipeline.com/customers\\_shippers/tariffs.aspx](http://www.chevronpipeline.com/customers_shippers/tariffs.aspx).<sup>30</sup> On November 21, 2014, WTXP filed its New Tariffs with the Commission.<sup>31</sup>

On January 1, 2014, WTXP increased its intrastate pipeline rates under the New Tariffs above what those rates had been in the Cancelled Tariffs.<sup>32</sup> WTXP sent notice to Targa of the changes and made the revised New Tariffs available on Chevron’s website but did not file the revised New Tariffs with the Commission.<sup>33</sup> On July 1, 2014, WTXP increased certain rates under one of the New Tariffs that addresses local volume and incentive rates, sent notice to Targa of the changes, and made the revised tariff available on Chevron’s website.<sup>34</sup> WTXP did not file the revised tariff with the Commission.<sup>35</sup>

Targa has shipped NGLs on the Pipeline pursuant to the terms of the New Tariffs and paid the rates contained within the New Tariffs.<sup>36</sup> The difference between what Targa would have been charged for service during the period from January 1, 2014, through October 31, 2014, under the Cancelled Tariffs and under the subsequent New Tariffs—ultimately filed on November 21, 2014—is approximately \$827,000, excluding interest.<sup>37</sup>

No shipper on the Pipeline (other than Targa) has filed a complaint at the Commission related to the New Tariffs.<sup>38</sup>

#### IV. Targa’s Complaint and Requested Relief

Targa complains that all rate charges recovered by WTXP under the New Tariffs during the 10-month period while the New Tariffs were not on file with the Commission are invalid. Targa argues that the rate amounts under the New Tariffs are illegitimate “since they were not

<sup>28</sup> Joint Ex. 1 (Stipulated Facts) ¶ 14; *see also* Joint Ex. 1, exh. 6 (Common Carrier Tariff No. 1.0.0 (titled “General Terms and Conditions of Service Rules Sheet,” replacing R.R.C. Tariff No. 65), Common Carrier Tariff No. 2.0.0 (titled “Local and Volume Incentive Rate Sheet,” replacing R.R.C. Tariff No. 94), and Common Carrier Tariff No. 3.0.0 (titled “Local Rate Sheet,” replacing R.R.C. Tariff No. 96), all effective January 1, 2014).

<sup>29</sup> Joint Ex. 1 (Stipulated Facts) ¶ 14.

<sup>30</sup> *Id.* ¶ 14 (as orally modified at the February 18, 2015 hearing).

<sup>31</sup> *Id.* ¶ 14.

<sup>32</sup> *Id.* ¶ 15.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* ¶ 16.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* ¶ 17.

<sup>37</sup> *Id.* ¶ 18.

<sup>38</sup> *Id.* ¶ 19.



filed with or authorized by the Commission.”<sup>39</sup> Targa requests that the Commission order “reparation or reimbursement of excess charges paid over and above the last effective tariffed rates” pursuant to Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges) of Subchapter F (Rates) of the Common Carrier Act.<sup>40</sup> Targa also requests that the Commission find that WTXP cannot simply opt-out of its status as a regulated common carrier pipeline in this State.<sup>41</sup> Finally, Targa requests that the Commission “grant Targa such further relief to which it is justly entitled.”<sup>42</sup>

In its post-hearing briefings, Targa further requests that the Commission (1) find that WTXP’s online publication of the New Tariffs was defective,<sup>43</sup> and (2) require WTXP to re-file its tariffs at the conclusion of this matter without the jurisdictional disclaimer on the cover pages of its presently-filed New Tariffs.<sup>44</sup>

## V. Positions of the Parties

The principal issues in this proceeding are whether WTXP, as a common carrier of NGLs, is subject to the Commission’s jurisdiction under the Common Carrier Act and whether common carrier tariffs are required to be filed with the Commission to be valid.

### A. Jurisdiction Over WTXP

#### 1. Targa’s Position

Targa argues that the Commission has full jurisdiction over WTXP’s rates and WTXP cannot choose to opt out.<sup>45</sup> In support, Targa notes that the Pipeline originally was a common carrier under Section 111.002 (Common Carriers Under Chapter) because it carried crude petroleum for its first 50 years.<sup>46</sup> As a common carrier of crude petroleum during this time, the Pipeline utilized eminent domain rights pursuant to Section 111.020 (Pipeline on Public Stream or Highway).<sup>47</sup> Specifically, Section 111.020(d) allows a pipeline to obtain the eminent domain rights of a common carrier pipeline by subjecting itself to the Commission’s jurisdiction and

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<sup>39</sup> Complaint, p. 2.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Targa’s Post-Hearing Brief, filed March 13, 2015 (“Targa Brief”), pp. 14-16.

<sup>44</sup> Targa Brief, pp. 2, 18; see also Joint Ex. 5 (New Tariffs, filed with the Commission on November 21, 2014), p. 1 (containing the following disclaimer: “This tariff is filed with the Texas Railroad Commission for the information of shippers and potential shippers of West Texas LPG Pipeline Limited Partnership, a Texas intrastate common carrier. By filing this tariff, West Texas LPG Pipeline Limited Partnership does not submit to the jurisdiction of the Texas Railroad Commission under Chapter 111 of the Texas Natural Resources Code.”).

<sup>45</sup> See Targa Brief, pp. 5-10; see also Targa’s Post-Hearing Reply Brief, filed April 6, 2015 (“Targa Reply Brief”), pp. 4-6.

<sup>46</sup> Targa Brief, pp. 5-7.

<sup>47</sup> *Id.*; see also Targa Reply Brief, pp. 4-5.

subjecting itself to the common carrier duties and responsibilities of the Common Carrier Act.<sup>48</sup> Targa states that WTXP has not put forward any authority to suggest that the Pipeline ever lost that status when it converted to petroleum products, and therefore the Commission could reasonably conclude that the Pipeline has always been a common carrier subject to all of the requirements of the Common Carrier Act.<sup>49</sup>

Targa also points out that, after ceasing to transport crude petroleum, the Pipeline continued to subject itself to the jurisdiction of the Commission by submitting numerous T-4 and T-4C filings to the Commission over the years on behalf of the Pipeline, with each T-4 filing since 1977 stating that the Pipeline would indeed “use any public highway or road, railroad, public utility or other common carrier right of way.”<sup>50</sup> Targa acknowledges WTXP’s argument that WTXP may have eminent domain authority outside the Common Carrier Act under Tex. Bus. Org. Code § 2.105 (Additional Powers of Certain Pipeline Business),<sup>51</sup> but maintains that this fact does not allow the Pipeline to escape its common carrier duties.<sup>52</sup> Thus, because WTXP continues to subject itself to the jurisdiction of the Commission, it is subject to the Commission’s jurisdiction for the entire Common Carrier Act, including the (Subchapter F) rate provisions.<sup>53</sup>

Targa notes that the Commission already has clarified in a recent docket that all provisions of the Common Carrier Act apply to all common carrier pipelines, regardless of the product transported.<sup>54</sup> In *Eastman Chemical Company v. Westlake Pipeline*, the Commission found that it had common carrier jurisdiction over a petroleum products pipeline, meaning that the Commission could determine all aspects of the complaint that a shipper filed against a common carrier ethylene pipeline, including discrimination and rates.<sup>55</sup> Lastly, Targa cites a Texas Supreme Court case, where the Supreme Court stated that common carriers are subject to the “common carrier regime” when accepting the power of eminent domain.<sup>56</sup> Targa construes

<sup>48</sup> See Tex. Nat. Res. Code § 111.020(d) (Pipeline on Public Stream or Highway) (“A person may acquire the right conferred in this section by filing with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.”); see also Targa Reply Brief, p. 5.

<sup>49</sup> Targa Brief, p. 6.

<sup>50</sup> *Id.*; see also Joint Ex. 1 (Stipulated Facts), exh. 2 (WTXP’s Form T-4 application, filed with the Commission on April 12, 2011).

<sup>51</sup> Tex. Bus. Org. Code § 2.105 (“In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller’s earth, sand, clay, liquefied minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.”).

<sup>52</sup> Targa Brief, pp. 8-9.

<sup>53</sup> *Id.*, pp. 6-10.

<sup>54</sup> See GUD No. 10296, *Complaint Filed by Eastman Chemical Company Against Westlake Ethylene Pipeline Corporation (Westlake Pipeline) Regarding Westlake Pipeline’s System T-4 Permit No. 05253*, Final Order (Dec. 9, 2014) (the “GUD No. 10296 Final Order”), p. 7 (“As a common carrier Westlake Pipeline is subject to all provisions of the Common Carrier Act, Tex. Nat. Res. Code Ann. §§ 111.002, 111.003, 111.011-111.025, 111.131, 111.133-111.142, 111.181-111.190, 111.121-111.127, & 111.261-111.262.”).

<sup>55</sup> GUD No. 10296 Final Order; see also Targa Brief, p. 9.

<sup>56</sup> Targa Brief, pp. 7-9 (citing *Texas Rice Land Partners, Ltd., v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 197 (Tex. 2012)).

the Supreme Court's "common carrier regime" terminology to refer to the "entire bundle of common carrier requirements" found in the Common Carrier Act.<sup>57</sup>

## 2. WTXP's Position

WTXP argues that, as a common carrier of NGL liquids, it is not subject to the rate-making provisions of the Common Carrier Act and therefore the Commission lacks jurisdiction over WTXP to require it to file its tariffs.<sup>58</sup>

The entire 10-month period during which WTXP did not file its New Tariffs with the Commission occurred prior to the Commission's December 2014 determination that all provisions of the Common Carrier Act apply to all common carriers. WTXP has maintained from the start of this proceeding that its decision not to file was informed in part by a May 2013 Beaumont Court of Appeals decision where that court determined that NGLs are not included in the term "crude petroleum" and that pipelines carrying NGLs are not included in the definition of "common carrier" found in Tex. Nat. Res. Code §§ 111.002 and 111.003.<sup>59</sup> In this proceeding, WTXP acknowledges that it is a common carrier under Texas law and therefore subject to the jurisdiction of the Commission pursuant to Tex. Nat. Res. Code § 81.051.<sup>60</sup> As such, WTXP acknowledges that the Commission has authority to require WTXP to file for a T-4 permit, to obtain an operator number, to file financial assurance, and to comply with the Commission's safety regulations.<sup>61</sup> However, WTXP disputes that the Commission has the authority to require the filing of tariffs and to regulate WTXP's rates because, WTXP argues, WTXP is not a common carrier subject to the Common Carrier Act because NGLs are not among the products specifically named in Section 111.002 (Common Carriers Under Chapter) of the Common Carrier Act.<sup>62</sup> Relying on the language of Section 111.002 and also on the 2013 Beaumont Court of Appeals decision where that court concluded that "the Legislature did not conflate crude petroleum and all of its potential by-products,"<sup>63</sup> WTXP argues that it is not subject to the Common Carrier Act because WTXP transports NGLs and not crude petroleum.<sup>64</sup>

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<sup>57</sup> Targa Brief, pp. 9-10.

<sup>58</sup> See West Texas LPG Pipeline Limited Partnership's Post-Hearing Brief, filed March 13, 2015 ("WTXP Brief"), pp. 5-9; see also West Texas LPG Pipeline Limited Partnership's Post-Hearing Reply Brief, filed April 6, 2015 ("WTXP Reply Brief"), pp. 2-6.

<sup>59</sup> WTXP's Response to Targa's Complaint, filed September 4, 2014 ("WTXP Response"), p. 2 (citing *Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd.*, 404 S.W.3d 754, 759 (Tex. App. – Beaumont 2013, no pet.)).

<sup>60</sup> Tex. Nat. Res. Code § 81.052(a)(3) ("The commission has jurisdiction over all persons owning or operating pipelines in Texas") and (b) ("Persons listed in Subsection (a) of this section and their pipelines and oil and gas wells are subject to the jurisdiction conferred by law on the commission.").

<sup>61</sup> WTXP Response, p. 3.

<sup>62</sup> *Id.*, p. 4 ("Under [Section 111.002's] plain language, Chapter 111 applies to persons who own, operate, or manage a pipeline to transport to or for the public for hire one or more of the products specifically identified therein: crude petroleum; coal in whatever form; carbon dioxide or hydrogen; and products related to coal gasification.") (internal cites omitted).

<sup>63</sup> *Crosstex*, 404 S.W.3d at 759.

<sup>64</sup> WTXP Response, pp. 3-4; see also WTXP Brief, pp. 5-7.

In support of its argument that it is not subject to the provisions of the Common Carrier Act, WTXP also argues that its eminent domain authority is derived not from the Common Carrier Act, but rather from Tex. Bus. Org. Code § 2.105 (Additional Powers of Certain Pipeline Businesses),<sup>65</sup> which WTXP argues specifically incorporates language from the Common Carrier Act but does not apply the Common Carrier Act as a whole.<sup>66</sup> Acquiring the Common Carrier Act's eminent domain rights and powers via Tex. Bus. Org. Code § 2.105 does not, WTXP argues, burden WTXP with all the rest of the duties and obligations under the rest of the Common Carrier Act, including the regulation of rates under Subchapter F (Rates), Sections 111.181-111.190.<sup>67</sup> Rather, WTXP argues that, at most, it should be subject to only those provisions of the Common Carrier Act that apply to "common carriers" generally and not to the rate-setting provisions under Subchapter F (Rates), which WTXP contends expressly limits its application to common carriers of crude petroleum only.<sup>68</sup>

Subsequent to WTXP filing its response to Targa's Complaint on September 4, 2014, the Commission determined in a different docket that common carriers are "subject to all provisions of the Common Carrier Act," including the rate-setting provisions under Subchapter F (Rates), Sections 111.181-111.190.<sup>69</sup> In that docket, the Commission determined that a pipeline transporting ethylene was subject to all provisions of the Common Carrier Act despite its transported product—ethylene—not being among those listed in Section 111.002 (Common Carriers Under Chapter).<sup>70</sup> Following the decision by the Commission in that docket, WTXP acknowledged the Commission's determination in that docket yet maintained its position to the contrary in this proceeding.<sup>71</sup>

### 3. *Examiners' Findings*

Whether WTXP, as a common carrier of a product not listed in Section 111.002 (Common Carriers Under Chapter), is subject to the Commission's jurisdiction under the Common Carrier Act is a principal point of disagreement between Targa and WTXP. The

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<sup>65</sup> Tex. Bus. Org. Code § 2.105 ("In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.").

<sup>66</sup> WTXP Response, pp. 4-7; WTXP Brief, pp. 6-7.

<sup>67</sup> WTXP Brief, p. 7.

<sup>68</sup> *Id.*, pp. 8-9 (citing Tex. Nat. Res. Code § 111.181 (Establishing and Promulgating Rates) ("The commission shall establish and promulgate rates of charges for gathering, transporting, loading, and delivering *crude petroleum* by common carriers in this state and for use of storage facilities necessarily incident to this transportation.")) (emphasis in original).

<sup>69</sup> GUD No. 10296 Final Order, p. 7 ("As a common carrier Westlake Pipeline is subject to all provisions of the Common Carrier Act, Tex. Nat. Res. Code Ann. §§ 111.002, 111.003, 111.011-111.025, 111.131, 111.133-111.142, 111.181-111.190, 111.121-111.127, & 111.261-111.262.").

<sup>70</sup> See GUD 10296 Final Order.

<sup>71</sup> WTXP Brief, p. 5 ("While aware that the Commission has recently ruled otherwise, WTXP preserves its argument that it is not subject to Chapter 111 of the Natural Resources Code.").

Commission already has determined this issue in a previous docket.<sup>72</sup> In *Eastman Chemical Company v. Westlake Pipeline*, the Commission clarified that all sections of the Common Carrier Act apply to all common carriers, regardless of the product transported.<sup>73</sup> Accordingly, and with acknowledgement that WTXP has preserved its arguments to the contrary, the Examiners find that the Commission has jurisdiction over WTXP with respect to all sections of the Common Carrier Act, including those relevant to this proceeding.

## **B. Whether Rates Charged Under the Unfiled New Tariffs Were Valid**

### ***1. Targa's Position***

Citing the common-law “filed-rate doctrine,” Targa argues that a common carrier pipeline can charge only those rates that are in a “properly filed tariff.”<sup>74</sup> Targa argues that WTXP was required by statute under the Common Carrier Act to file its New Tariffs with the Commission, and that failure to do so rendered the New Tariffs invalid while they remained unfiled. Since Targa paid the rates under the New Tariffs while they remained unfiled, Targa requests reimbursement pursuant to Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges) of Subchapter F (Rates) of the Common Carrier Act, totalling approximately \$827,000 in overcharges—plus interest—that is the difference between what Targa would have been charged for service during the period from January 1, 2014, through October 31, 2014, under the Cancelled Tariffs and under the subsequent New Tariffs.<sup>75</sup>

Targa relies on the filed-rate doctrine as the legal basis for its requested reimbursement. Targa presents the filed-rate doctrine to the Commission as follows: when tariffs are filed with a regulatory body, they govern the relationship between the regulated entity and its customers<sup>76</sup>; raising rates without going through the proper statutory procedures is unlawful and a deviation from filed rates is not permitted upon any pretext<sup>77</sup>; customers of a regulated entity have an implied contract that persists until the entity follows the statutory procedures for raising the rates<sup>78</sup>; the policy goals of the doctrine are to preserve an administrative agency’s primary jurisdiction over reasonableness of rates and at the same time to ensure that regulated entities charge only those rates of which the agency has been made cognizant<sup>79</sup>; and the doctrine applies

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<sup>72</sup> See GUD No. 10296 Final Order, p. 7 (“As a common carrier Westlake Pipeline is subject to all provisions of the Common Carrier Act, Tex. Nat. Res. Code Ann. §§ 111.002, 111.003, 111.011-111.025, 111.131, 111.133-111.142, 111.181-111.190, 111.121-111.127, & 111.261-111.262.”).

<sup>73</sup> *Id.*

<sup>74</sup> Targa Brief, pp. 11-14.

<sup>75</sup> *Id.*, pp. 16-18; see also Joint Ex. 1 (Stipulated Facts) ¶ 18.

<sup>76</sup> Targa Brief, p. 11 (citing *Entex v. Railroad Comm’n of Texas*, 18 S.W.3d 858, 863 (Tex. App.—Austin 2000, pet. denied)).

<sup>77</sup> *Id.*, p. 11 (citing *Entex*, 18 S.W.3d at 865 and *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1998)).

<sup>78</sup> *Id.*, p. 11 (citing *AT&T*, 524 U.S. at 222).

<sup>79</sup> *Id.*, pp. 11-12 (citing *City of Girard, Kan. v. FERC*, 790 F.2d 919, 922 (D.C. Cir. 1986)).

when state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates.<sup>80</sup>

In support of its argument that any rates charged under the unfiled New Tariffs were invalid under the filed-rate doctrine, Targa notes that the Examiners who were previously assigned to this docket made an interim ruling directing WTXP to charge the rate reflected in the Cancelled Tariffs pending resolution of this proceeding or until WTXP filed with the Commission its New Tariffs.<sup>81</sup> In making that ruling, the previous Examiners cited a case involving a gas utility in which a Texas court stated that regulated entities may not charge rates or provide services “other than those properly filed with the appropriate regulatory authority.”<sup>82</sup>

Targa also argues that WTXP violated the Common Carrier Act by not filing its New Tariffs with the Commission. Section 111.014 (Publication of Tariffs) states, in its entirety: “Common Carriers shall make and publish their tariffs under rules prescribed by the Commission.”<sup>83</sup> Paragraph 21 of Commission Rule 3.71 (Pipeline Tariffs) states, in its entirety: “Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline is requested to file one copy with the commission.”<sup>84</sup> Targa argues that Section 111.014 and Commission Rule 3.71(21), read together, make filing common carrier tariffs with the Commission mandatory, not optional.<sup>85</sup> Targa points to the use of the term “file” in relation to tariffs or rates elsewhere in the Common Carrier Act as evidence that the Legislature expected pipeline common carriers to file their tariffs, whether the Commission “requested” them to or not.<sup>86</sup> Targa similarly points to the use of the term “file” twice in relation to tariffs or rates in Commission Rule 3.71 as evidence of the Commission’s understanding that the language “make and publish” found in Section 111.014 means a pipeline must file its tariff.<sup>87</sup>

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<sup>80</sup> *Id.*, p. 12 (citing *Sw. Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 693 (Tex. App. 1996)).

<sup>81</sup> Examiners’ Letter No. 3, issued November 7, 2014 (“Examiners’ Letter No. 3”), p. 3.

<sup>82</sup> *Id.*, p. 3 (citing *Entex*, 18 S.W.3d at 862-63).

<sup>83</sup> Tex. Nat. Res. Code § 111.014 (Publication of Tariffs).

<sup>84</sup> 16 Tex. Admin. Code § 3.71(21).

<sup>85</sup> Targa Brief, pp. 13-14; *see also* Targa Reply Brief, pp. 6-8.

<sup>86</sup> Targa Brief, p. 14 (emphasis in original); *see also* Tex. Nat. Res. Code §§ 111.185 (Temporary Rates) (“If a common carrier makes application or files a tariff to establish a new rate on either a new or old line, a temporary rate may be placed into effect immediately on filing the tariff with the commission.”), 111.186 (Reparation and Reimbursement) (“If rates have been filed, each shipper who pays these filed rates is entitled to reparation or reimbursement of all excess rates or transportation charges paid over and above the rate that is finally determined on the shipments.”), and 111.187 (Reimbursement of Excess Charges) (“If a rate is filed by a common carrier and complaint against the rate or petition to reduce the rate is filed by a shipper, and the complaint is sustained in whole or part, all shippers who have paid the rates filed by the common carrier are entitled to reparation or reimbursement of all excess transportation charges paid over and above the proper rate as finally determined on all shipments made after the date of the filing of the complaint.”).

<sup>87</sup> Targa Reply Brief, p. 7; *see also* 16 Tex. Admin. Code § 3.71(8) (Gathering Charges) (“Tariffs to be filed by a pipeline shall specify separately the charges for gathering of the oil, for transportation, and for delivery.”) and 3.71(21) (“Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline is requested to file one copy with the commission.”).

In its post-hearing brief, Targa argued for the first time in this proceeding that WTXP's publication of its New Tariffs on the website of the Pipeline's operator was deficient because Commission rules do not expressly provide for the internet publication of tariffs.<sup>88</sup> Also for the first time in its post-hearing brief, Targa requested that the Commission require WTXP to re-file its New Tariffs at the conclusion of this matter without the jurisdictional disclaimer that WTXP placed on the cover pages of the New Tariffs, filed with the Commission on November 21, 2014.<sup>89</sup>

## 2. WTXP's Position

WTXP argues that there is no requirement that common carriers file a tariff with the Commission and that the filed-rate doctrine is not applicable in this proceeding.<sup>90</sup> WTXP points to the plain language of the Common Carrier Act, which contains no express requirement for filing tariffs, and to Commission Rule 3.71(21), which states that common carriers are "requested" to file, as determinative that pipeline tariffs may be filed, but are not required to be filed.<sup>91</sup> With respect to Section 111.014 (Publication of Tariffs), WTXP argues that the operative language is "publish" and concedes that, traditionally, common carriers have filed those tariffs with the Commission.<sup>92</sup> WTXP argues, however, that regardless of what—according to Targa—the Legislature "intended," there is no clear filing requirement in Section 111.014 and therefore it would be unfair for the Commission to give Targa an \$827,000 "windfall" for a complaint based solely on a procedural technicality and not on the reasonableness of the rates.<sup>93</sup>

Regarding Commission Rule 3.71(21), WTXP argues that the phrase "each pipeline is requested" is fundamentally different from "the pipeline shall" and that the absence of any mandatory language is meaningful.<sup>94</sup> WTXP notes the contrast in the language of Commission Rule 3.71(21)—"requested"—with the language of other rules in the same section: "[T]he pipeline *shall* give the shipper a run ticket..."; "[T]he pipeline *shall* be apportioned..."; "[E]ach pipeline *shall* immediately notify..."; and "[E]ach pipeline *shall* post and publish..."<sup>95</sup> WTXP asserts that it found no precedent at the Commission or elsewhere interpreting the words "is requested" to mean "shall" or "is required."<sup>96</sup> WTXP offers that if the Commission wants to clarify that Commission Rule 3.71(21) *requires* the filing of a tariff, it may do so or it may amend Commission Rule 3.71(21) to contain mandatory language such as the "shall" used elsewhere in Commission Rule 3.71.<sup>97</sup> WTXP further offers that the Commission can resolve

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<sup>88</sup> See Targa Brief, pp. 14-16.

<sup>89</sup> *Id.*, pp. 2, 18.

<sup>90</sup> WTXP Brief, pp. 3-5; *see also* WTXP Reply Brief, pp. 6-8.

<sup>91</sup> *Id.*

<sup>92</sup> WTXP Brief, p. 4.

<sup>93</sup> WTXP Reply Brief, pp. 8, 13.

<sup>94</sup> WTXP Brief, p. 4; *see also* WTXP Reply Brief, p. 8.

<sup>95</sup> WTXP Brief, p. 4 (emphasis in original) (citing Commission Rules 3.71(1), 3.71(16), 3.71(19)(A), and 3.71(20)).

<sup>96</sup> *Id.*, p. 4.

<sup>97</sup> *Id.*

this Complaint by simply acknowledging the plain, unambiguous language of the applicable law, which requires that tariffs be *published*, but merely requests that they be *filed*, and if the Commission determines that the language actually requires filing then it can make that clarification without unjustly enriching Targa.<sup>98</sup>

WTXP also argues that the filed-rate doctrine is not applicable in this proceeding. WTXP argues that the filed-rate doctrine normally applies, and works, in the context of agencies that must determine and/or approve rates before they can be charged.<sup>99</sup> The Commission, however, does not require prior approval of the rates charged by common carriers, nor does it review, determine, or approve common carrier rates in the absence of a complaint.<sup>100</sup> WTXP points out that the Commission does not take any role in the initial negotiating and setting of common carrier rates but rather relies on the market to establish fair rates for common carriers and then provides a forum for reviewing only those common carrier rates that are challenged as unreasonable.<sup>101</sup> In this context, WTXP argues that Targa should not be allowed to rely on the filed-rate doctrine to justify the refund of rates whose reasonableness Targa does not challenge.<sup>102</sup>

Regarding publication of the New Tariffs, WTXP argues that internet publication on the website of the Pipeline's operator constituted proper publishing under Commission Rule 3.71 and conformed to actual industry practice.<sup>103</sup> By making the New Tariffs available on the website of the Pipeline's operator, WTXP argues that every shipper on the Pipeline had access to the New Tariffs—both before and after filing—and that such internet publication made the New Tariffs generally known to the public.<sup>104</sup> Thus, all shippers on the Pipeline, including Targa, had access to the New Tariffs via the internet.

Lastly, WTXP argues: that Targa's request that the Commission require WTXP to remove the jurisdictional disclaimer from the cover pages of the New Tariffs is beyond the scope of this proceeding because Targa did not seek this remedy in its Complaint; that if the Commission determines that Targa is entitled to a refund, Targa is only entitled to a refund for the time between January 1 and October 31, 2014, because there was no overpayment in November 2014; and that Targa is not entitled to interest because Targa has offered no evidence related to its claim for interest and because no statute authorizes interest in the context of this proceeding.<sup>105</sup>

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<sup>98</sup> WTXP Reply Brief, p. 1.

<sup>99</sup> *Id.*, p. 7 (citing *Wegoland, Ltd. v. NYNEX Corp.*, 806 F.Supp. 1112, 1115 (S.D.N.Y. 1992) (“Although the doctrine has been applied primarily in the context of federal regulation, it applies equally where state law creates a state agency and a statutory scheme pursuant to which the state agency *determines reasonable rates.*”) (emphasis in WTXP Reply Brief)).

<sup>100</sup> WTXP Reply Brief, p. 7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, p. 9.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*, pp. 10-12.



### 3. *Examiners' Findings*

Along with the above jurisdictional issue, the legal question of whether common carrier pipelines are required to file tariffs with the Commission is the other principal point of contention between Targa and WTXP. The parties ask that the Commission interpret the relevant portions of the Common Carrier Act and Commission rules to definitively decide this issue. Doing so necessarily involves the Commission determining four matters of first impression: (i) whether the scope of Subchapter F (Rates) of the Common Carrier Act extends to situations involving reimbursements of potential tariff overcharges that are not determined pursuant to a formal ratemaking proceeding; (ii) whether the filed-rate doctrine prohibits common carriers from charging rates under tariffs that are not on file with the Commission; (iii) whether the Common Carrier Act requires common carrier tariffs to be filed; and (iv) whether Commission Rule 3.71(21) requires common carrier tariffs to be filed.

#### *i. Scope of Subchapter F (Rates) and Jurisdiction to Hear Targa's Complaint*

##### Questions related to Targa's requested reimbursement

The Common Carrier Act specifies which types of questions the Commission has jurisdiction to hear and determine in a complaint proceeding. The Commission has jurisdiction over any person "on any question relating to the enforcement of" Subchapters C (Public Utilities), D (Common Purchasers), and F (Rates) of the Common Carrier Act, along with Sections 111.004 (General Restriction on Transportation of Oil), 111.025 (Abandoning Connections), 111.131 (Commission Rules for Common Carriers), 111.132 (Commission Rules for Public Utilities), 111.133 (Enforcement by Commission), 111.136 (Review of Orders), 111.137 (Enlargement and Extension of Facilities), and 111.140 (Filing Monthly Statements).<sup>106</sup> The relevant portion of the Common Carrier Act in this proceeding is Subchapter F (Rates), under which Targa seeks reimbursement of excess charges under Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges).<sup>107</sup>

Subchapter F (Rates) consists of 10 sections, all of which facially pertain only to the processes and considerations in formal ratemaking proceedings by which the Commission sets common carrier rates using statutory bases and methodology.<sup>108</sup> Nowhere does Subchapter F speak to situations where the Commission does not establish tariff rates using the "basis for rates" criteria of Section 111.183 (Basis for Rates) in formal ratemaking proceedings.<sup>109</sup> Only

<sup>106</sup> Tex. Nat. Res. Code § 111.221 (Complaints; Jurisdiction to Hear Complaints).

<sup>107</sup> Complaint, p. 2 n6.

<sup>108</sup> See Tex. Nat. Res. Code §§ 111.181 (Establishing and Promulgating Rates), 111.182 (Items Included in Rates), 111.183 (Basis for Rate), 111.184 (Discretion of Commission), 111.185 (Temporary Rates), 111.186 (Reparation and Reimbursement), 111.187 (Reimbursement of Excess Charges), 111.188 (Annual Rate Hearing), 111.189 (Hearing and Determination of Rates), and 111.190 (Hearings to Adjust Rates).

<sup>109</sup> See *id.* at §§ 111.183 (Basis for Rates) ("The basis of the rates shall be an amount that will provide a fair return on the aggregate value of the property of a common carrier used and useful in the services performed after providing reasonable allowance for depreciation and other factors and for reasonable operating expenses under

two sections in Subchapter F (Rates) pertain to reparation and reimbursement of excess rates or charges—Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges)—and both sections facially apply only to situations where the Commission sets rates pursuant to a formal ratemaking proceeding.<sup>110</sup>

This is not a ratemaking proceeding and no one has challenged the rate amounts in the New Tariffs, nor has the Commission set the rate amounts in the New Tariffs pursuant to the criteria in Section 111.183 (Basis for Rates). Rather, Targa argues that it is entitled to reimbursement under Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges) not because the rates in the New Tariffs are unreasonable, but because the New Tariffs were not filed with the Commission. Targa seeks reimbursement based on the rate charges it paid in excess of the Cancelled Tariffs, which were filed with the Commission until cancelled by WTXP but which were never themselves set by the Commission in a formal ratemaking proceeding pursuant to the basis for rates found in Section 111.183 (Basis for Rates).

Because this is not a ratemaking proceeding and the reimbursement sought by Targa is not based on Commission-determined rates pursuant to the criteria in Section 111.183 (Basis for Rates), it is not readily clear whether the question of the validity of the unfiled New Tariffs “relates” to the enforcement of Subchapter F (Rates). If it does not, then the Commission lacks jurisdiction to hear and determine this specific question, even though the Commission has unquestioned jurisdiction over common carrier ratemaking, generally.<sup>111</sup> The Examiners find that construing Subchapter F (Rates) so narrowly in scope to only apply to situations in which the Commission sets common carrier rates pursuant to a formal ratemaking proceeding might prejudice shippers by preventing the Commission from adjudicating complaints involving overcharges that are unrelated to the reasonableness of the rates. Targa cites only Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges) as the bases for its reimbursement claims, but the Examiners find that those sections are inapplicable here because they facially speak only to reimbursements pursuant to a rate that has been set by the Commission in a formal ratemaking proceeding and that is based on the criteria in Section 111.183 (Basis for Rates). However, Section 111.181 (Establishing and Promulgating Rates) states that the Commission “shall establish and promulgate rates of charges for gathering, transporting, loading, and delivering crude petroleum by common carriers in this state and for

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honest, efficient, and economical management.”), 111.189 (Hearing and Determination of Rates) (“If a person at interest files an application for a change in a rate or rates, the commission shall call a hearing and immediately after the hearing shall publish and promulgate a rate or rates in accordance with the basis provided in this subchapter.”), 111.190 (Hearings to Adjust Rates) (“On its own motion or on motion of any interested person, the commission shall hold a hearing to adjust, establish, and promulgate a proper rate or rates if it has reason to believe that any rate or rates do not conform to the basis provided in this subchapter.”).

<sup>110</sup> See *id.* at §§ 111.186 (Reparation and Reimbursement) (“If rates have been filed, each shipper who pays these filed rates is entitled to reparation or reimbursement of all excess rates or transportation charges paid over and above the rate that is finally determined on the shipments.”) and 111.187 (Reimbursement of Excess Charges) (“If a rate is filed by a common carrier and complaint against the rate or petition to reduce the rate is filed by a shipper, and the complaint is sustained in whole or part, all shippers who have paid the rates filed by the common carrier are entitled to reparation or reimbursement of all excess transportation charges paid over and above the proper rate as finally determined on all shipments made after the date of the filing of the complaint.”).

<sup>111</sup> See *id.* at § 111.221 (Complaints; Jurisdiction to Hear Complaints).

use of storage facilities necessarily incident to this transportation.”<sup>112</sup> The Examiners recommend that this language be construed broadly to include situations where, as here, the Commission is asked to hear and determine questions relating to possible overcharges that are not necessarily determined by formal ratemaking proceedings that set common carrier rates based on the criteria in Section 111.183 (Basis for Rates). The Examiners find that the scope of Subchapter F (Rates) may include reimbursements in situations other than formal ratemaking proceedings. Targa’s Complaint as it relates to reimbursement of possible overcharges, then, is within the scope of Subchapter F (Rates) even though this is not a ratemaking proceeding and neither the Cancelled Tariffs nor the New Tariffs were determined by the Commission using the criteria in Section 111.183 (Basis for Rates). Therefore, the Examiners find that the Commission’s broad jurisdiction over common carrier ratemaking extends to the question of the validity of the unfilled New Tariffs.

Questions related to publication and WTXP’s jurisdictional disclaimer

The Examiners find that questions relating to the publication of the New Tariffs and the jurisdictional disclaimer on the cover pages of the New Tariffs are outside the scope of Subchapter F (Rates) and therefore the Commission lacks jurisdiction to consider them in this proceeding. Unlike the above question of reimbursement, the Common Carrier Act speaks directly to the making and publishing of tariffs elsewhere outside of Subchapter F (Rates). Section 111.014 (Publication of Tariffs) in Subchapter B (Common Carriers) speaks directly to the making and publishing of common carrier tariffs: “Common carriers shall make and publish their tariffs under rules prescribed by the commission.”<sup>113</sup> By statute, the Commission lacks jurisdiction to hear and determine questions related to the enforcement of Section 111.014.<sup>114</sup> The prescribed remedy for violation of Section 111.014 is not reimbursement of overcharges paid by the shipper, but rather an administrative penalty assessed against the common carrier that is recoverable only by the State.<sup>115</sup> The Examiners find that Targa’s questions relating to the publication of the New Tariffs and WTXP’s jurisdictional disclaimer on the cover pages of the New Tariffs are questions related to Section 111.014, not Subchapter F (Rates). As such, the Commission lacks jurisdiction under Section 111.221 (Complaints; Jurisdiction to Hear Complaints) to hear and determine these questions.<sup>116</sup>

Even if the Commission would have jurisdiction to hear and determine questions related to publication of the New Tariffs and WTXP’s jurisdictional disclaimer, doing so in this

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<sup>112</sup> *Id.* at § 111.181 (Establishing and Promulgating Rates).

<sup>113</sup> *Id.* at § 111.014 (Publishing of Tariffs).

<sup>114</sup> *See id.* at § 111.221 (Complaints; Jurisdiction to Hear Complaints).

<sup>115</sup> *See id.* at § 111.261 (Penalty Recoverable by State) (“A common carrier under this chapter is subject to a penalty of not less than \$100 nor more than \$1,000 for each offense, recoverable in the name of the state, if the common carrier...violates Section 111.013 through 111.024...or fails to perform a duty imposed by Section 111.013 through 111.024...”).

<sup>116</sup> *Id.* at § 111.221 (Complaints; Jurisdiction to Hear Complaints) (“Any person or the attorney general on behalf of the state may institute proceedings before the commission or apply for a hearing before the commission on any question relating to the enforcement of Subchapters C, D, and F of this chapter and Sections 111.004, 111.025, 111.131 through 111.133, 111.136, 111.137, and 111.140 of this code, and the commission has jurisdiction to hear and determine these questions after giving proper notice as provided by law.”).

proceeding would be improper because WTXP was not properly noticed of those issues, as required by Section 111.221 (Complaints; Jurisdiction to Hear Complaints).<sup>117</sup> Effective January 1, 2014, the New Tariffs were posted to and available on the website of the Pipeline's operator.<sup>118</sup> Targa did not raise questions relating to the sufficiency of publication of the New Tariffs in its Complaint, which Targa filed with the Commission on August 15, 2014. On November 21, 2014, WTXP filed the New Tariffs with the jurisdictional disclaimer language on the cover pages.<sup>119</sup> On December 22, 2014, the Commission issued a Notice of Hearing that stated that the issues that may be addressed at the hearing included, but were not limited to, the following:

- Whether the last applicable tariffs filed by WTXP with the Commission (the Cancelled Tariffs) should be the effective tariffs;
- Whether WTXP should pay reparations or refunds for charges that exceeded those authorized by the Cancelled Tariffs; and
- Any and all other non-rate issues raised in the pleadings, evidence or argument that are necessary for the Commission to render a final decision on the merits.<sup>120</sup>

Neither publication defects nor removal of the jurisdictional disclaimer were addressed or discussed at the February 18, 2015 hearing on the merits. In its post-hearing brief, Targa, for the first time, raised the issue of publication defects and requested the Commission to require WTXP to remove the New Tariffs' jurisdictional disclaimer language.<sup>121</sup> Accordingly, the Examiners find that the Commission may not properly hear and determine these issues in this proceeding because notice of these two issues was not properly provided to WTXP, as required by Section 111.221 (Complaints; Jurisdiction to Hear Complaints).

## ii. *The Filed-Rate Doctrine*

The filed-rate doctrine has been misunderstood and misapplied thus far in this docket. Citing several cases where courts applied the filed-rate doctrine to various electric, gas, and telecommunications utilities, the Examiners previously assigned to this docket found that WTXP "may charge only rates that are properly on file with the Commission" and directed WTXP to charge the rate reflected in the previously-filed Cancelled Tariffs.<sup>122</sup> According to Targa, the filed-rate doctrine prohibits common carriers from charging rates under a tariff unless that tariff is first filed with the Commission.<sup>123</sup> In other words, according to Targa, the filed-rate doctrine states that unfiled common carrier tariffs are *de jure* invalid even where no other operative/active

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<sup>117</sup> *Id.* at § 111.221 (Complaints; Jurisdiction to Hear Complaints) ("...and the commission has jurisdiction to hear and determine these questions *after giving proper notice as provided by law.*") (emphasis added).

<sup>118</sup> Joint Ex. 1 (Stipulated Facts) ¶ 14 (as orally modified at the February 18, 2015 hearing).

<sup>119</sup> *Id.*; *see also* Joint Ex. 5 (New Tariffs, filed with the Commission on November 21, 2014).

<sup>120</sup> Notice of Hearing, issued December 22, 2014 ("Notice of Hearing"), p. 1.

<sup>121</sup> Targa Brief, pp. 2, 14-16, 18.

<sup>122</sup> Examiners' Letter No. 3, p. 3.

<sup>123</sup> *See* Targa Brief, pp. 11-13.

tariffs that relate to the same rates are on file with the Commission. According to WTXP, the filed-rate doctrine is inapplicable where, as here, rates are set initially by the market, not the Commission, and the Commission does not meaningfully review or approve rates that are filed unless the reasonableness of those rates is challenged by a shipper.<sup>124</sup> Neither party properly construes the filed-rate doctrine as it applies in Texas.

### Mechanics of the filed-rate doctrine

The “filed-rate doctrine” applies when state law creates a state agency and a statutory scheme under which the agency determines reasonable rates for the service provided.<sup>125</sup> The doctrine holds that a tariff filed with and approved by an administrative agency under a statutory scheme is presumed reasonable unless a litigant proves otherwise.<sup>126</sup> The doctrine bars judicial recourse against a regulated entity based upon allegations that the entity’s “filed rate” is too high, unfair, or unlawful.<sup>127</sup> Under the doctrine, filed tariffs govern a utility’s relationship with its customers and have the force and effect of law until suspended or set aside.<sup>128</sup> Regulated utilities cannot vary a tariff’s terms with individual customers, discriminate in providing services, or charge rates other than those properly filed with the appropriate regulatory authority.<sup>129</sup> Likewise, the doctrine precludes the rate-setting body from altering filed and approved rates retroactively.<sup>130</sup> When a regulatory agency approves a tariff, courts presume, under the filed-rate doctrine, that the tariff is reasonable.<sup>131</sup> A utility’s obligations to its customers cannot exceed its duties under a filed tariff, and aggrieved customers cannot enforce alleged rights that contradict the tariff’s provisions.<sup>132</sup> Consequently, the filed-rate doctrine prohibits a customer from suing a utility in contract or tort over issues that a publicly-filed tariff’s terms govern.<sup>133</sup> Simply stated,

<sup>124</sup> WTXP Reply Brief, pp. 6-7.

<sup>125</sup> See, e.g., *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216 (Tex. 2002) (citing *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 579 (1981), and *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922)); *CenterPoint Energy Entex v. R.R. Com’n of Texas*, 208 S.W.3d 608, 621 (Tex. App.—Austin 2006, pet. dism’d); *Entex*, 18 S.W.3d at 862 (“The doctrine operates across the spectrum of regulated utilities and applies where state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates.”) (internal quotes and cite omitted).

<sup>126</sup> See, e.g., *Sw. Elec. Power*, 73 S.W.3d at 216 (citing *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921), and *Wegoland, Ltd., v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994)); *CenterPoint*, 208 S.W.3d at 621.

<sup>127</sup> *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)).

<sup>128</sup> See, e.g., *Sw. Elec. Power*, 73 S.W.3d at 217 (citing *Keogh*, 260 U.S. at 162-63, and *Carter v. AT&T Co.*, 356 F.2d 486, 496 (5th Cir. 1966)); *CenterPoint*, 208 S.W.3d at 621.

<sup>129</sup> See, e.g., *Sw. Elec. Power*, 73 S.W.3d at 217 (citing *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990), and *Arkansas La. Gas*, 453 U.S. at 577); *CenterPoint*, 208 S.W.3d at 621; *Entex*, 18 S.W.3d at 862; *Sw. Bell Tel.*, 919 S.W.2d at 692 (“Regulated entities are prohibited from charging rates for their services other than those properly filed with the appropriate regulatory authority.”).

<sup>130</sup> *Sw. Bell Tel.*, 919 S.W.2d at 692.

<sup>131</sup> *Sw. Elec. Power*, 73 S.W.3d at 219 (citing *Western Union*, 256 U.S. at 572).

<sup>132</sup> *Id.* at 217.

<sup>133</sup> *Id.* (citing *AT&T*, 524 U.S. at 227, and *Maislin*, 497 U.S. at 126); *Sw. Bell Tel.*, 919 S.W.2d at 693 (“The filed rate doctrine prohibits a customer from claiming a lower rate than the rate the regulated entity has filed with the regulatory agency, because the filed rate alone governs the relationship between the regulated entity and its

the filed-rate doctrine holds that any “filed rate”—that is, one approved by the governing regulatory agency—is *per se* reasonable and unassailable in judicial proceedings brought in court by ratepayers.<sup>134</sup>

Two principles underlie the filed-rate doctrine: nondiscrimination and nonjusticiability. First, the doctrine prevents regulated companies from engaging in price discrimination between customers (nondiscrimination).<sup>135</sup> Second, the doctrine preserves the exclusive role of regulatory agencies in approving rates and keeping courts, which are far less competent to perform this function, out of the rate-making process (nonjusticiability).<sup>136</sup> The “nonjusticiability” strand recognizes that (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime.<sup>137</sup>

The filed-rate doctrine does not provide a basis for a claim; instead, it is a doctrine that establishes that a filed tariff definitively governs a utility’s relationship with its customers.<sup>138</sup> The doctrine applies to the provision of services set out in filed tariffs, not just the tariff’s rates.<sup>139</sup> The Fifth Circuit has clarified that the filed-rate doctrine applies to market-based rates that are not determined or meaningfully reviewed by the governing regulatory agency so long as the governing agency is charged with a sufficient “oversight of the market.”<sup>140</sup> It is the *filing* of

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customer. Allowing a state court to award damages to a customer based on a rate lower than the filed rate would undermine the regulatory scheme.” (internal citation omitted).

<sup>134</sup> *Texas Commercial Energy*, 413 F.3d at 508 (quoting *Wegoland*, 27 F.3d at 18).

<sup>135</sup> *Winn v. Alamo Title Ins. Co.*, No. A-09-CA-214-SS, 2009 WL 7099484, at \*4 (W.D. Tex. May 13, 2009).

<sup>136</sup> *Id.*, at \*4; see also *Fax Telecommunicaciones v. AT & T*, 952 F. Supp. 946, 951 (E.D.N.Y. 1996), *aff’d sub nom. Fax Telecommunicaciones Inc. v. AT & T*, 138 F.3d 479 (2d Cir. 1998) (“Thus, non-justiciability and anti-discrimination are the core purposes of the doctrine.”).

<sup>137</sup> *Winn*, 2009 WL 7099484, at \*4 (quoting *Verizon Del., Inc. v. Covad Comms. Co.*, 377 F.3d 1081, 1086 (9th Cir. 2004)).

<sup>138</sup> *Connect Insured Tel., Inc. v. Qwest Long Distance, Inc.*, No. 3:10-CV-1897-D, 2012 WL 2995063, at \*11 (N.D. Tex. July 23, 2012) (filed-rate doctrine not a proper means of seeking relief that could properly be recovered in a claim for breach of contract).

<sup>139</sup> See, e.g., *Mincron SBC Corp. v. Worldcom, Inc.*, 994 S.W.2d 785, 791 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citing *AT&T*, 524 U.S. at 214) (holding that the filed-rate doctrine applies to the provision of services set out in filed tariffs, not just the tariff’s rates); *Kanuco Tech. Corp. v. Worldcom Network Services, Inc.*, 979 S.W.2d 368, 373 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (filed-rate doctrine applies to services covered by a filed tariff); *Sw. Bell Tel.*, 919 S.W.2d at 694-98 (applying filed-rate doctrine to provision of services in a filed tariff).

<sup>140</sup> See *Texas Commercial Energy*, 413 F.3d at 509-10 (holding that the filed-rate doctrine applied to market-based rates despite the Public Utility Commission of Texas (“PUCT”) not setting or approving the rates, where PUCT was required under the Public Utility Code to ensure “safe, reliable, and reasonably priced electricity” and “that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive.”); see also *Texas Commercial Energy v. TXU Energy, Inc.*, No. C-03-249, 2004 WL 1777597, at \*10, 12 (S.D. Tex. June 24, 2004), *aff’d*, 413 F.3d at 503 (holding that the filed-rate doctrine applies to market-based rates in the electricity market and stating, “PUCT, as the regulatory agency charged with overseeing the Texas electricity market, possesses the institutional competence to address rate-making issues in the [relevant rate] market, one of the principles underlying the filed-rate doctrine.”), *Town of Norwood, Mass. v. New England*

the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed-rate doctrine.<sup>141</sup> There appear to be no Texas cases addressing the issue of whether the filed-rate doctrine applies to voluntarily filed tariffs, but at least one court outside of Texas has done so.<sup>142</sup>

#### Applicability to market-based rates

WTPX misses the mark in its dismissal of the filed-rate doctrine in this proceeding merely because common carrier rates are market-based and the Commission plays no role in determining common carrier rates unless they are challenged as unreasonable. As the Fifth Circuit explained in *Texas Commercial Energy*, the filed-rate doctrine applies to market-based rates that are not determined or meaningfully reviewed by the governing regulatory agency so long as the governing agency is charged with a sufficient “oversight of the market.”<sup>143</sup> In that case, the Fifth Circuit held that the filed-rate doctrine applied to market-based electric rates, which the Public Utility Commission of Texas neither set nor approved, because the Public Utility Commission had sufficient “oversight over the market.”<sup>144</sup> As the lower court explained, the Public Utility Commission was required by statute to ensure “safe, reliable, and reasonably priced electricity,” and therefore the filed-rate doctrine applied to market-based rates in that case.<sup>145</sup> Here, the Commission similarly is charged with ensuring reasonable common carrier rates and therefore has sufficient oversight over the common carrier market.<sup>146</sup> Therefore, the filed-rate doctrine applies to market-based common carrier rates that are filed with the Commission, even where the Commission plays no initial role in setting the rates.

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*Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) (concluding that the filed-rate doctrine applied to market-based energy rates because FERC was “responsible for ensuring ‘just and reasonable’ rates and, to that end, wholesale power rates continue to be filed and subject to agency review), and *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756-760-61 (9th Cir. 2004) (in federal context, the filed-rate doctrine continued to apply to market-based energy rates because FERC continued to “oversee wholesale electricity rates...by reviewing and approving a variety of documents filed by market actors”).

<sup>141</sup> *Town of Norwood*, 202 F.3d at 419 (citing *Square D Co.*, 476 U.S. at 417, and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988)) (emphasis in original); see also *McCray v. Fid. Nat. Title Ins. Co.*, 682 F.3d 229, 238-39 (3d Cir. 2012) (“[T]he Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review. Instead, the doctrine applies as long as the agency has in fact authorized the challenged rate. . . . Indeed, neither this court nor the Supreme Court has suggested that a distinction should exist between agency authorization through ‘approval’ or ‘non-approval’ of filed rates.”).

<sup>142</sup> See *Gallivan v. AT&T Corp.*, 124 Cal. App. 4th 1377, 1384-85 (Court of Appeal, 2d District, Div. 2, California 2004) (where the FCC permitted—but did not require—tariffs to be filed, the filed-rate doctrine was applicable to any rate that was voluntarily filed because the FCC had exclusive authority to accept or challenge the rates).

<sup>143</sup> See *Texas Commercial Energy*, 413 F.3d at 509-10.

<sup>144</sup> *Id.*

<sup>145</sup> *Texas Commercial Energy*, 2004 WL 1777597, at \*12.

<sup>146</sup> See, e.g., Tex. Nat. Res. Code §§ 111.131 (Commission Rules for Common Carriers), 111.181 (Establishing and Promulgating Rates) (“The commission shall establish and promulgate rates of charges for gathering, transporting, loading, and delivering crude petroleum by common carriers in this state and for use of storage facilities necessarily incident to this transportation.”), 111.183 (Basis for Rates), 111.184 (Discretion of Commission) (“The commission has reasonable latitude in establishing and adjusting competitive rates.”), and 111.190 (Hearings to Adjust Rates) (“On its own motion or on motion of any interested person, the commission shall hold a hearing to adjust, establish, and promulgate a proper rate or rates if it has reason to believe that any rate or rates do not conform to the basis provided in this subchapter.”).

Applicability in this proceeding

Targa misses the mark in its characterization of the mechanics of the filed-rate doctrine. In Examiners' Letter No. 3, the previous Examiners cited two Texas Court of Appeals cases for the principle that the filed-rate doctrine prohibits regulated entities from charging rates "other than those properly filed with the appropriate regulatory authority."<sup>147</sup> Targa reiterated this language in its post-hearing brief and maintains that the filed-rate doctrine thus requires any new tariff to be filed with the Commission to become valid.<sup>148</sup> This misconstrues the mechanics of the filed-rate doctrine. The doctrine does not require that a *new* rate be "properly filed" with the appropriate regulatory authority to become valid. Rather, the doctrine renders invalid any attempt to charge a rate that differs from a *previously-filed* rate that is still operative. It is the *filing* of a tariff that triggers the filed-rate doctrine.<sup>149</sup> Once filed, a tariff's reasonableness is presumed and thereafter the filed-rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's "filed rate" is too high, unfair, or unlawful.<sup>150</sup> Simply put, in the absence of a valid, still-operational filed rate, the filed-rate doctrine cannot be applied.

The filed-rate doctrine is not a substitute for a statute rendering tariffs invalid unless they are filed. A requirement that a particular tariff must be filed to be valid is one made the Legislature, not common law. For example, the Texas Legislature expressly requires that gas, electric, and telecommunications utilities file their tariffs, and the Legislature also makes plain in *separate* statutes that each of those types of tariffs, if not filed, is invalid.<sup>151</sup> The filed-rate doctrine does neither of these things. Rather, the doctrine simply requires that regulated entities may not charge rates "other than those properly filed" with the appropriate agency—that is, regulated entities may not charge rates that *vary* from whichever rates are on file, if any. The term "properly filed," as stated in the above principle, does not refer to new rates that may be objectionable to a ratepayer, but rather to the rates previously filed by the regulated entity that, while they remain on file, definitively govern the relationship between the regulated entity and its customers. So long as a filed tariff continues to be operational, the regulated entity may not vary from that tariff's rates and terms. Despite what the parties have argued and what the previous Examiners have ruled, for purposes of proper application of the filed-rate doctrine in this proceeding, the critical issue is not whether the New Tariffs were properly filed, but whether the Cancelled Tariffs were properly cancelled.

WTXP has been forthright from the start of this proceeding that its reason for cancelling the previous, filed tariffs—and not initially filing the New Tariffs—was due to WTXP's belief that, as a common carrier of NGLs, it was not subject to the Commission's jurisdiction under the Common Carrier Act.<sup>152</sup> However, the act of cancelling the old filed tariffs was not, by itself, in

<sup>147</sup> Examiners' Letter No. 3, p. 3 (citing *Entex*, 18 S.W.3d at 862-63, and *Sw. Bell Tel.*, 919 S.W.2d at 692).

<sup>148</sup> Targa Brief, pp. 11-13.

<sup>149</sup> *Town of Norwood*, 202 F.3d at 419 (emphasis in original).

<sup>150</sup> See *Sw. Elec. Power*, 73 S.W.3d at 219; *Texas Commercial Energy*, 413 F.3d at 507.

<sup>151</sup> See Tex. Util. Code §§ 102.151, 104.005 (gas utilities); §§ 32.101, 36.004 (electric utilities); and §§ 52.251, 53.004 (telecommunications utilities).

<sup>152</sup> See WTXP Response.



violation of any statute or rule, and WTXP's motive for doing so is irrelevant. Nothing in the Common Carrier Act or Commission rules expressly prevents a common carrier from cancelling its tariffs, and common carriers are not required under any part the Natural Resources Code—or any other law—to obtain Commission approval before initially increasing rates under new tariffs. Rather, the Commission is authorized to set rates in ratemaking proceedings pursuant to Subchapter F (Rates) only when a “person at interest” files an application for a change in a rate or rates.<sup>153</sup>

While the Common Carrier Act and Commission rules do not expressly prohibit a common carrier from canceling its previously-filed tariffs, the validity of such attempted cancellation is not always obvious. If tariffs are required to be on file, then any attempt by a common carrier to cancel a previously-filed tariff without immediately replacing it with a newly-filed tariff could be construed as an invalid cancellation attempt. As explained below, the Examiners do not construe either the Common Carrier Act or Commission Rule 3.71(21) to require filing. However, even if filing were required, the Examiners would be reluctant to presume an implied rule prohibiting tariff cancellation in certain circumstances where no current statute or rule expressly does so.

Here, the uncontroverted record shows that WTXP filed cancellation notices for its previously-filed tariffs with the Commission, with cancellation effective January 1, 2014.<sup>154</sup> The Examiners find that those cancellation notices effectively cancelled the Cancelled Tariffs. WTXP did not begin charging rates under the New Tariffs until after that date.<sup>155</sup> Therefore, the Examiners find that the Cancelled Tariffs were properly cancelled by WTXP effective January 1, 2014, and thereafter no operative rate was on file with the Commission until WTXP filed its New Tariffs on November 21, 2014, at the previous Examiners' direction. Because no operative rate or rates were on file with the Commission when WTXP charged rates under the New Tariffs, the filed-rate doctrine was never triggered and therefore is inapplicable to this proceeding.

For the foregoing reasons, the filed-rate doctrine should not be applied here. Applying the filed-rate doctrine to situations where, as here, no operative tariff or rate was on file would expand the doctrine's scope beyond what any Texas court has done previously<sup>156</sup> and would effectively “fill in gaps” in the Common Carrier Act beyond what the Texas Legislature passed into law.

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<sup>153</sup> Tex. Nat. Res. Code § 111.189 (Hearing and Determination of Rates).

<sup>154</sup> Joint Ex. 1 (Stipulated Facts) ¶ 13 (“On December 19, 2013, WTXP filed cancellation notices with the Commission for the [Cancelled Tariffs], with cancellation effective as of January 1, 2014.”); *see also* Joint Ex. 1, exh. 5 (Cancellation notices for R.R.C. Tariff Nos. 65, 94, and 96 (effective January 1, 2014), all filed with the Commission on December 19, 2013).

<sup>155</sup> Joint Ex. 1 (Stipulated Facts) ¶¶ 14-17.

<sup>156</sup> In *Texas Commercial Energy*, the Fifth Circuit applied the filed-rate doctrine where market-based rates in a particular market were not, themselves, required to be filed with the Public Utility Commission of Texas. *Texas Commercial Energy*, 413 F.3d at 509-10. As the lower court explained, however, even though that market's particular rates were not required to be filed (and were not filed), the broader “wholesale power rates” in Texas were on file with the Commission and capped rates in that particular market at \$1,000 per MWh and, therefore, the filed-rate doctrine applied. *Texas Commercial Energy*, 2004 WL 1777597, at \*12 (emphasis added).

iii. *Whether the Common Carrier Act Requires Common Carrier Tariffs to be Filed*

Separate from the filed-rate doctrine's applicability in this proceeding, the legal question of whether common carrier pipelines are required to file their tariffs with the Commission involves determining whether common carriers are required under the Common Carrier Act and/or Commission rules to file their tariffs. Looking only at the text of Section 111.014 (Publication of Tariffs) and Commission Rule 3.71(21), the Examiners previously assigned to this docket made the initial determination that the scope of the "make and publish" language of Section 111.014 (Publication of Tariffs)<sup>157</sup> includes filing, and that the "is requested" language of Commission Rule 3.71 (Pipeline Tariffs)<sup>158</sup> actually means *is required*.<sup>159</sup> Targa echoed this construction in its subsequent briefing, arguing that Section 111.014 and Commission Rule 3.71(21), read together, creates a filing requirement under the Common Carrier Act.<sup>160</sup> WTXP argues that the Common Carrier Act does not require a common carrier to file its tariffs because the plain language of Commission Rule 3.71(21) that "each pipeline is requested" is fundamentally different than "the pipeline shall," and therefore Commission Rule 3.71(21) imposes no mandatory duty for common carriers to file their tariffs.<sup>161</sup> The undersigned Examiners re-visit the previous Examiners' determination and apply Texas' well-settled principles of statutory construction to the Common Carrier Act and to Commission Rule 3.71(21) separately.

Statutory construction

Matters of statutory construction are questions of law rather than issues of fact.<sup>162</sup> The primary objective when construing a statute is to ascertain and give effect to the Legislature's intent.<sup>163</sup> To discern the Legislature's intent, courts construe the statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context or unless such a construction leads to an absurd result.<sup>164</sup> When construing a statute, courts

<sup>157</sup> Tex. Nat. Res. Code § 111.014 (Publication of Tariffs) ("Common carriers shall *make and publish* their tariffs under rules prescribed by the commission.") (emphasis added).

<sup>158</sup> 16 Tex. Admin. Code § 3.71(21) ("Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline *is requested* to file one copy with the commission.") (emphasis added).

<sup>159</sup> Examiners' Letter No. 3, pp. 2-3 (emphasis added).

<sup>160</sup> Targa Brief, pp. 13-14; *see also* Targa Reply Brief, pp. 6-8.

<sup>161</sup> WTXP Brief, pp. 3-5.

<sup>162</sup> *Verizon Bus. Network Services, Inc. v. Combs*, No. 07-11-0025-CV, 2013 WL 1343530, at \*5 (Tex. App.—Amarillo Apr. 3, 2013), *review dismissed* (Oct. 10, 2014), *petition reinstated* (Oct. 10, 2014) (citing *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000)); *see also* *Valley Baptist Med. Ctr. v. Morales*, 295 S.W.3d 408, 410 (Tex. App.—Corpus Christi 2009, no pet.).

<sup>163</sup> *Verizon Bus. Network*, 2013 WL 1343530, at \*5 (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)).

<sup>164</sup> *Id.* (citing *Tex. Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004), *Taylor Firemen's & Policemen's Civil Serv. v. Com'n*, 616 S.W.2d 187, 189 (Tex. 1981), and *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996)); *see also* *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985) ("We must construe statutes as written and, if possible, ascertain legislative intent from the statute's language."); *Sw. Bell Tel.*

recognize that the words the Legislature chooses should be the surest guide to legislative intent.<sup>165</sup> Courts read every word as if it were deliberately chosen and presume that omitted words are excluded purposefully.<sup>166</sup> Courts construe a statute as a whole, rather than its isolated provisions, where a too-literal construction would prevent the enforcement of the statute according to its true intent.<sup>167</sup> Even statutory language that appears to impose a mandatory duty may be interpreted to be only directory when necessary to fulfill the legislative intent of the statute.<sup>168</sup> Where possible, courts are to construe language used in statutes so as to harmonize all relevant laws, not create conflict.<sup>169</sup> Only when those words are ambiguous do courts resort to rules of construction or extrinsic aids.<sup>170</sup>

The Code Construction Act applies to the construction of each provision of the Common Carrier Act.<sup>171</sup> The Code Construction Act states that words and phrases “shall be read in context and construed according to the rules of grammar and common usage.”<sup>172</sup> The Code Construction Act also states, in pertinent part, that when construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider, among other matters, the consequences of a particular construction and the statute’s title/caption.<sup>173</sup>

Courts give “serious consideration” to an agency’s construction of a statute that it is charged with enforcing, particularly when the statute involves complex subject matter within the agency’s area of expertise, so long as that construction is reasonable and consistent with the

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*Co. v. Combs*, 270 S.W.3d 249, 260 (Tex. App.—Amarillo 2008, pet. denied) (“If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, we normally defer to the agency’s interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.”); *Valley Baptist*, 295 S.W.3d at 410 (“Our goal is to ascertain and give effect to the Legislature’s intent by examining the statute’s plain meaning.”).

<sup>165</sup> *Valley Baptist*, 295 S.W.3d at 410 (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009)).

<sup>166</sup> *Prop. Cas. Insurers Ass’n of Am. v. Texas Dept. of Ins.*, No. 07-07-0057-CV, 2008 WL 4425520, at \*2 (Tex. App.—Amarillo Sept. 30, 2008, no pet.) (citing *Cornyn v. Universe Life Ins. Co.*, 988 S.W.2d 376, 379 (Tex. App.—Austin 1999, pet. denied)).

<sup>167</sup> See, e.g., *Helena Chem. Co.*, 47 S.W.3d at 493 (“Additionally, we must always consider the statute as a whole rather than its isolated provisions.”); *Barshop*, 925 S.W.2d at 629 (“This Court has recognized that a too literal construction of a statute, which would prevent the enforcement of it according to its true intent, should be avoided.”) (internal quotes omitted) (quoting *State v. Dyer*, 200 S.W.2d 813, 815 (Tex. 1947)).

<sup>168</sup> See, e.g., *Helena Chem. Co.*, 47 S.W.3d at 493 (“However, we have held that language that appears to impose a mandatory duty to be only directory when this interpretation is most consistent with the Legislature’s intent.”); *Barshop*, 925 S.W.2d at 629 (“[S]tatutory language that appears to impose a mandatory duty may be interpreted to be only directory when necessary to fulfill the legislative intent of the statute.”).

<sup>169</sup> *Valley Baptist*, 295 S.W.3d at 410-11 (quoting *Rodriguez v. Texas Workforce Com’n*, 986 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1999, pet. denied)).

<sup>170</sup> *Id.* at 410-11 (quoting *Entergy*, 282 S.W.3d at 437).

<sup>171</sup> See Tex. Nat. Res. Code § 1.002 (Construction of Code).

<sup>172</sup> Tex. Govt. Code § 311.011 (Common and Technical Usage of Words).

<sup>173</sup> *Id.* at § 311.023 (Statute Construction Aids).

statutory language.<sup>174</sup> If a statute can be reasonably read as the enforcing agency has ruled, then courts are bound to accept that interpretation even if other reasonable interpretations exist.<sup>175</sup>

Section 111.014 (Publication of Tariffs)

Nowhere does the Common Carrier Act speak to a filing requirement for tariffs, either expressly or impliedly. Section 111.014 (Publication of Tariffs), located in Subchapter B (Common Carriers), reads in its entirety: “Common carriers shall make and publish their tariffs under rules prescribed by the commission.” Targa argues that the scope of “make and publish” in Section 111.014 includes filing, and therefore a filing requirement in a Commission rule, if one exists, would then by reference become a requirement under Section 111.014 of the Common Carrier Act, as well.<sup>176</sup> Targa points to the use of the term “file” in relation to tariffs or rates elsewhere in the Common Carrier Act as evidence that the Legislature intended Section 111.014’s language, “shall make and publish their tariffs,” to include filing.<sup>177</sup> WTXP argues that there is not a requirement under the Common Carrier Act that a common carrier must file its tariffs.<sup>178</sup> WTXP states that the operative language in Section 111.014 is “publish” and concedes that Section 111.014 requires common carriers to publish their tariffs.<sup>179</sup> Despite the moderate attention given to the scope of Section 111.014 thus far in this proceeding, it is a critical legal determination necessary for the resolution of Targa’s Complaint and the Examiners address it now.

When construing a statute, courts recognize that the words the Legislature chooses should be the surest guide to legislative intent.<sup>180</sup> Courts read every word as if it were deliberately chosen and presume that omitted words are excluded purposefully.<sup>181</sup> A statute’s title may be

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<sup>174</sup> *Verizon Bus. Network*, 2013 WL 1343530, at \*5 (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

<sup>175</sup> *Verizon Bus. Network*, 2013 WL 1343530, at \*5; *see also Sw. Bell Tel.*, 270 S.W.3d at 260 (“If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, we normally defer to the agency’s interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.”).

<sup>176</sup> Targa Brief, pp. 13-14; *see also* Targa Reply Brief, pp. 6-8.

<sup>177</sup> Targa Reply Brief, p. 7; *see also* Tex. Nat. Res. Code §§ 111.185 (Temporary Rates) (“If a common carrier makes application or files a tariff to establish a new rate on either a new or old line, a temporary rate may be placed into effect immediately on filing the tariff with the commission.”), 111.186 (Reparation and Reimbursement) (“If rates have been filed, each shipper who pays these filed rates is entitled to reparation or reimbursement of all excess rates or transportation charges paid over and above the rate that is finally determined on the shipments.”), and 111.187 (Reimbursement of Excess Charges) (“If a rate is filed by a common carrier and complaint against the rate or petition to reduce the rate is filed by a shipper, and the complaint is sustained in whole or part, all shippers who have paid the rates filed by the common carrier are entitled to reparation or reimbursement of all excess transportation charges paid over and above the proper rate as finally determined on all shipments made after the date of the filing of the complaint.”).

<sup>178</sup> WTXP Brief, p. 3.

<sup>179</sup> *Id.*, p. 4; *see also* WTXP Reply Brief, p. 8.

<sup>180</sup> *Valley Baptist*, 295 S.W.3d at 410 (quoting *Entergy*, 282 S.W.3d at 437).

<sup>181</sup> *Prop. Cas. Insurers*, 2008 WL 4425520, at \*2 (citing *Cornyn*, 988 S.W.2d at 379).

considered as a guide to show legislative intent.<sup>182</sup> Here, neither the plain language of Section 111.014—“Common carriers shall make and publish their tariffs under rules prescribed by the commission”—nor its title—“Publication of Tariffs”—requires, or even speaks to, the filing of tariffs. In construing the scope of Section 111.014, the Examiners are bound to read every word as if it were deliberately chosen by the Legislature and presume that omitted words are excluded purposefully.<sup>183</sup> Section 111.014’s title reads only “Publication of Tariffs.” Section 111.014’s text contains no reference to filing or even uses the word. Elsewhere where the Legislature has spoken to the filing of other types of tariffs, it has done so expressly and unequivocally. For gas utilities, a statute titled “Schedule Filings” states that each gas utility *shall file* its rate schedules with each regulatory authority.<sup>184</sup> For electric utilities, a statute titled “Tariff Filings” states that each electric utility *shall file* with each regulatory authority a tariff showing each rate that is “subject to the regulatory authority’s original or appellate jurisdiction” and “in effect for a utility service, product, or commodity offered by the utility.”<sup>185</sup> For telecommunications utilities, a statute titled “Tariff Filings” states that each public utility *shall file* with the commission a tariff showing each rate that is “subject to the commission’s jurisdiction” and “in effect for a utility service, product, or commodity offered by the utility.”<sup>186</sup> Here, an express filing requirement is omitted from the Common Carrier Act entirely.

Section 111.014’s plain language, both in its title and body, pertains only to the “making” and “publishing” of common carrier tariffs, not filing. The Examiners decline to read a word into Section 111.014 that the Legislature did not put there. The Examiners also reject Targa’s argument that either “make” or “publish” in Section 111.014 means “to file.” The words, “make,” “publish,” and “file” have distinctly separate common-usage meanings. The Examiners are unaware of any instance where the Commission or any Texas court has used either combination of these words interchangeably or that either word has acquired a specialized “technical or particular meaning” in the common carrier context. On the contrary, even within the subject Commission Rule 3.71 the Commission speaks to “publishing” and “filing” separately.<sup>187</sup> The Examiners further disagree with Targa’s argument that the existence of the term “file” in relation to tariffs or rates in three other sections in the Common Carrier Act<sup>188</sup>

<sup>182</sup> Tex. Govt. Code § 311.023 (Statute Construction Aids); *see also Moore v. Trevino*, 94 S.W.3d 723, 726 (Tex. App.—San Antonio 2002, pet. denied) (“While the title may be considered as a guide to show legislative intent, it has no enacting force.”), *High Plains Natural Gas Co. v. R.R. Comm’n of Tex.*, 467 S.W.2d 532, 539 (Tex. Civ. App.—Austin 1971), *writ refused NRE* (Oct. 6, 1971) (“While the caption is relevant in matters of statutory interpretation, an Act is to be interpreted in the full light of its title but the title, of itself, has no enacting force, and cannot confer powers not mentioned in the Act.”).

<sup>183</sup> *Prop. Cas. Insurers*, 2008 WL 4425520, at \*2 (citing *Cornyn*, 988 S.W.2d at 379).

<sup>184</sup> Tex. Util. Code § 102.151 (Schedule Filings) (emphasis added).

<sup>185</sup> *Id.* at § 32.101 (Tariff Filings) (emphasis added).

<sup>186</sup> *Id.* at § 52.251 (Tariff Filings) (emphasis added).

<sup>187</sup> *See* 16 Tex. Admin. Code § 3.71(20) (speaking to publication) and (21) (speaking to filing).

<sup>188</sup> *See* Tex. Nat. Res. Code §§ 111.185 (Temporary Rates) (“If a common carrier makes application or files a tariff to establish a new rate on either a new or old line, a temporary rate may be placed into effect immediately on filing the tariff with the commission.”), 111.186 (Reparation and Reimbursement) (“If rates have been filed, each shipper who pays these filed rates is entitled to reparation or reimbursement of all excess rates or transportation charges paid over and above the rate that is finally determined on the shipments.”), and 111.187 (Reimbursement of Excess Charges) (“If a rate is filed by a common carrier and complaint against the rate or petition to reduce the rate is filed by a shipper, and the complaint is sustained in whole or part, all shippers who have paid the rates filed

demonstrates the Legislature's intention that pipelines be required to file their tariffs with the Commission.<sup>189</sup> Neither of these sections deals principally—or even peripherally—with tariff filing, but rather with setting rates and recovering overcharges in formal ratemaking proceedings. At most, references to “filing” in these sections demonstrate the Legislature's expectation that pipeline tariffs *could* be filed, not that they must be.

Expanding the scope of Section 111.014 (Publication of Tariffs) to include filing would create conflict elsewhere in the Common Carrier Act and Commission rules. Whether or not a statute is considered ambiguous on its face, a court may consider, among other matters, the consequences of a particular construction.<sup>190</sup> Where possible, courts are to construe language used in statutes so as to harmonize all relevant laws, not create conflict.<sup>191</sup> Here, the Commission has broad and unquestioned authority over common carrier ratemaking. By statute, however, the Commission does not have jurisdiction to hear and determine questions related to the enforcement of Section 111.014.<sup>192</sup> If the scope of Section 111.014 were construed to include filing, then the Commission would lack jurisdiction to “hear and determine” filing-related questions, such as the ones posed by Targa in this proceeding. The Commission similarly would be statutorily prohibited from making rules for the *enforcement* of pipeline tariff filings,<sup>193</sup> despite having clear authority to establish and promulgate tariff filing rules and requirements.<sup>194</sup> In other words, if the scope of Section 111.014 were to include filing, then the Commission would be without any authority to enforce its own rules of pipeline tariff filing, or to “hear and determine” questions relating to filings of which the Commission maintains physical custody. Absent any express—or implied—language anywhere in the Common Carrier Act that Section 111.014 should be construed so broadly, the Examiners reject a construction that causes such disharmony.

In conclusion, the Examiners find that the scope of Section 111.014 (Publication of Tariffs) does not include filing. Accordingly, the Examiners find that the Common Carrier Act contains no filing requirement for common carrier tariffs.

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by the common carrier are entitled to reparation or reimbursement of all excess transportation charges paid over and above the proper rate as finally determined on all shipments made after the date of the filing of the complaint.”).

<sup>189</sup> Targa Brief, p. 14; *see also* Targa Reply Brief, p. 7.

<sup>190</sup> Tex. Govt. Code § 311.023 (Statute Construction Aids).

<sup>191</sup> *Valley Baptist*, 295 S.W.3d at 410-11 (quoting *Rodriguez*, 986 S.W.2d at 783).

<sup>192</sup> *See* Tex. Nat. Res. Code § 111.221 (Complaints; Jurisdiction to Hear Complaints) (omitting Section 111.014 from the list of Common Carrier Act sections that are subject to the Commission's jurisdiction).

<sup>193</sup> *See id.* at § 111.133 (Enforcement by Commission) (omitting Section 111.014 from the list of Common Carrier Act sections for which the Commission is granted the authority to make rules for enforcement).

<sup>194</sup> *See id.* at § 111.131 (Commission Rules for Common Carriers) (“The commission shall establish and promulgate rules for gathering, transporting, loading, and delivering crude petroleum by common carriers in this state and for use of storage facilities necessarily incident to this transportation and shall prescribe and enforce rules, in the manner provided by law, for the government and control of common carriers with respect to their pipelines and receiving, transferring, and loading facilities.”).

iv. *Whether Commission Rule 3.71(21) Requires Common Carrier Tariffs to be Filed*

Outside of the Common Carrier Act, WTXP still may have violated a Commission rule by not filing its New Tariffs. Commission Rule 3.71(21) speaks to tariff filing: “Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline is requested to file one copy with the commission.” As stated above, the Examiners previously assigned to this docket made the initial determination that the “is requested” language in this rule actually means *is required*.<sup>195</sup> Targa echoed this construction in its subsequent briefing.<sup>196</sup> WTXP argues that the plain language of Commission Rule 3.71(21) that “each pipeline is requested” is fundamentally different than “the pipeline shall,” and therefore Commission Rule 3.71(21) merely asks that pipeline tariffs be filed but does not mandate it.<sup>197</sup> The undersigned Examiners re-visit the previous Examiners’ determination.

Courts construe administrative rules, which have the same force as statutes, in the same manner as statutes.<sup>198</sup> Courts construe a statute as a whole, rather than its isolated provisions.<sup>199</sup> Courts read every word as if it were deliberately chosen.<sup>200</sup> Only when those words are ambiguous do courts resort to rules of construction or extrinsic aids.<sup>201</sup> Courts defer to an agency’s interpretation of its own rule when the rule is vague or ambiguous, unless the administrative interpretation is “plainly erroneous or inconsistent with the regulation.”<sup>202</sup> Here, the Examiners do not find the word “requested” to be at all ambiguous. The Code Construction Act provides that words and phrases shall be construed according to common usage.<sup>203</sup> The Examiners are unaware of any instance where any administrative agency or court, in Texas or otherwise, construed “is requested” to mean “is required.” The word “requested,” or any variation thereof, is not included among seven potentially ambiguous terms that the Code Construction Act preemptively construes.<sup>204</sup> Even statutory language that appears to impose a mandatory duty—such as “must” and “shall”—may be interpreted to be only directory in certain circumstances.<sup>205</sup> Here, the Examiners find the word “requested” to be plainly unambiguous and

<sup>195</sup> Examiners’ Letter No. 3, pp. 2-3 (emphasis added).

<sup>196</sup> Targa Brief, pp. 13-14; *see also* Targa Reply Brief, pp. 7-8.

<sup>197</sup> WTXP Brief, pp. 3-5.

<sup>198</sup> *See, e.g., Verizon Bus. Network*, 2013 WL 1343530, at \*5 (citing *Rodriguez*, 997 S.W.2d at 254).

<sup>199</sup> *See, e.g., Helena Chem. Co.*, 47 S.W.3d at 493 (“Additionally, we must always consider the statute as a whole rather than its isolated provisions.”); *Barshop*, 925 S.W.2d at 629 (“This Court has recognized that a too literal construction of a statute, which would prevent the enforcement of it according to its true intent, should be avoided.”) (internal quotes omitted) (quoting *Dyer*, 200 S.W.2d at 815).

<sup>200</sup> *Prop. Cas. Insurers*, 2008 WL 4425520, at \*2 (citing *Cornyn*, 988 S.W.2d at 379).

<sup>201</sup> *Valley Baptist*, 295 S.W.3d at 410-11 (quoting *Entergy*, 282 S.W.3d at 437).

<sup>202</sup> *See, e.g., Verizon Bus. Network*, 2013 WL 1343530, at \*5 (citing *Rodriguez*, 997 S.W.2d at 254-55, and *Gulf Coast Coalition of Cities v. Public Utility Com’n*, 151 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.)).

<sup>203</sup> Tex. Govt. Code § 311.011 (Common and Technical Usage of Words).

<sup>204</sup> *See id.* at § 311.016 (“May,” “Shall,” “Must,” etc.) (construing the following terms: “may”; “shall”; “must”; “is entitled to”; “may not”; “is not entitled to”; and “is not required to”).

to impose no mandatory duty to file, even in the context of Commission Rule 3.71(21) as a whole.<sup>206</sup>

Neither construction by the Commission of the word “requested” in Commission Rule 3.71(21)—mandatory versus optional—would lead to absurd or noteworthy practical consequences. If filing under the rule is optional, there would be no prejudice to shippers or to the Commission. Unlike with gas utilities, the Commission plays no role in the initial setting of pipeline rates, which are market-based. The Commission’s ratemaking duties under Subchapter F (Rates) of the Common Carrier Act would remain undisturbed. Shippers would continue to be made aware of applicable tariffs via publication of those tariffs by the common carriers, as required by Commission Rule 3.71(20),<sup>207</sup> and would maintain the ability to challenge rates at the Commission and recover overcharges pursuant to Subchapter F (Rates) of the Common Carrier Act.

Nor would a construction by the Commission that Commission Rule 3.71(21) requires filing lead to absurd or noteworthy practical consequences. Notwithstanding the underlying facts in this proceeding, most—if not all—common carriers already file their tariffs with the Commission since doing so, procedurally and administratively, is simple and inexpensive. Currently, there is no penalty for a violation of Commission Rule 3.71.<sup>208</sup> Requiring pipeline tariffs be filed under Commission Rule 3.71(21), then, would carry with it no administrative penalty, as Commission rules currently stand.

In conclusion, the Examiners construe Commission Rule 3.71(21) to make filing optional, not mandatory, although an alternate construction by the Commission could reasonably be made. If filing is optional, there is no prejudice to shippers or to the Commission.

## VI. Requested Relief

Targa requests that the Commission order WTXP to “refund its unlawful over-charges plus interest” for the 10-month period during which the New Tariffs were not on file with the Commission.<sup>209</sup> The difference between what Targa would have been charged for service during this period under the Cancelled Tariffs and under the subsequent New Tariffs is approximately \$827,000, excluding interest.<sup>210</sup>

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<sup>205</sup> See, e.g., *Helena Chem. Co.*, 47 S.W.3d at 493 (“However, we have held that language that appears to impose a mandatory duty to be only directory when this interpretation is most consistent with the Legislature’s intent.”); *Barshop*, 925 S.W.2d at 629 (“[S]tatutory language that appears to impose a mandatory duty may be interpreted to be only directory when necessary to fulfill the legislative intent of the statute.”).

<sup>206</sup> 16 Tex. Admin. Code § 3.71(21) (“Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline is requested to file one copy with the commission.”).

<sup>207</sup> See *id.* at § 3.71(20) (“Printing and posting. Each pipeline shall have paragraphs (1)-(19) of this section printed on its tariff sheets, and shall post the printed sections in a prominent place in its various offices for the inspection of the shipping public. Each pipeline shall post and publish only such rules and regulations as may be adopted by the commission as general rules or such special rules as may be adopted for any particular field.”).

<sup>208</sup> See *id.* at § 3.107 (Penalty Guidelines for Oil and Gas Violations), Tables 1-5.

<sup>209</sup> See Targa Brief, p. 1.

<sup>210</sup> Joint Ex. 1 (Stipulated Facts) ¶ 18.



While shippers may be entitled to reimbursements under Subchapter F (Rates) of the Common Carrier Act in certain situations, no such situation exists here. This is not a ratemaking proceeding whereby the Commission set a rate utilizing the statutory bases of Section 111.183 (Basis for Rates), and therefore the ratemaking reimbursement statutes—Section 111.186 (Reparation and Reimbursement) and Section 111.187 (Reimbursement of Excess Charges)—do not apply. The filed-rate doctrine is inapplicable here because WTXP properly cancelled its old tariffs before charging rates under the New Tariffs. The scope of Section 111.014 (Publication of Tariffs) does not include filing, but even if it did and filing were required thereunder, the Commission would be without jurisdiction to hear and determine questions related to the enforcement of Section 111.014.<sup>211</sup> Regardless, the proper relief for a violation of Section 111.014 is a penalty recoverable by the State, not reimbursement of excess charges to the shipper.<sup>212</sup> Therefore, there is no relief under the Common Carrier Act to which Targa is entitled.

Regarding Commission Rule 3.71(21), the Examiners construe the language “is requested” to mean that common carriers may file their tariffs voluntarily, but they are not required to do so. Even if tariffs are required to be filed under Commission Rule 3.71(21), no administrative penalty for a violation of this rule exists.<sup>213</sup> Therefore, there is no relief under any Commission rule to which Targa is entitled.

In conclusion, for the foregoing reasons, Targa is not entitled to the relief it seeks in its Complaint.

## VII. Conclusion

As previously clarified by the Commission, all common carriers are subject to all provisions of the Common Carrier Act. Therefore, WTXP, as a common carrier, is subject to all provisions of the Common Carrier Act and cannot avoid the Commission’s jurisdiction to hear and determine the questions at issue in this proceeding. The scope of Subchapter F (Rates) of the Common Carrier Act extends to—and does not prohibit—reimbursements in situations other than formal ratemaking proceedings. The filed-rate doctrine is inapplicable here because WTXP properly cancelled its previously-filed tariffs before it began charging new rates. The scope of Section 111.014 (Publication of Tariffs) of the Common Carrier Act does not include tariff filing, and tariff filing is not required elsewhere in the Common Carrier Act. Finally, Commission Rule 3.71(21) allows common carriers to file their tariffs voluntarily, but it does not make filing mandatory. Therefore, the Examiners find that rates charged under the unfiled New Tariffs were valid. Accordingly, there is no relief to which Targa is entitled in this proceeding.

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<sup>211</sup> See Tex. Nat. Res. Code § 111.221 (Complaints; Jurisdiction to Hear Complaints).

<sup>212</sup> See *id.* at §§ 111.261 (Penalty Recoverable by State), 111.262 (Penalty Recoverable by Aggrieved Party), and 111.263 (Penalty Recoverable by State and Aggrieved Party).

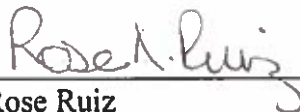
<sup>213</sup> See 16 Tex. Admin. Code § 3.107 (Penalty Guidelines for Oil and Gas Violations), Tables 1-5.

Respectfully submitted,



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John Dodson  
Hearings Examiner



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Rose Ruiz  
Technical Examiner

## RAILROAD COMMISSION OF TEXAS

COMPLAINT OF TARGA LIQUIDS	§	
MARKETING AND TRADE LLC	§	
AGAINST WEST TEXAS LPG	§	
LIMITED PARTNERSHIP AS OWNER	§	OIL & GAS DOCKET NO. 20-0292777
OF WEST TEXAS LPG PIPELINE	§	
SYSTEM	§	

### PROPOSED FINAL ORDER

Notice of Open Meeting to consider this Order was duly posted with the Secretary of State within the time period provided by law pursuant to Tex. Gov't Code Ann. Chap 551, et seq. (Vernon 2008 & Supp. 2015). The Railroad Commission adopts the following findings of fact and conclusions of law and orders as follows:

### FINDINGS OF FACT

1. West Texas LPG Pipeline Limited Partnership ("WTPX") owns the West Texas LPG Pipeline System ("WTPL Pipeline" or the "Pipeline"), which is approximately 2,245 miles in length and traverses 47 counties throughout the State of Texas.
2. Through November 2014, Chevron Pipe Line Company ("Chevron") operated the Pipeline on behalf of WTPX. Chevron, directly or through its affiliates, also owned an 80 percent interest in WTPX.
3. The applicable T-4 permit number is 00963.
4. The Pipeline is a common carrier pipeline, engaged in the business of transporting natural gas liquids ("NGLs") for hire from one place to another within the State of Texas.
5. The Pipeline, or segments thereof, has transported crude petroleum, refined products, and most recently—and currently—Y-grade NGLs. Crude petroleum transportation service began in approximately 1904; refined products service began in approximately 1953; and Y-grade NGLs service began in approximately 1957. The Pipeline currently transports only Y-grade NGLs.
6. The Pipeline does not transport crude petroleum, coal or any mixture of coal, carbon dioxide or hydrogen, feedstocks for carbon gasification, or any derivative products of carbon gasification.
7. WTPX currently provides Targa Liquids and Marketing and Trade, LLC ("Targa") and other shippers intrastate transportation services for NGLs from West Texas to Mont Belvieu, Texas.

8. Targa is currently the largest intrastate shipper of NGLs on the Pipeline.
9. Until December 2013, WTXP's "R.R.C. Tariff Nos. 65, 94, and 96," as filed with the Commission and published on Chevron's website, governed NGL shipments by Targa and similarly-situated shippers on the Pipeline (the "Cancelled Tariffs").
10. The Cancelled Tariffs could previously be obtained by requesting a copy from the Railroad Commission or by downloading a copy from Chevron's website, [http://www.chevronpipeline.com/customers\\_shippers/tariffs.aspx](http://www.chevronpipeline.com/customers_shippers/tariffs.aspx).
11. WTXP's rates under the Cancelled Tariffs were not determined by the Commission.
12. On December 19, 2013, WTXP filed cancellation notices with the Commission for the Cancelled Tariffs, with cancellation effective as of January 1, 2014.
13. The Cancelled Tariffs were properly cancelled by WTXP effective January 1, 2014.
14. The process by which WTXP cancelled its Cancelled Tariffs was not improper.
15. On January 1, 2014, WTXP issued new tariffs for the Pipeline, labeled "Texas Common Carrier No. 1.0.0" (a rules sheet with general terms and conditions of service), "Texas Common Carrier No. 2.0.0" (a rate sheet with local and volume incentive rates), and "Texas Common Carrier No. 3.0.0" (a rate sheet with local rates) (collectively, the "New Tariffs"). The New Tariffs were not filed with the Commission.
16. WTXP's rates under the New Tariffs were not determined by the Commission.
17. WTXP properly increased its rates under the New Tariffs.
18. The process by which WTXP increased its rates under the New Tariffs was not improper.
19. Effective January 1, 2014, the New Tariffs were posted to and available on the Chevron website, [http://www.chevronpipeline.com/customers\\_shippers/tariffs.aspx](http://www.chevronpipeline.com/customers_shippers/tariffs.aspx).
20. On January 1, 2014, WTXP increased its intrastate pipeline rates under the New Tariffs above what those rates had been in the Cancelled Tariffs. WTXP sent notice to Targa of the changes and made the revised New Tariffs available on Chevron's website but did not file the revised New Tariffs with the Commission.
21. On July 1, 2014, WTXP increased certain rates under one of the New Tariffs that addresses local volume and incentive rates, sent notice to Targa of the changes, and made the revised tariff available on Chevron's website. WTXP did not file the revised tariff with the Commission.
22. Targa has shipped NGLs on the Pipeline pursuant to the terms of the New Tariffs and paid the rates contained within the New Tariffs.

23. On August 15, 2014, Targa filed its Complaint in this matter. In its Complaint, Targa alleges that WTXP cannot “opt out” of its status as a regulated common carrier subject to the Commission’s jurisdiction and that WTXP’s New Tariffs were illegitimate and unauthorized because they were never filed with the Commission. Targa does not allege that the rate contained in the New Tariffs is unreasonable and does not allege that WTXP has discriminated against Targa or any other shipper.
24. In its Complaint, Targa requests that the Commission award Targa reparation and reimbursement under Sections 111.186 (Reparation and Reimbursement) and 111.187 (Reimbursement of Excess Charges) of excess charges paid by Targa over and above the rates contained in the Cancelled Tariffs.
25. Targa’s Complaint was docketed as Oil and Gas Docket No. 20-0292777.
26. WTXP responded to Targa’s Complaint on September 4, 2014.
27. On November 7, 2014, the Examiners previously assigned to this docket issued an interim ruling, in which those Examiners determined that, pending resolution of this matter, the filed-rate doctrine required WTXP to charge only those rates contained in the Cancelled Tariffs, which previously had been on file with the Commission. This interim ruling provided that WTXP could charge the rates contained in its New Tariffs once the New Tariffs were filed with the Commission.
28. On November 14, 2014, WTXP appealed the November 7, 2014 interim ruling to the Commission. WTXP’s Motion for Rehearing was overruled as a matter of law on January 2, 2015, when the Commission took no action on it.
29. On November 21, 2014, WTXP filed the New Tariffs with the Commission. The filed New Tariffs contained the following jurisdictional disclaimer on the cover pages:

This tariff is filed with the Texas Railroad Commission for the information of shippers and potential shippers of West Texas LPG Pipeline Limited Partnership, a Texas intrastate common carrier. By filing this tariff, West Texas LPG Pipeline Limited Partnership does not submit to the jurisdiction of the Texas Railroad Commission under Chapter 111 of the Texas Natural Resources Code.
30. From January 1, 2014, when the Cancelled Tariffs were properly cancelled by WTXP, until November 21, 2014, when WTXP filed its New Tariffs with the Commission, no operative rates or tariffs relating to the rates contained in the New Tariffs were on file with the Commission.
31. Between January 1, 2014, and October 31, 2014, Targa paid an amount to WTXP that was approximately \$827,000, excluding interest, in excess of the rates contained in WTXP’s Cancelled Tariffs.

32. In December 2014, Oneok Partners, LP ("Oneok") acquired Chevron's interest in WTXP. Since December 2014, Oneok has owned an 80 percent interest in WTXP and operates the Pipeline on behalf of WTXP.
33. Targa was not invoiced for its November 2014 shipping activity until after the New Tariffs had been filed at the Commission. Since November 1, 2014, Targa has been invoiced for its shipping activity at the rate on file with the Commission in the New Tariffs.
34. Notice of hearing was issued on December 22, 2014. The Notice stated that the issues that may be addressed at the hearing included, but were not limited to, the following:
  - Whether the last applicable tariffs filed by WTXP with the Commission (the Cancelled Tariffs) should be the effective tariffs;
  - Whether WTXP should pay reparations or refunds for charges that exceeded those authorized by the Cancelled Tariffs; and
  - Any and all other non-rate issues raised in the pleadings, evidence or argument that are necessary for the Commission to render a final decision on the merits.
35. Alleged publication defects of the New Tariffs and removal of the jurisdictional disclaimer contained on the cover pages of the filed New Tariffs were not noticed issues in the formal Notice of Hearing.
36. The hearing on the merits was held on February 18, 2015. Neither alleged publication defects of the New Tariffs nor removal of the jurisdictional disclaimer contained on the cover pages of the New Tariffs were addressed or discussed at the February 18, 2015 hearing on the merits.
37. The parties filed post-hearing briefs and post-hearing reply briefs on March 13, 2015, and April 6, 2015, respectively.
38. The record was formally closed on April 6, 2015.
39. Subsequent to the hearing on the merits and post-hearing submissions by the parties, the docket was reassigned to the Proposal for Decision's undersigned Examiners. The Proposal for Decision's undersigned Examiners have read the record.
40. No parties have moved to intervene in this docket.
41. No shipper on the Pipeline, other than Targa, has filed a complaint at the Commission related to the New Tariffs.

### CONCLUSIONS OF LAW

1. The WTPL Pipeline is a common carrier as that term is used in TEX. NAT. RES. CODE ANN., Section 111.020(d) (Vernon 2001 & Supp. 2014) and is therefore subject to the jurisdiction of the Railroad Commission of Texas.
2. As a common carrier, the WTPL Pipeline is subject to all provisions of the Common Carrier Act, TEX. NAT. RES. CODE §§ 111.002, 111.003, 111.011-111.025, 111.131, 111.133-111.142, 111.181-111.190, 111.221-111.227, and 111.261-111.262.
3. The Commission has jurisdiction over WTXP and the WTXP Pipeline to hear and determine any question relating to the enforcement of Subchapters C (Public Utilities), D (Common Purchasers), and F (Rates) of TEX. NAT. RES. CODE Chapter 111 (Common Carrier Act), along with Sections 111.004, 111.025, 111.131 through 111.133, 111.136, 111.137, and 111.140 of the Common Carrier Act.
4. The Commission is without jurisdiction to hear and determine questions related to the enforcement of Section 111.014 (Publication of Tariffs), located in Subchapter B (Common Carriers) of the Common Carrier Act.
5. This matter was processed in accordance with the requirements of TEX. NAT. RES. CODE Chapter 111 (Common Carrier Act) and the Administrative Procedures Act (Tex. Gov't Code Sections 2001.001-2001.902).
6. Chapters 81 and 111 of the Texas Natural Resources Code vest the Commission with the authority to regulate rates charged by common carrier pipelines.
7. The scope of Section 111.014 (Publication of Tariffs), located in Subchapter B (Common Carriers) of the Common Carrier Act does not include tariff filing.
8. The scope of Section 111.014 (Publication of Tariffs), located in Subchapter B (Common Carriers) of the Common Carrier Act includes defects in proper publication of common carrier tariffs, as well as the properness of legal and jurisdictional disclaimers contained on the pages of common carrier tariffs.
9. Prior to the hearing on the merits in this proceeding, WTXP was not properly noticed of questions related to publication defects of the New Tariffs or of the properness of WTXP's jurisdictional disclaimer located on the cover pages of the filed New Tariffs.
10. Questions related to alleged defects in the publication of WTXP's New Tariffs and to the properness of WTXP's jurisdictional disclaimer located on the cover pages of the filed New Tariffs may not properly be considered or determined in this proceeding, and resolution of those questions is not necessary for the Commission to resolve the issues in Targa's Complaint.

11. The scope of Subchapter F (Rates) of the Common Carrier Act extends to—and does not prohibit—reimbursements in situations other than formal ratemaking proceedings.
12. Sections 111.185 (Temporary Rates), 111.186 (Reparation and Reimbursement), and 111.187 (Reimbursement of Excess Charges) extend to—and do not prohibit—reimbursements in ratemaking proceedings where common carrier tariffs were not filed with the Commission.
13. The filed-rate doctrine is inapplicable here because WTXP properly cancelled its Cancelled Tariffs before it began charging new rates under the New Tariffs.
14. Common carrier tariffs are not required to be filed under the Common Carrier Act.
15. Commission Rule 3.71(21) does not impose a mandatory duty for common carriers to file their tariffs with the Commission. Common carriers may, however, do so voluntarily.
16. With respect to the issues properly heard and determined by the Commission in this proceeding, WTXP is in compliance with the Common Carrier Act and Commission Rule 3.71(21).
17. With respect to the issues properly heard and determined by the Commission in this proceeding, there is no relief to which Targa is entitled.

**IT IS THEREFORE ORDERED** that WTXP is a common carrier subject to all provisions of the Common Carrier Act over which the Commission has jurisdiction in this complaint proceeding.

**IT IS FURTHER ORDERED** that WTXP is in compliance with the Common Carrier Act and Commission rules with respect to the matters and questions properly heard and determined in this complaint proceeding.

**IT IS FURTHER ORDERED** that there is no relief in this complaint proceeding to which Targa is entitled.

It is further **ORDERED** by the Commission that this order shall not be final and effective until 25 days after the Commission's order is signed, unless the time for filing a motion for rehearing has been extended under Tex. Gov't Code §2001.142, by agreement under Tex. Gov't Code §2001.147, or by written Commission Order issued pursuant to Tex. Gov't Code §2001.146(e). If a timely motion for rehearing of an application is filed by any party at interest, this order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the Commission. Pursuant to Tex. Gov't Code §2001.146(e), the time allotted for Commission action on a motion for rehearing in this case prior to its being overruled by operation of law is hereby extended until 90 days from the date Commission Order is signed.



**SIGNED** this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

**RAILROAD COMMISSION OF TEXAS**

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**CHAIRMAN DAVID PORTER**

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**COMMISSIONER CHRISTI CRADDICK**

\_\_\_\_\_  
**COMMISSIONER RYAN SITTON**

**ATTEST:**

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**SECRETARY**