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WAYNE CHRISTIAN, *COMMISSIONER*  
JIM WRIGHT, *COMMISSIONER*



DANA AVANT LEWIS, *DIRECTOR*

# RAILROAD COMMISSION OF TEXAS

## HEARINGS DIVISION

**GUD NO. 10597**  
**First Amended Proposal for Decision**

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**COMPLAINT OF VOPAK MODA HOUSTON, LLC (VMH), AGAINST  
MAGELLAN CRUDE OIL PIPELINE COMPANY, LP**

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**Administrative Law Judge John Dodson**  
**Technical Examiners: James Currier, Rose Ruiz**

### **PARTIES**

**COMPLAINANT: Vopak Moda Houston, LLC (VMH)**  
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**RESPONDENT: Magellan Crude Oil Pipeline Company, LP (Magellan)**  
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Jason Powers, Nicholas Shum, Kallie Gallagher  
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*Counsel for Magellan*

**PROCEDURAL TIMELINE**

Complaint Filed by VMH: Parties Request Abatement to Pursue Settlement:	January 20, 2017 August 22, 2017, through November 13, 2018
Supplement to Complaint Filed:	November 14, 2018
Hearing on the Merits:	November 19-20, 2019, and June 2, 2020
Evidentiary Record Closed:	June 2, 2020
Original PFD Issued:	November 5, 2020
PFD Exceptions Filed:	December 4, 2020
Replies to PFD Exceptions Filed:	December 16, 2020
Deadline for Commission Action:	Not applicable

### **STATEMENT OF THE CASE**

In this docket, the owner of a planned crude storage facility in Houston (VMH) asks the Commission to compel an interconnection and business relationship with a nearby common carrier pipeline (Magellan), as well as dictate the contractual terms governing the interconnection. Though filed in early 2017, a significant portion of this docket was held in abatement while the parties pursued settlement discussions. In late 2018, VMH renewed the prosecution of its claims.

Under existing Texas law, common carrier pipelines are required to exchange crude petroleum tonnage with each like common carrier. The Railroad Commission, in certain circumstances, further may require (1) connections at every locality reached by both pipelines if "a necessity exists," and (2) that a common carrier extend or enlarge its pipeline/facilities if doing so is "required in the public interest." Here, VMH plans to construct its own pipeline segments connecting its planned crude storage facility to Magellan's nearby Houston Crude Oil Distribution System (HDS). Though involvement and approval by the Railroad Commission is not required for common carrier pipelines to accomplish an interconnection, VMH asks the Commission here to invoke its seldom-used authority to compel such an interconnection by ordering Magellan to install new connection equipment at its Shell Dock Road Junction facility to make possible a connection with VMH's planned, yet unbuilt, pipeline segments.

Magellan has not refused to interconnect with VMH. Rather, Magellan has offered VMH an interconnection agreement, though VMH argues that its terms are unfair and unreasonable compared to select terms in various connection contracts Magellan has with other pipelines. Though VMH generally alleges that Magellan continues to refuse to connect with VMH on a "reasonable, non-discriminatory" basis, VMH's claim here is not a discrimination claim, but rather an interconnection request (functioning similarly to an application). VMH's storage facility is partially complete, but there is no crude oil stored there and VMH has not yet built its planned pipeline segments needed to reach Magellan's nearby HDS facility.

In addition to arguing that another crude storage facility in Houston is necessary and required in the public interest, VMH also asks the Commission to approve contractual terms drafted by VMH that will govern its prospective business relationship with Magellan.

### **RECOMMENDATION SUMMARY**

Commission action here to force Magellan to interconnect with VMH by enlarging or extending Magellan's HDS facilities is not proper under Texas law. Therefore, the recommendation is for the Commission to deny VMH's request.

There is no deadline for Commission action.

**SUMMARY OF CHANGES TO ORIGINAL PFD**

This First Amended PFD makes certain typographical corrections and other non-substantive changes, as well as substantive changes with respect to added legal analysis, revised statutory construction, and certain amended findings of fact and conclusions of law. Notable changes in this First Amended PFD include:

- Typographical error “65 million barrels” is corrected to read “6.5 million barrels” (p. 12);
- Revised characterization of testimony by a VMH witness (p. 13), along with added clarification of its evidentiary scope and probative weight (p. 13, footnote 72);
- Significantly revised statutory construction and legal analysis relating to VMH’s claim under Section 111.023 (Exchange of Facilities) (pp. 24-25), along with brief referencing language elsewhere (pp. iii, 1, 6, 34);
- Added analysis and treatment of evidence pertaining to Magellan’s business relationships with competitor pipelines and third-party storage terminals in the Houston market (p. 32 and footnote 175); and
- Added clarification relating to the timeliness of VMH’s claims (pp. 33-34).

The Amended Proposed Final Order reflects these changes, where appropriate. Consistent with Commission Rule § 1.121(f), amendments contained therein are noted with specificity (p. 4, footnote). Amendments to the findings of fact and conclusions of law include:

- Original FOF Nos. 59, 67, and 87, and Original COL Nos. 14, 15, 16, and 25 are vacated;
- Original FOF Nos. 40, 45, 49, 50, 57, 66, 72, and 82 are amended (Amended FOF Nos. 42, 47, 51, 53, 60, 69, 74, and 85, respectively);
- Original COL Nos. 18, 20, and 23 are amended (Amended COL Nos. 21, 23, and 26, respectively);
- Amended FOF Nos. 36, 37, 52, 61, 82, and 91 are new findings of fact; and
- Amended COL Nos. 8, 9, 10, 17, 18, 19, 27, and 28 are new conclusions of law.

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### PFD Attachments

Attachment 1:	Combined Exhibit List
Attachment 2:	Magellan’s Houston Crude Oil Distribution System (HDS) Maps
Attachment 3:	VMH Crude Facility Map and Tank Farm Diagram
Attachment 4:	VMH Facility Development Plan
Attachment 5:	Amended Proposed Final Order

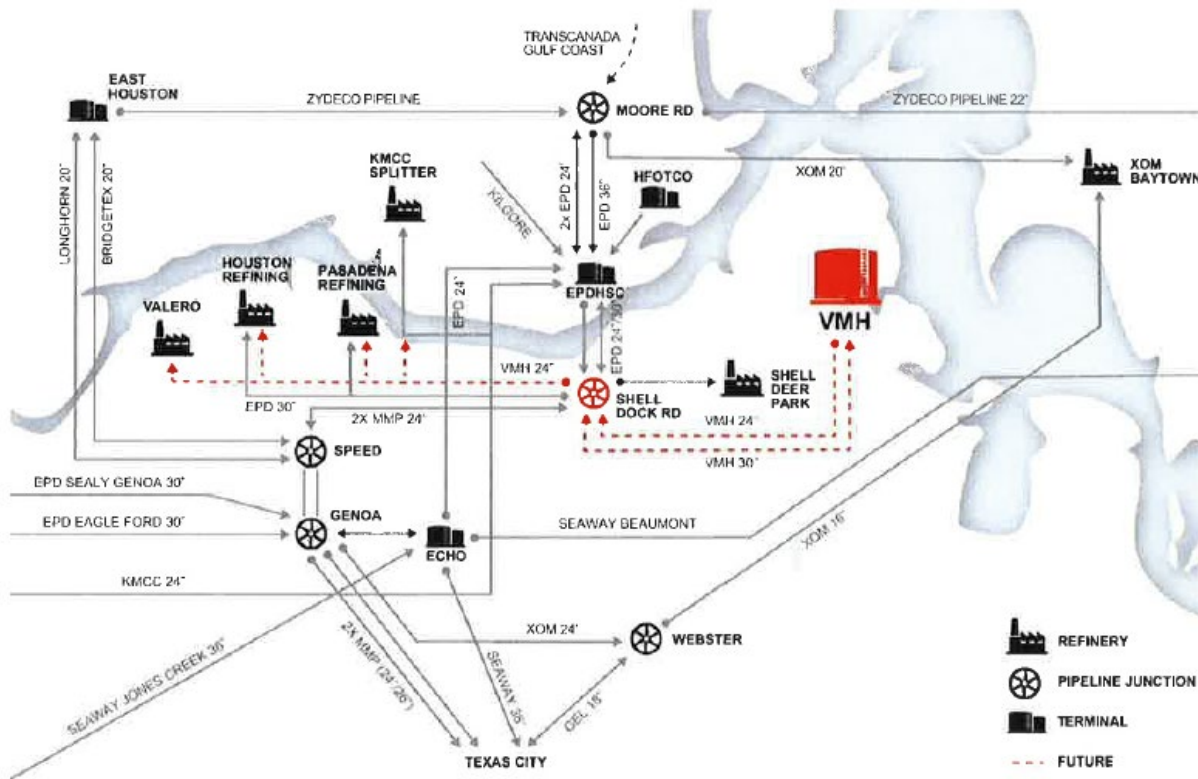
**FIRST AMENDED PROPOSAL FOR DECISION**

**I. INTRODUCTION**

Complainant Vopak Moda Houston, LLC (“VMH”), the owner of a planned crude storage facility in Houston, asks the Commission to compel an interconnection with a nearby pipeline system, the Houston Crude Oil Distribution System (“HDS”), which is owned and operated by Magellan Crude Oil Pipeline Company, LP (“Magellan”). Though filed in early 2017, a significant portion of this docket was held in abatement at the request of the parties while they pursued settlement discussions.

VMH invokes a seldom-used authority conferred by the Legislature to the Railroad Commission whereby, in certain circumstances, the Commission may: require interconnection between two like pipelines for the interchange of crude petroleum tonnage if a necessity exists (Section 111.023); and require a crude oil pipeline to extend or enlarge its facilities (Section 111.137).<sup>1</sup>

As shown below in red, VMH plans to build a deepwater bulk liquids storage and terminal facility on the Houston Ship Channel, along with side-by-side pipelines that will transport crude oil to and from Magellan’s nearby Shell Dock Road Junction, a junction point on Magellan’s HDS. Unsatisfied with the terms offered by Magellan, VMH asks the Commission here to order Magellan to interconnect with VMH’s planned, yet unbuilt, pipeline segments.



<sup>1</sup> Unless otherwise specified, all statutory sections referenced textually herein refer to the Texas Natural Resources Code, Chapter 111 (Common Carrier Act).

## II. PARTIES

### **VMH**

Complainant VMH is a joint venture between Moda Midstream Operating, LLC (“Moda Operating”), and Vopak Terminals North America, Inc. Moda Operating is a subsidiary of Moda Midstream, LLC (“Moda Midstream”), which is a liquids terminaling and logistics company—based in Houston and backed by a Texas-based private equity fund—that provides independent terminal, storage, and distribution solutions to refiners, petrochemical manufacturers, marketers and producers of crude oil, condensate, NGLs, refined products, and other bulk liquids.<sup>2</sup>

Vopak Terminals North America, Inc., is a subsidiary of Koninklijke N.V. (together, “Vopak”), a publicly-traded company headquartered in the Netherlands and listed on the NYSE Euronext Amsterdam stock exchange.<sup>3</sup> Vopak is an independent tank storage company that operates a global network of more than 60 tank terminals located in strategic marine locations in North America, Central America, South America, Europe, Africa, the Middle East, and Australia.<sup>4</sup>

As discussed in further detail below, VMH is in the process of developing a deepwater bulk liquids storage and terminal facility located on the Houston Ship Channel (the “Vopak Deer Park Terminal” or “VMH Facility”), as well as associated inbound and outbound pipelines, to handle receipt, storage, and transportation to the distribution system of crude oil and refined products.

### **Magellan**

Respondent Magellan is a Delaware limited partnership, of which Magellan Midstream Partners, LP, is the sole limited partner and Magellan Pipeline GP, LLC, is the general partner. Magellan is a common carrier under Texas law, in the business transporting, storing, and distributing refined petroleum products and crude oil. Magellan’s crude oil business segment is comprised of about 2,200 miles of pipelines and storage facilities, including the HDS, used to transport crude oil from production and gathering facilities to refineries and other end-users.<sup>5</sup>

Magellan owns and operates the HDS, which is one of several competing common carrier pipeline distribution systems in the Houston area. As explained in further detail below, Magellan’s HDS connects its East Houston terminal through several interchanges to various points, including multiple refineries throughout the Houston area and crude oil import and export facilities.<sup>6</sup> The HDS also is connected to other third-party pipelines and facilities that allow access to crude oil from the Permian and Eagle Ford basins, and from the Cushing, Oklahoma, crude oil trading hub.<sup>7</sup>

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<sup>2</sup> VMH Ex. 3 (Pre-filed direct testimony of Jonathan Ackerman on behalf of VMH (the “Ackerman Test.”)) at 2.

<sup>3</sup> Complaint, filed on Jan. 20, 2017 (“Compl.”), at 3-4; VMH Ex. 3 (Ackerman Test.) at 2-3.

<sup>4</sup> Compl. at 4; VMH Ex. 3 (Ackerman Test.) at 3.

<sup>5</sup> Magellan Ex. 1 (Pre-filed direct testimony of Mark Roles on behalf of Magellan (the “Roles Test.”)) at 5.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 5-6.

### III. JURISDICTION, BURDEN OF PROOF, AND NOTICE

#### ***Jurisdiction***

The Commission has jurisdiction over Magellan and all matters in this proceeding: pursuant to Chapter 81 (Railroad Commission of Texas) of the Texas Natural Resources Code, including Section 81.051 (Jurisdiction of Commission);<sup>8</sup> and pursuant to Chapter 111 (Common Carrier Act) of the Natural Resources Code, including Section 111.013 (Control of Pipelines) and Section 111.221 (Complaint; Jurisdiction to Hear Complaints).

#### ***Burden of Proof***

Complainant VMH carries the burden of proving its requested relief by a preponderance of the evidence.<sup>9</sup>

#### ***Notice***

Proper notice has been issued in this proceeding in accordance with all applicable statutory and regulatory requirements.

On January 20, 2017, VMH served a copy of its complaint on Magellan.<sup>10</sup> On January 26, 2017, the Hearings Division sent a letter to the parties, notifying Magellan of the complaint.<sup>11</sup> On February 9, 2017, Magellan formally appeared in this docket, and subsequently all pleadings, notices, and other official communications have been served directly on counsel for VMH and Magellan.

On October 25, 2019, and on May 22, 2020, the Administrative Law Judge ("ALJ") issued the Notice of Hearing and Notice of Re-Opening of Hearing, respectively, both of which complied with Chapter 2001 (Administrative Procedure) of the Texas Government Code, Part 1 (Railroad Commission of Texas) of Title 16 (Economic Regulation) of the Texas Administrative Code, and all other applicable requirements.<sup>12</sup> On October 31, 2019, and on May 29, 2020, the Notice of Hearing and Notice of Re-Opening of Hearing were published in *Gas Utilities Information Bulletin Nos. 1118 and 1132*, respectively.<sup>13</sup>

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<sup>8</sup> Tex. Nat. Res. Code § 81.051(a)(3) ("The Commission has jurisdiction over all persons owning or operating pipelines in Texas.").

<sup>9</sup> Commission Rule § 1.23(b) ("The complainant in a complaint proceeding shall have the burden of proof which is a preponderance of the evidence.").

<sup>10</sup> Vopak Moda Houston, LLC's Complaint and Motion to Consolidate, filed Jan. 20, 2017, at 17 (certifying that a copy was served on Respondent Magellan).

<sup>11</sup> Examiner Letter No. 01 (Receipt of Complaint), issued Jan. 26, 2017.

<sup>12</sup> See Examiner Letter No. 16 (Notice of Hearing), issued Oct. 25, 2019, and Examiner Letter No. 24 (Notice of Re-Opening of Merits Hearing), issued May 22, 2020.

<sup>13</sup> *Gas Utilities Information Bulletin No. 1118*, published by the Oversight and Safety Division on Oct. 31, 2019, pp. 4-5 (containing the full Notice of Hearing); *Gas Utilities Information Bulletin No. 1132*, published by the Oversight and Safety Division on May 29, 2020, pp. 4-5 (containing the full Notice of Re-Opening of Hearing).



#### IV. PROCEDURAL HISTORY

On January 20, 2017, VMH filed its complaint. On February 9, 2017, Magellan appeared in the docket, timely answering the complaint and moving for dismissal.<sup>14</sup> On May 1, 2017, after briefing and oral argument, the motion to dismiss was denied.<sup>15</sup> In denying Magellan's motion, the ALJ reasoned:

*VMH need not be a shipper or have already-completed facilities to have standing to bring claims under Common Carrier Act Sections 111.137 (Enlargement and Extension of Facilities) and 111.023 (Exchange of Facilities). VMH has shown completion of certain regulatory and facility development benchmarks to meet general threshold standing requirements to bring its claims.*

On August 22, 2017, the parties requested abatement of the proceeding, representing that they were "engaged in settlement discussions with the purpose of resolving the matters stated in [the complaint]," with VMH further requesting to keep the proceeding in place "should [VMH] need to pursue a resolution before the Commission."<sup>16</sup> On July 27, 2018, VMH again requested abatement, representing that the parties were still engaged in settlement negotiations and that "a settlement proposal is currently under advisement between the parties."<sup>17</sup>

On November 14, 2018, VMH notified the ALJ that settlement efforts with Magellan had failed and that "VMH intends to pursue relief in this docket."<sup>18</sup> Also on November 14, VMH separately filed a supplement to its complaint, requesting that the Commission include in a final interconnection order additional language requiring Magellan to make the interconnection lawfully and without discrimination.<sup>19</sup> Construing this supplement as a separate discrimination claim, Magellan moved for its dismissal.<sup>20</sup> On January 15, 2019, after briefing and oral argument, the motion to dismiss VMH's supplemental request to interconnect without discrimination—construed by Magellan as a new/standalone discrimination claim—was granted.<sup>21</sup> Partially granting the motion, the ALJ reasoned:

*VMH's supplemental claim requesting a non-discriminatory connection to Magellan's facilities is improper as a discrimination claim because VMH has not pleaded facts supporting that Magellan currently owes any duty to VMH. The claim also is improper—and unnecessary—as a condition to VMH's requested interconnection because a lawful interconnection is presumed under [Sections 111.023 and 111.137].*

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<sup>14</sup> Magellan Crude Oil Pipeline Company, LP's Response and Motion to Dismiss Vopak Moda Houston, LLC's Complaint and Motion to Consolidate, filed by Magellan on Feb. 9, 2017 (the "Magellan Response").

<sup>15</sup> Examiner Letter No. 02 (Ruling on Magellan's Motion to Dismiss), issued on May 1, 2017.

<sup>16</sup> Letter to the ALJ from counsel for VMH, dated Aug. 22, 2017 (responding to Examiner Letter No. 03 (Status), issued Aug. 8, 2017, instructing VMH to affirm its intent to continue prosecuting its complaint or else withdraw it).

<sup>17</sup> Letter to the ALJ from counsel for VMH, dated July 27, 2018 (responding to Examiner Letter No. 04 (Status), issued July 9, 2018, instructing VMH again to resume prosecuting its complaint or else face dismissal).

<sup>18</sup> Vopak Moda Houston, LLC's Motion to Substitute Counsel, filed Nov. 14, 2018, ¶ 1.

<sup>19</sup> Vopak Moda Houston, LLC's Supplement to Complaint, filed by VMH on Nov. 14, 2018 (the "Supp. Compl."), ¶ 2.

<sup>20</sup> Magellan's Response to Vopak Moda Houston, LLC's Supplement to Complaint and Motion to Dismiss, filed by Magellan on Dec. 4, 2018.

<sup>21</sup> Interim Ruling Partially Granting Magellan's Motion to Dismiss, issued Jan. 15, 2019.

On October 25, 2019, the ALJ issued the Notice of Hearing, setting the merits hearing to commence on November 19, 2019 (the "Notice of Hearing").<sup>22</sup> On October 31, 2019, the Notice of Hearing was published in *Gas Utilities Information Bulletin No. 1118*, available on the Commission's website.<sup>23</sup>

On November 18, 2019, the ALJ issued several written evidentiary rulings on the admissibility of certain pre-filed witness testimonies offered by VMH and Magellan.<sup>24</sup>

The merits hearing initially was held from November 19-20, 2019, in Austin. Following the hearing, the evidentiary record remained open to allow the parties to make optional completeness filings with respect to certain exhibits. On January 17, 2020, the ALJ: made additional evidentiary rulings pertaining to deposition designations and counter-designations offered into evidence by the parties;<sup>25</sup> made legal findings that certain exhibits and portions of the hearing transcript contain highly-sensitive, confidential information under Chapter 552 (Public Information) of the Texas Government Code and ruled that these materials shall remain sealed permanently in Commission records;<sup>26</sup> and closed the evidentiary record.<sup>27</sup>

On April 27, 2020, VMH filed a motion to supplement the record, requesting that the hearing and evidentiary record be re-opened to allow the parties an opportunity to supplement the record with additional evidence on the effect of the coronavirus pandemic on U.S. crude oil storage and access to markets.<sup>28</sup> During a post-hearing conference held on May 14, 2020, the ALJ granted VMH's motion, directing that the hearing would re-open to permit both parties the opportunity to: (1) offer additional evidence, limited in scope to VMH's motion; and (2) cross-examine witnesses, if any, and make appropriate evidentiary objections.

On May 22, 2020, the ALJ issued the Notice of Re-Opening of Hearing, setting the merits hearing to re-open on June 2, 2020 (the "Notice of Re-Opening of Hearing").<sup>29</sup> On May 29, 2020, the Notice of Re-Opening of Hearing was published in *Gas Utilities Information Bulletin No. 1132*, available on the Commission's website.<sup>30</sup>

On June 2, 2020, the hearing was re-opened for the limited purpose described above, and the record then re-closed the same day. A combined list of the parties' exhibits admitted into the evidentiary record is attached as Attachment 1.

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<sup>22</sup> Examiner Letter No. 16 (Notice of Hearing), issued Oct. 25, 2019 (attaching the Notice of Hearing).

<sup>23</sup> *Gas Utilities Information Bulletin No. 1118*, published by the Oversight and Safety Division on Oct. 31, 2019, pp. 4-5 (containing the full Notice of Hearing).

<sup>24</sup> Evidentiary Ruling on Admissibility of the Pre-Filed Testimony of Jonathan Ackerman, issued Nov. 18, 2019; Evidentiary Ruling on Motion to Exclude the Pre-Filed Expert Testimony of Alexander Fielden, issued Nov. 18, 2019; Evidentiary Ruling on Admissibility of the Pre-Filed Testimony of Mark Roles, issued Nov. 18, 2019.

<sup>25</sup> Evidentiary Rulings on Objections to the Deposition Designations of Melanie Little, issued Jan. 17, 2020; Evidentiary Rulings on Objections to the Deposition Designations of Robb Barnes, issued Jan. 17, 2020; Evidentiary Rulings on Objections to the Deposition Designations of Brett Hunter, issued Jan. 17, 2020.

<sup>26</sup> Order Permanently Sealing Portions of the Administrative and Evidentiary Record, issued on Jan. 17, 2020.

<sup>27</sup> Examiner Letter No. 21 (Close of Evidentiary Record), issued Jan. 17, 2020.

<sup>28</sup> Vopak Moda Houston, LLC's Motion to Supplement the Record, filed by VMH on April 27, 2020.

<sup>29</sup> Examiner Letter No. 24 (Notice of Re-Opening of Merits Hearing), issued May 22, 2020.

<sup>30</sup> *Gas Utilities Information Bulletin No. 1132*, published by the Oversight and Safety Division on May 29, 2020, pp. 4-5 (containing the full Notice of Re-Opening of Hearing).

## V. PIPELINE INTERCONNECTION AND EXTENSION OF FACILITIES UNDER THE COMMON CARRIER ACT

The authorities offered by VMH to support its request for a Commission-ordered interconnection with Magellan are Sections 111.023 (Exchange of Facilities) and 111.137 (Enlargement and Extension of Facilities) of the Common Carrier Act.<sup>31</sup>

Section 111.023 (Exchange of Facilities) imposes certain legal duties upon a common carrier to interconnect and exchange crude petroleum with other like common carriers, as well as authorizes the Railroad Commission—where necessary—to require connections and facilities at every locality reached by both pipelines. According to VMH, relief under this statute is appropriate here because it would be extraordinarily difficult, if not impossible, for VMH to access the “full array of refining and logistics offerings” in the Houston area without connecting with Magellan’s HDS.<sup>32</sup> In full, Section 111.023 reads:

- (a) *A common carrier shall exchange crude petroleum tonnage with each like common carrier.*
- (b) *When a necessity exists, the [Railroad Commission] may require connections and facilities for the interchange of crude petroleum tonnage to be made at every locality reached by both pipelines, subject to the rules and rates made by the Commission.*
- (c) *A common carrier pipeline under like rules shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline.*<sup>33</sup>

Section 111.137 (Enlargement and Extension of Facilities) authorizes the Railroad Commission, in certain circumstances, to order a common carrier pipeline to extend or enlarge its facilities. According to VMH, relief under this statute is appropriate here because the requested extension/enlargement of Magellan’s HDS (1) is reasonable, (2) is in the public interest, and (2) does not impair Magellan’s ability to fulfill its duties to the public.<sup>34</sup> In full, Section 111.137 reads:

*On its own initiative without complaint, and after proper notice and hearing, as provided by law the [Railroad Commission] may authorize or require by order any common carrier owning or operating pipelines in this state or owning, operating, or managing crude petroleum storage tanks or facilities for the public for hire, to extend or enlarge those pipelines or storage facilities if the extension or enlargement is found to be reasonable and required in the public interest and the expense involved will not impair the ability of the common carrier or public utility to perform its duty to the public.*<sup>35</sup>

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<sup>31</sup> See Tex. Nat. Res. Code §§ 111.023, 111.137.

<sup>32</sup> Compl. at 6.

<sup>33</sup> Tex. Nat. Res. Code § 111.023.

<sup>34</sup> Compl. at 9-13.

<sup>35</sup> Tex. Nat. Res. Code § 111.137.

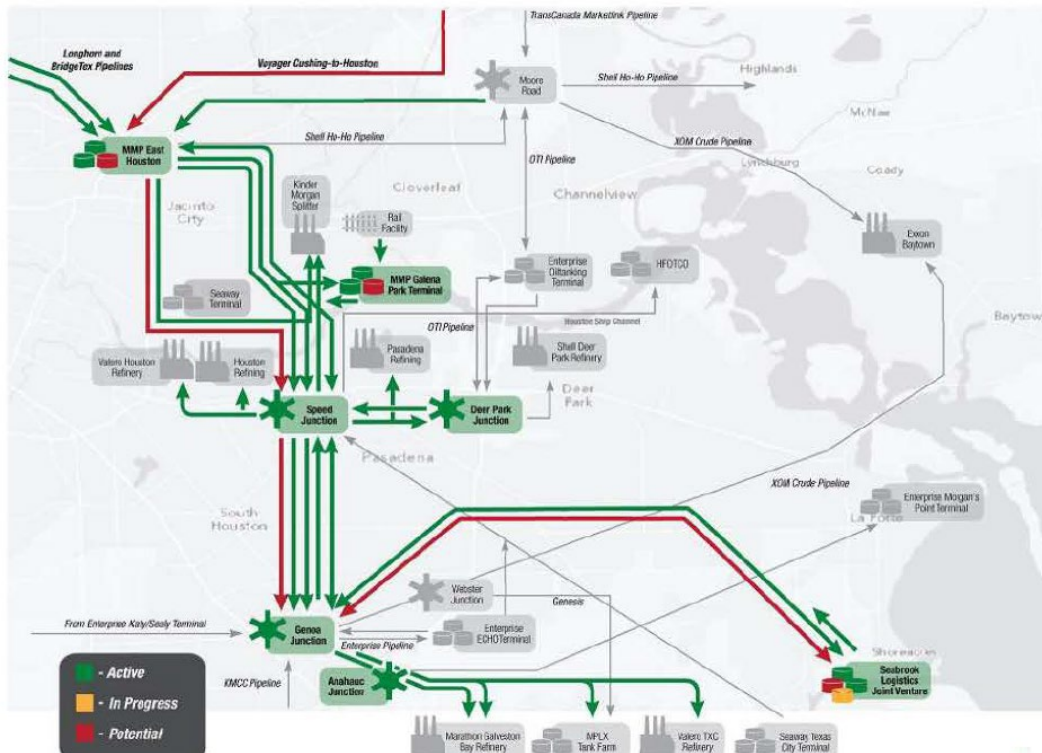
## VI. VMH'S REQUEST

### A. Relevant Background

#### 1. Magellan's Houston Crude Oil Distribution System (HDS)

Magellan's crude oil business segment is comprised of about 2,200 miles of pipelines and storage facilities, including the HDS, used to transport crude oil from production and gathering facilities to refineries and other end-users.<sup>36</sup> Magellan built and acquired the HDS over about eight years through strategic partnerships and direct acquisitions. The HDS connects Magellan's East Houston terminal through several interchanges to various points, including multiple refineries throughout the Houston area and crude oil import and export facilities. The HDS also is connected to other third-party pipelines and facilities that allow access to crude oil from the Permian and Eagle Ford basins, as well as from the Cushing, Oklahoma, crude oil trading hub.<sup>37</sup>

The below map illustrates the general HDS footprint and facilities, as of 2019.<sup>38</sup>



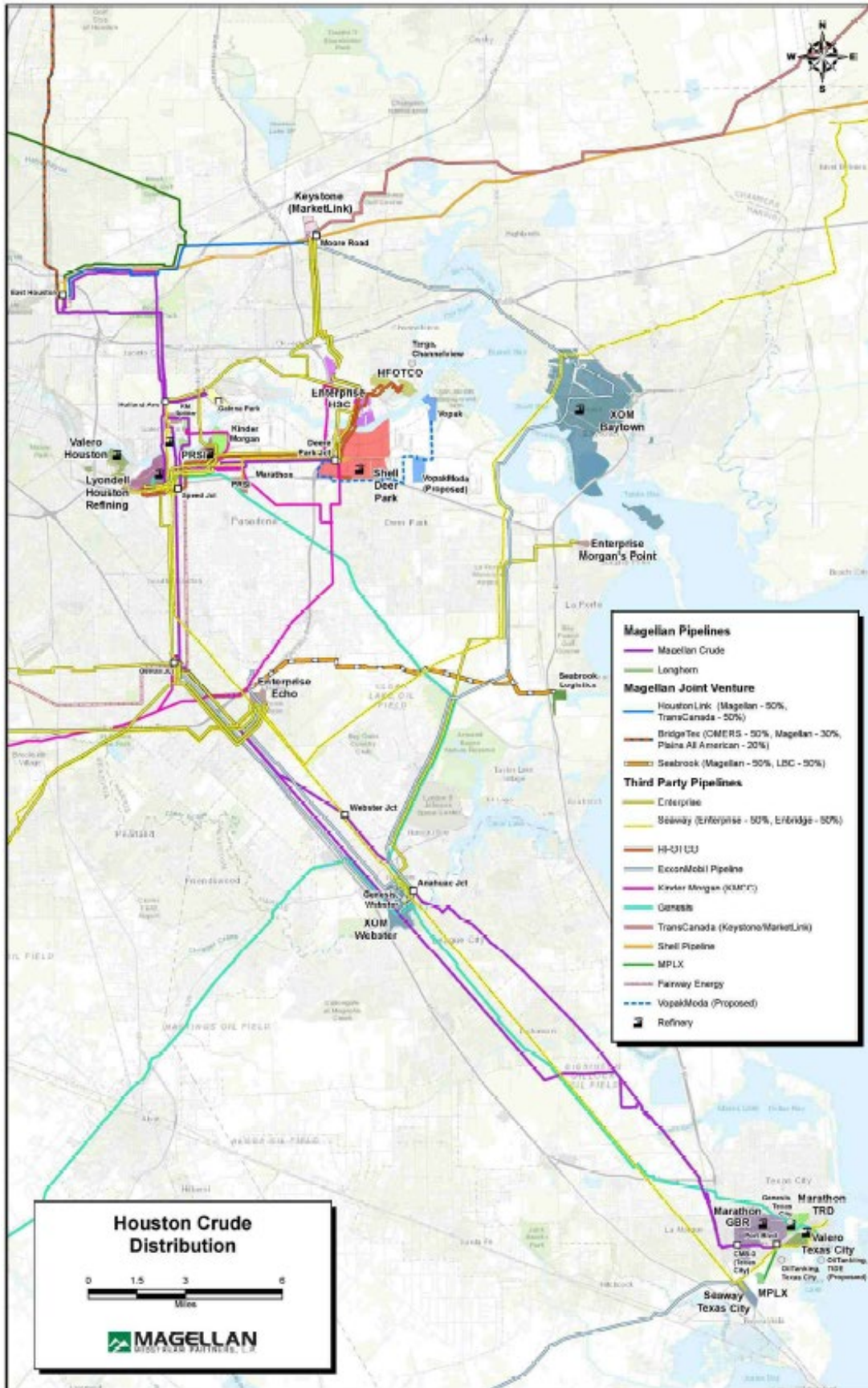
According to Magellan, its HDS is a significant pipeline system for the transportation and distribution of crude oil in the Houston area, but other pipeline systems also exist that are comparable to the HDS in size and scope and allow for similar or even greater connectivity to storage facilities, refineries, and docks.<sup>39</sup> The map on the next page shows the HDS and these other systems.

<sup>36</sup> Magellan Ex. 1 (Roles Test.) at 5.

<sup>37</sup> *Id.* at 5-6; see also *id.* at Exhibit Magellan-2.

<sup>38</sup> VMH Ex. 29-C. Larger versions of this map and the map on the next page are attached as Attachment 2.

<sup>39</sup> Magellan Ex. 1 (Roles Test.) at 6.



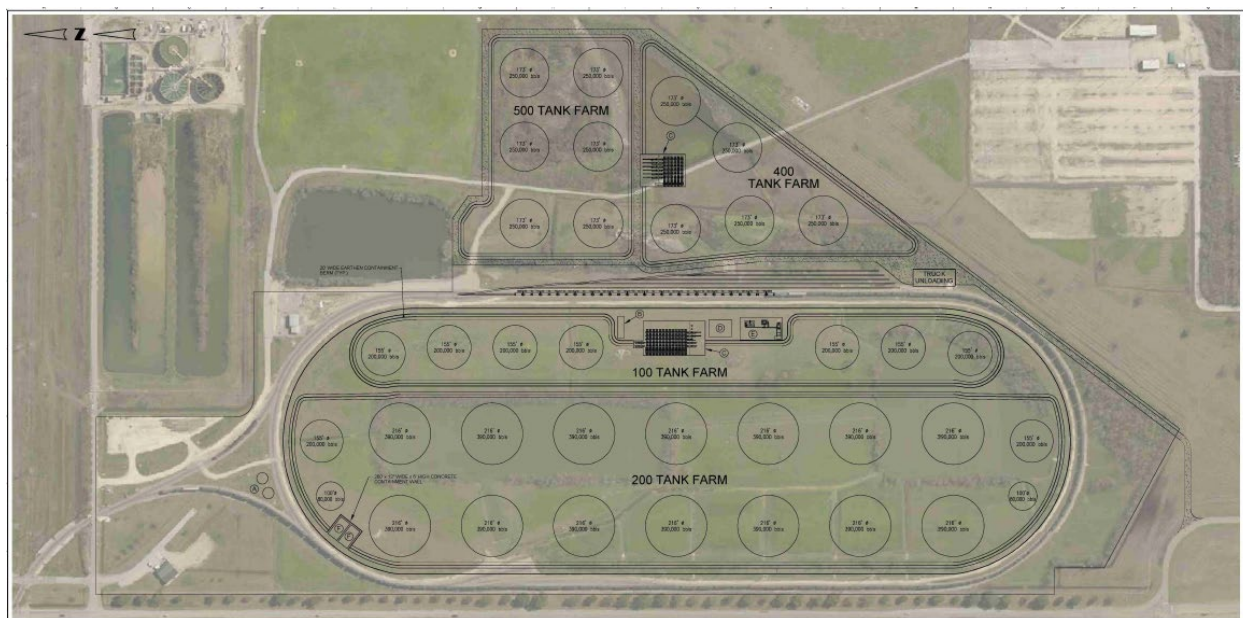


## 2. VMH's Planned Storage Facility and Pipelines

VMH is in the process of planning and developing a deepwater bulk liquids storage and terminal facility on the Houston Ship Channel to handle receipt, storage, and transportation to the distribution system of crude oil and refined products.<sup>40</sup> Once complete, VMH's terminal and related facilities will store crude oil, ammonia, and vacuum gas oil ("VGO"), with facilities for storing ammonia and VGO operational by late 2020 and the facilities for storing crude oil operational and complete by 2022.<sup>41</sup> A copy of VMH's Facility Development Plan is attached as [Attachment 4](#).

Only the crude oil aspects of the VMH terminal are relevant to this proceeding. The initial development of VMH's crude oil facilities includes 4 million barrels of crude oil storage, with capital spending associated with this phase to exceed \$250 million, which includes costs to construct marine facilities that are targeted to be utilized for the crude oil development and other product service.<sup>42</sup> VMH expects these facilities, once connected to the HDS, to provide service to the Houston-area refineries (Valero, Lyondell, PRSI, and Shell), Exxon's Baytown refinery, and the coastal refineries (Marathon's Galveston and Texas City refineries and Valero's Texas City refinery).<sup>43</sup>

Citing significant and sustained market demand of the past five to seven years, VMH expects that crude oil will continue to flow to Houston for export and distribution to end users. Accordingly, VMH also has developed initial plans for "phase two" of its crude oil infrastructure, which includes doubling its crude oil storage capacity and additional marine infrastructure.<sup>44</sup> The below diagram shows VMH's planned crude facility and tank farm.<sup>45</sup>



<sup>40</sup> VMH Ex. 3 (Ackerman Test.) at 6.

<sup>41</sup> See VMH Ex. 3-B (VMH Development Plan), p. 21.

<sup>42</sup> VMH Ex. 3 (Ackerman Test.) at 7.

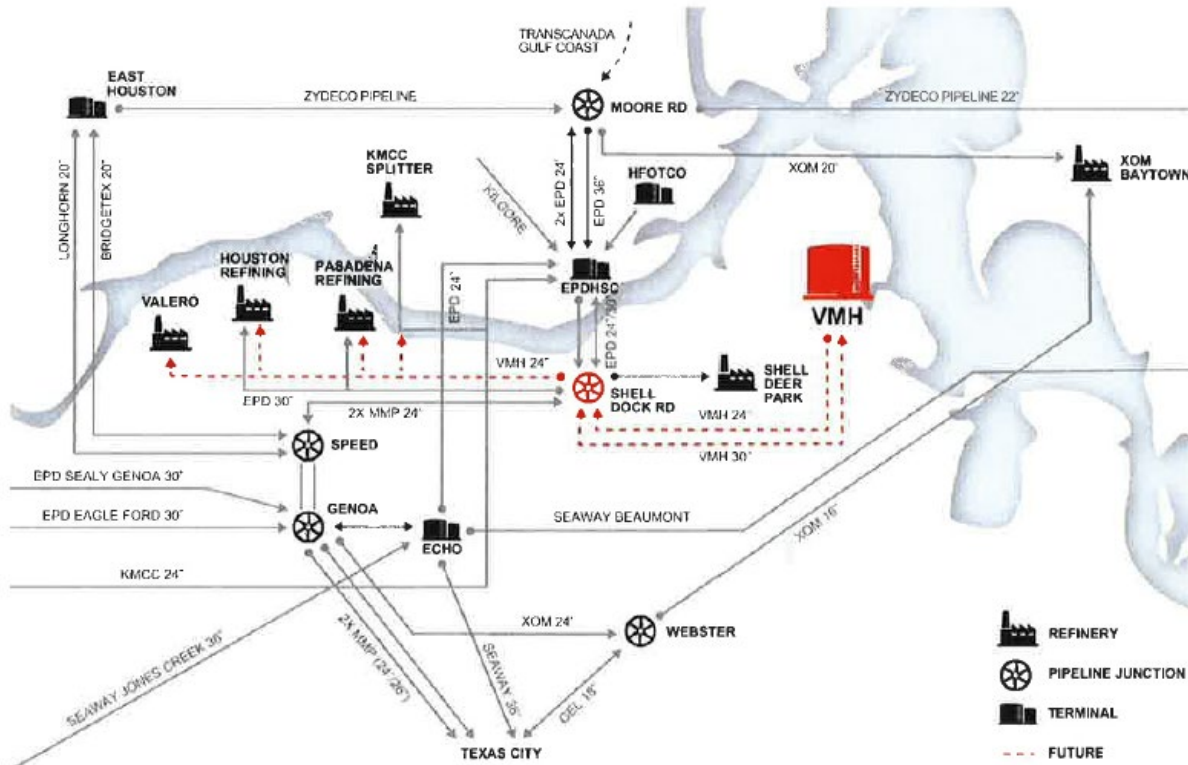
<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> VMH Ex. 44. A larger version of this diagram, with additional information, is attached as [Attachment 3](#).

In addition to operating storage tanks and docks, VMH also plans to construct side-by-side common carrier pipelines that will connect its storage and terminal facility with Magellan’s nearby Shell Dock Road Junction,<sup>46</sup> a junction point on Magellan’s HDS.<sup>47</sup> Both pipelines are planned to be approximately 5.7 miles in length, with the 30” inbound line and the 24” outbound line both having an estimated capacity between 360,000 and 480,000 barrels per day (“bpd”).<sup>48</sup>

The below map shows VMH’s planned storage facility along the Houston Ship Channel, along with VMH’s planned side-by-side pipelines that will, once built, connect VMH’s storage and terminal facility with Magellan’s HDS at the Shell Dock Road Junction location.<sup>49</sup>



According to VMH, the physical task of connecting its adjacent pipeline segments, once they are built, to Magellan’s Shell Dock Road Junction facility technically is very simple. Each of the two interconnections comprise “not much more than a tap, flanges, and valves.”<sup>50</sup> VMH represents that it will pay the entire amount of the expenses associated with this work, including Magellan’s portion, which VMH estimates will total approximately \$5 million.<sup>51</sup>

<sup>46</sup> The parties also refer to this junction point as the “Deer Park Junction.”

<sup>47</sup> VMH Ex. 3 (Ackerman Test.) at 6-7, 9.

<sup>48</sup> VMH Ex. 3-E (VMH T-4 Pipeline Permits); VMH Ex. 9 (VMH User Requirements & Basis of Design), p. 45; VMH Ex. 21 (VMH’s Connection Responses), pp. 6-7.

<sup>49</sup> VMH Ex. 3-B (VMH Development Plan), p. 3.

<sup>50</sup> VMH Ex. 3 (Ackerman Test.) at 15-16.

<sup>51</sup> *Id.* at 9.

Although its planned storage and terminal facilities are not yet complete or operational, VMH represents that it has “achieved a number of significant developmental benchmarks” toward completion, as described by VMH below.<sup>52</sup>

- *VMH owns and controls the real property where the storage and terminal facilities are currently and will be located in the future. This property is ideally located to provide storage and distribution of crude oil and refined products through water access to the Houston Ship Channel and proximity to the Houston-area crude oil distribution system and refinery complex.*<sup>53</sup>
- *VMH has obtained an Air Permit for emissions from the facility issued by the Texas Commission on Environmental Quality, an essential requirement for operating facilities of this type.*<sup>54</sup>
- *VMH obtained a Dock Permit from the Army Corps of Engineers for its barge loading and offloading facilities, another essential requirement.*<sup>55</sup>
- *VMH’s terminal is currently operational in part. However, operations are currently limited and construction is on-going. Subject to certain conditions, phase one of the crude oil storage and terminal project may be completed [by early 2021].*<sup>56</sup>

With respect to VMH’s separate planned project of constructing side-by-side pipelines connecting its storage and terminal facility with Magellan’s nearby Shell Dock Road Junction facility, VMH also offers developmental benchmarks for those, as described by VMH below.<sup>57</sup>

- *VMH has obtained the required T-4 pipeline permit for the crude oil common carrier pipeline that will allow producers to access the storage and logistics services of VMH from the Magellan HDS.*<sup>58</sup>
- *The right-of-way for the VMH common carrier has been mapped and surveyed, and the right-of-way has been acquired.*

Regarding anticipated use, VMH represents that it: has entered commercial discussions with many storage customers and shippers; has customers for portions of its terminal and has an executed term sheet for more than 1,000,000 barrels of crude oil; has multiple customers who have expressed interest once interconnection with Magellan’s HDS is secured; and has customers who have repeatedly demanded (to VMH) that VMH be connected to the HDS.<sup>59</sup> According to VMH, all its potential customers require that the storage provide maximum connectivity to the Houston-area refining complex, including the interconnections to Magellan’s HDS.<sup>60</sup>

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<sup>52</sup> See Compl. at 4-5, and VMH Ex. 3 (Ackerman Test.) at 7-8.

<sup>53</sup> Prior to the Hearing, VMH also executed a 50-year lease with the Port of Houston for dock space. VMH Ex. 63.

<sup>54</sup> VMH Ex. 3-C (VMH Air Permit).

<sup>55</sup> VMH Ex. 3-D (VMH Dock Permit).

<sup>56</sup> VMH Ex. 3 (Ackerman Test.) at 8.

<sup>57</sup> See *id.*

<sup>58</sup> VMH Ex. 3-E (VMH Pipeline Permits).

<sup>59</sup> VMH Ex. 3 (Ackerman Test.) at 8.

<sup>60</sup> *Id.* at 8-9.



## B. VMH's Evidence and Arguments

As discussed above, VMH plans to construct a crude oil storage terminal along the Houston Ship Channel, along with side-by-side pipeline segments—one inbound and one outbound—that would extend to Magellan's nearby HDS facility at Shell Dock Road Junction approximately 5.7 miles away. VMH argues that its requested interconnection technically is very simple, would cost Magellan nothing, and would benefit the public by adding a new crude storage facility in the Houston area, something VMH says will alleviate market congestion costs. In support, VMH provides testimony from the below witnesses.

- *Jonathan Ackerman* (fact and expert), Executive Vice President and Chief Financial Officer at Moda Midstream. Mr. Ackerman discusses VMH's ongoing negotiation efforts with Magellan for an interconnection agreement to connect VMH's planned inbound and outbound pipeline segments with Magellan's nearby HDS facility at Shell Dock Road Junction. Mr. Ackerman also offers opinions on the reasonableness of VMH's requested interconnections.<sup>61</sup>
- *Alexander Fielden* (expert), Director of Research, Commodities, and Energy for Morningstar, Inc., an investment research firm based in Chicago, Illinois. Mr. Fielden primarily offers opinions that growing crude flows from shale production headed to Houston export docks through Magellan's pipeline system have increased congestion and price volatility, and therefore additional crude storage space is needed to alleviate market congestion cost.<sup>62</sup>

### 1. Negotiations with Magellan

VMH considers Magellan a competitor in the Houston crude oil storage market, something that VMH believes has informed and affected Magellan's conduct in ongoing negotiations with VMH for a lawful and reasonable connection agreement. Magellan has three existing Houston-area crude oil storage facilities that would compete for business with VMH's planned storage terminal, once it is operational: the East Houston Terminal, which has over 6.5 million barrels of crude oil storage; the Seabrook Logistics Terminal, which is jointly owned by Magellan and operates over 2.4 million barrels of storage capacity, as well as a deep-water vessel berth; and the Galena Park Terminal, which offers crude oil and refined products storage and marine docks.<sup>63</sup> VMH argues that Magellan has been resistant to providing reasonable, lawful, non-discriminatory interconnections with VMH's planned pipelines and facilities in an effort "that appears to be based on favoring its own system and storage and avoiding legitimate competition for the transportation and storage of crude oil that would benefit shippers, refineries, and the public."<sup>64</sup>

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<sup>61</sup> See VMH Ex. 3 (Ackerman Test.).

<sup>62</sup> See VMH Ex. 18 (Pre-filed direct testimony of Alexander Fielden on behalf of VMH (the "Fielden Test."); see also VMH Ex. 64 (Declaration of Alexander Fielden, dated April 24, 2020 (the "Fielden Decl.")).

<sup>63</sup> VMH Ex. 3 (Ackerman Test.) at 11.

<sup>64</sup> *Id.* at 12.

### Terms Offered by Magellan

Beginning in 2016, VMH has engaged in lengthy discussions with Magellan for amenable terms of an interconnection. According to VMH, Magellan has consistently refused to offer any interconnections on a reasonable basis.<sup>65</sup>

In March 2016, a VMH executive first approached Magellan to request an interconnection at Magellan's HDS facility at Shell Dock Road Junction.<sup>66</sup> After this initial request, Magellan indicated that it may be interested in the interconnection if Magellan obtained equity in the VMH project.<sup>67</sup> After a few months passed, in June 2016, VMH had a follow-up phone call with Magellan, which again was noncommittal about its willingness to provide an interconnection.<sup>68</sup> In August 2016, VMH followed up with an email request to Magellan to see if it had assessed the possibility of the interconnections.<sup>69</sup> In September 2016, VMH had a phone call with Magellan, in which Magellan acknowledged that no system analysis had been done regarding the interconnections, though Magellan did ask for information regarding types of crude, origin points, and other operational information potentially relevant to the interconnections.<sup>70</sup> VMH then provided Magellan with this requested information regarding the characteristics of the oil that would be delivered to VMH through Magellan's HDS. After no response was received from Magellan, in December 2016, VMH met with Magellan to express concerns about "slow rolling" VMH's request.<sup>71</sup>

In January 2017, VMH submitted a demand for interconnections with Magellan, invoking Magellan's common carrier obligations to do so. On this same date, VMH had an extensive discussion with Magellan about the interconnection, after which a VMH executive was briefed internally: that Magellan expressed concern about the interconnection's impact on long-haul shippers that deliver barrels into Magellan's HDS and about "putting a competitor in business by providing the interconnections"; and that Magellan wanted a significant "take or pay" commitment from shippers, as well as published pipeline tariff rates, as part of the interconnections.<sup>72</sup> VMH responded that none of the other parties connected at Shell Dock Road Junction pay additional interconnection fees, and any additional fees or capital requirements would put VMH in an uneconomic position relative to alternative storage facilities.<sup>73</sup>

According to VMH, years of inaction and unreasonable proposals from Magellan forced VMH to bring this complaint. VMH provided Magellan a proposed connection agreement, which VMH considers to be consistent with Magellan's other connection agreements, but Magellan rejected that proposal.<sup>74</sup>

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<sup>65</sup> See *id.* at 16-19.

<sup>66</sup> *Id.* at 16.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 17.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* This testimony was admitted into evidence not for the truth of the matter asserted but rather for the purpose of establishing what the witness, a VMH senior executive acting in that capacity, understood to be the status of a relevant business matter. Hearing Tr. (Nov. 19, 2019) at 84-85. Probative weight of this evidence was minimal, informing the narrow issue of VMH's progress to completion of facilities, and was not dispositive of a material issue.

<sup>73</sup> VMH Ex. 3 (Ackerman Test.) at 17.

<sup>74</sup> *Id.* at 19; VMH Ex. 1-9 (Draft Connection Agreement, provided by VMH to Magellan on May 13, 2019).

### Magellan's Practice of Downgrading WTI Crude that Leaves its System

Impeding negotiation efforts between VMH and Magellan is a tariff term recently added by Magellan to its HDS Tariff whereby Magellan “downgrades” the product grade of crude that leaves Magellan’s facilities from West Texas Intermediate Crude (“WTI”), a higher value product grade, to a lower grade of product, Domestic Sweet, which VMH says is less valuable by \$2 to \$5 per barrel.<sup>75</sup> VMH argues that this practice by Magellan—forcing a downgrade in the product grade (and price) of any crude oil that leaves Magellan’s facilities for a third-party storage facility, such as the one VMH plans to build, and then returns back at a later time to Magellan’s HDS system—violates Commission Rule § 3.71 (Pipeline Tariffs). The relevant language in Rule § 3.71 relied upon by VMH states:

*A pipeline may deliver to consignee either the identical oil received for transportation, subject to such consequences of mixing with other oil as are incident to the usual pipeline transportation, or it may make delivery from its common stock at destination; provide, if this last be done, the delivery shall be of substantially like kind and market value.<sup>76</sup>*

VMH argues that this automatic “downgrading” practice by Magellan violates the above rule language because the crude oil being nominated (or re-nominated) to Magellan’s HDS is assigned a product grade (by Magellan) based not on the physical characteristics of the crude oil being nominated, but rather based on whether the crude being nominated has ever left Magellan’s pipelines or storage tanks.<sup>77</sup> This is the case even if the crude oil in question has exactly the same physical characteristics of the crude oil that left Magellan’s system.<sup>78</sup>

According to VMH, this practice has a significant and materially harmful effect on VMH’s customers because this “automatic downgrading” economically punishes VMH and its shippers if those shippers chose to use VMH’s crude oil storage instead of a competing Magellan storage facility.<sup>79</sup> Even if a shipper used the Magellan system from the Permian Basin to a WTI-only tank at VMH’s facility, and the shipper re-delivered those barrels on the HDS the next day, Magellan would downgrade the product and refuse to treat the exact same barrels as the WTI delivered the previous day.<sup>80</sup> Although Magellan has quality testing and other tools at its disposal to evaluate the physical characteristics of the crude delivered to its HDS, Magellan disregards those tools and instead uses its HDS Tariff to exclude competition and ensure that the HDS does not operate as an open access common carrier pipeline.<sup>81</sup> VMH argues that this practice is unlawful and asks that its requested Commission order include language that eliminates this WTI downgrading practice.

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<sup>75</sup> VMH Br. at 21-22.

<sup>76</sup> Commission Rule § 3.71(6) (Identity of oil, maintenance of oil).

<sup>77</sup> VMH Ex. 3 (Ackerman Test.) at 12-15; VMH Br. at 21.

<sup>78</sup> VMH Ex. 3 (Ackerman Test.) at 13.

<sup>79</sup> *Id.* at 15.

<sup>80</sup> VMH Br. at 22.

<sup>81</sup> *Id.*

## 2. Alleviation of Crude Flow Congestion

VMH primarily argues that this interconnection is required in the public interest because VMH's planned storage terminal, once complete, will give shippers another option for crude storage in the Houston area, thereby alleviating market congestion costs.<sup>82</sup> According to VMH, the Houston pipeline system suffers from "a lack of competitive access" that increases market congestion costs, and so additional access to third-party storage facilities such as the one VMH plans to build would "alleviate current and future congestion."<sup>83</sup>

For this argument of alleviating market congestion, VMH acknowledges that it did not perform a specific terminal-by-terminal analysis on the impact of VMH's requested interconnection and that it is "hypothetical to understand" how one particular terminal would impact the market.<sup>84</sup> Rather, VMH reasons that its planned crude storage terminal, once complete, would have a positive impact on congestion because "any additional optionality for shippers . . . effectively alleviates the issue of anyone being stranded or gives someone other options that reduces the congestion."<sup>85</sup> VMH further explains that additional storage: acts as a buffer by absorbing some of the price volatility risk; provides additional options so the seller does not have to take a price hit during a bad market; and gives the shipper the option of keeping oil in storage and waiting for a higher price, rather than being forced to sell at a disadvantageous price.<sup>86</sup>

Within the Houston region, changes in crude flows arising from growing shale production have led to a significant increase in inbound pipeline flows from shale basins even as refiners still import waterborne medium and heavy crudes.<sup>87</sup> An analysis of transportation reports submitted to the Railroad Commission shows that in the years between 2013 and 2018, crude pipeline flows into the Houston area increased 70 percent, from 1.7 million barrels/day ("mmb/d") on average (in 2013) to 2.9 mmb/d on average (in 2018).<sup>88</sup> Most of the new flows are from shale production in the Eagle Ford and Permian basins, as well as basins north and west of Midwest hub in Cushing, Oklahoma.<sup>89</sup> Production also increased in Western Canada with some of that incremental output making its way to Cushing and then south to the Texas Gulf Coast.<sup>90</sup>

Between 2013 and 2018, the largest expansion in deliveries into Houston was on the Magellan system, via the Longhorn and BridgeTex trunk pipelines from the Permian.<sup>91</sup> VMH analyzed the changing crude flows into Houston from these years on six major pipeline systems, including Magellan's. The below figure provides a

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<sup>82</sup> See VMH Ex. 18 (Fielden Test.).

<sup>83</sup> *Id.* at 2.

<sup>84</sup> Hearing Tr. (Nov. 20, 2019) at 15-16 (Fielden testifying).

<sup>85</sup> *Id.* at 16-17 (Fielden testifying).

<sup>86</sup> *Id.* (Nov. 19, 2019) at 261-63 (Fielden testifying).

<sup>87</sup> VMH Ex. 18 (Fielden Test.) at 3.

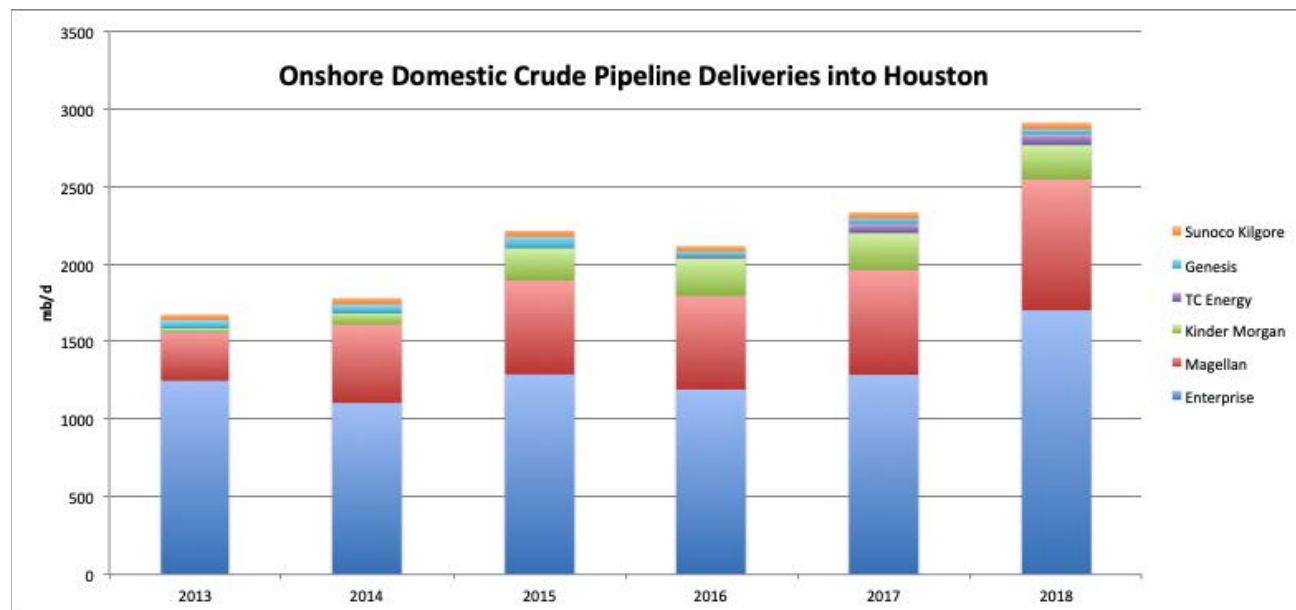
<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 6.

detailed picture of the changing monthly crude delivery volumes into the Houston area on these pipelines.<sup>92</sup>



The below table gives annual summaries of this data.<sup>93</sup>

	<b>Enterprise</b>	<b>Magellan</b>	<b>Kinder Morgan</b>	<b>TC Energy</b>	<b>Genesis</b>	<b>Sunoco Kilgore</b>	<b>Total</b>
2013	1245	311	24		53	37	1670
2014	1102	505	80		61	40	1787
2015	1285	614	208		76	37	2219
2016	1188	612	238	13	35	35	2121
2017	1282	684	239	61	32	39	2337
2018	1708	841	221	71	33	42	2915

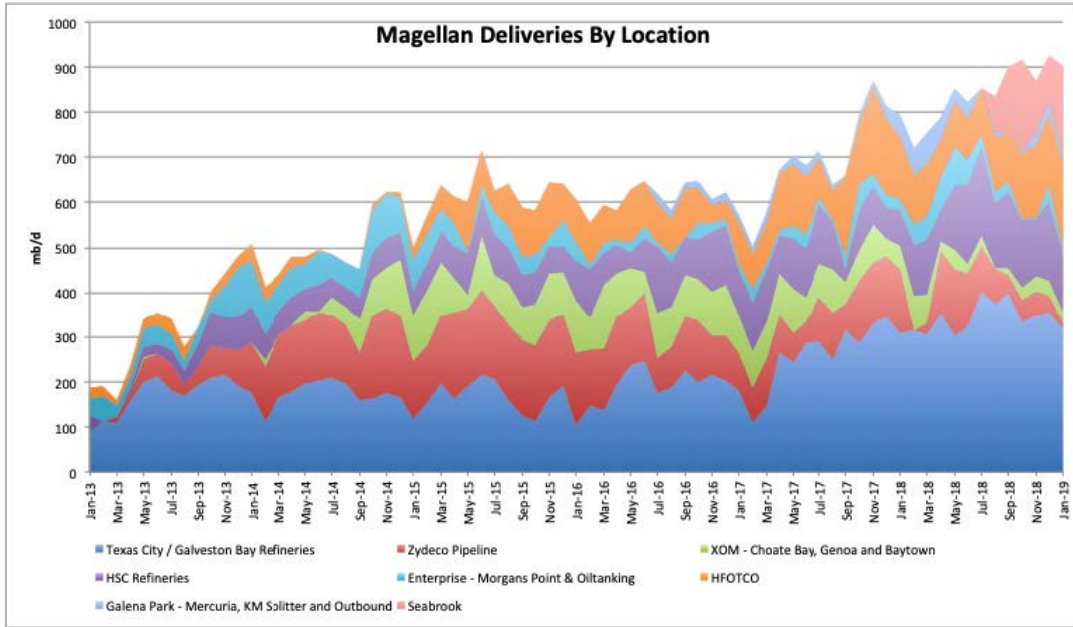
As shown above, Magellan deliveries into Houston grew by 530 mb/d from an average of 311 mb/d (in 2013) to 841 mb/d (in 2018). Growth on the Enterprise system was a close second, increasing by 460 mb/d. Smaller volumes came into the region on the Kinder Morgan crude and condensate pipeline from the Eagle Ford basin, the Genesis South Texas pipeline, the Sunoco Kilgore pipeline (from the Permian), and after 2016 on the TC Energy (formerly TransCanada) Marketlink pipeline from Cushing, Oklahoma.<sup>94</sup>

<sup>92</sup> See *id.* at 6.

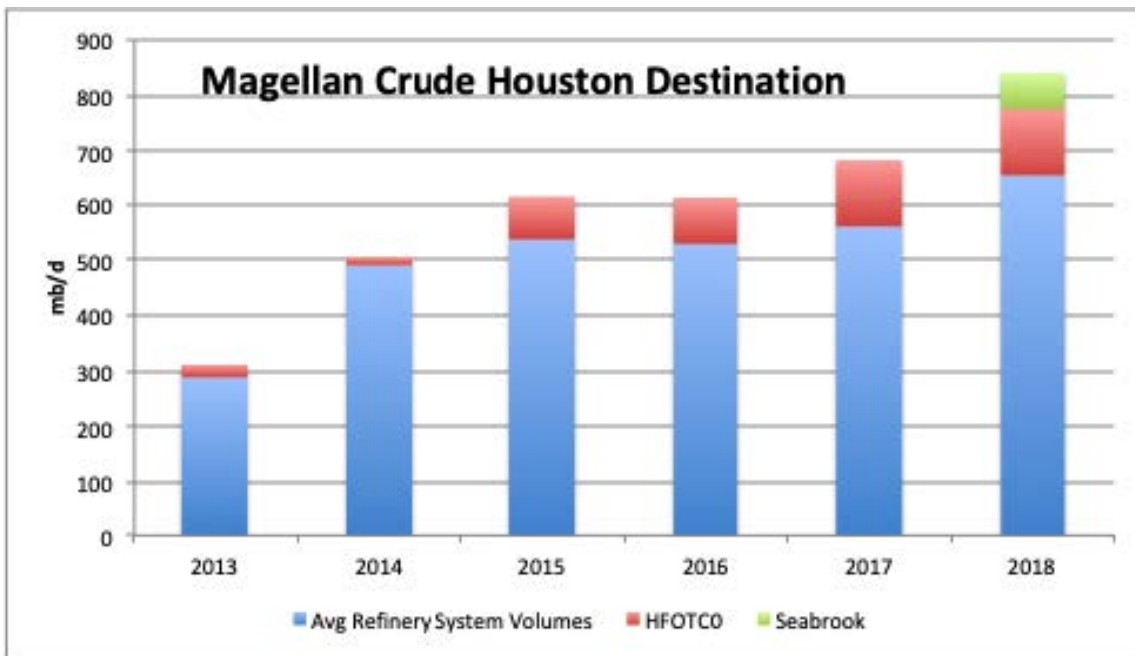
<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Once the export ban was lifted at the end of 2015, Magellan volumes increasingly flowed to the SemGroup Houston Fuel Oil Terminal (“HFOTCO”) on the Ship Channel (shaded orange, below), which has export dock capacity, and then later to the Seabrook Logistics Marine Terminal in Trinity Bay—a joint venture between Magellan and LBC Tank Terminals, connected to Magellan’s HDS. Flows to Seabrook (shaded pink, below) increased rapidly after the terminal came online.<sup>95</sup>

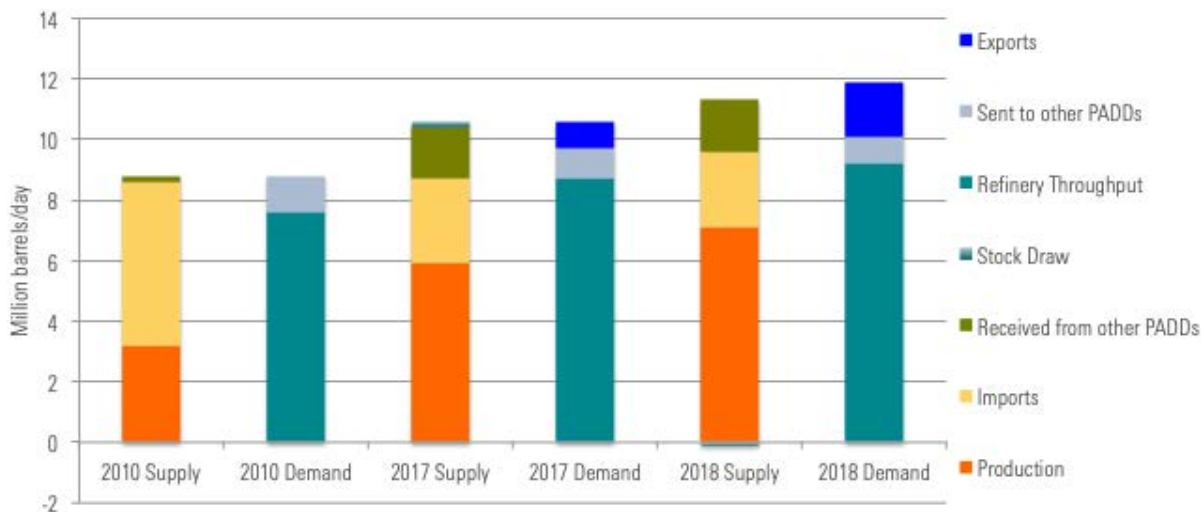


The below figure summarizes these annual flow rates by grouping deliveries to refinery systems (blue), HFOTCO (red), and Seabrook (green).



<sup>95</sup> See *id.* at 9-10.

On the impact of the development of the export market, VMH argues that since 2017, when crude production recovered from the 2015/2016 downturn caused by lower prices, the only significant market for new production of light sweet crude has been exports, which have primarily been shipped from Gulf Coast ports, where they act as a balancing mechanism between excess supply and domestic demand.<sup>96</sup> VMH offers the below figure in support, showing the estimated crude supply demand balances in the Gulf Coast region.<sup>97</sup>



VMH offers the below table to show that the Houston region has the largest export flows on the Gulf Coast today.<sup>98</sup>

Terminal	Volume (Mb/d)
Enterprise Houston	355
ETP Nederland	271
Moda Ingleside	197
P66 Beaumont	153
Seaway Texas City	101
Seaway Freeport	83
Buckeye Corpus	80
NuStar Corpus	76
Plains St. James	75
HFOTCO	75
Magellan Seabrook	73
FHR Ingleside	71
NuStar St. James	57
Enterprise Beaumont	52
LOOP	50

<sup>96</sup> *Id.* at 14.

<sup>97</sup> *See id.* at 15.

<sup>98</sup> *See id.* at 16.

According to VMH, the increased volumes combined with the historic development of Houston pipeline connections between long haul destination terminals and refineries and export docks has created congestion in the Houston distribution center.<sup>99</sup> Despite handling the largest volumes of growing exports, the existing Houston pipeline distribution and terminal system wasn't designed for large-scale crude exports; it was largely built to stage incoming imports.<sup>100</sup> As a result, VMH states that midstream companies have scrambled to accommodate increased demand for limited dock access and storage capacity to stage crude batches for loading onto export tankers.<sup>101</sup> As crude flows into Houston grew, the system has become increasingly congested because of the need to navigate the "last mile" between long-haul pipeline destinations and export terminals.<sup>102</sup>

VMH further argues that congestion in the Houston distribution system today manifests itself in increased costs for shippers and exporters, and that limited choice increases congestion cost.<sup>103</sup> According to VMH, the congestion problem is largely attributable to limited choices available for shippers trying to navigate the Houston distribution system. Magellan and Enterprise dominate distribution and are incentivized to control the storage and dock space choices available to their customers by limiting connections to third parties. They prefer to direct crude through their distribution system to their docks, picking up incremental pipeline, terminal, and storage tariffs along the way. However, according to VMH, this strategy does not best serve shippers "held hostage to the distribution system" because it reduces their choices to avoid congestion costs.<sup>104</sup>

In sum, VMH argues that Magellan's HDS lacks sufficient access to third-party crude storage facilities, and this causes increased market congestion costs. The remedy, according to VMH, is for the Commission to require "as many connections as can be justified by investors and shippers," something that "would benefit shippers and consumers alike."<sup>105</sup>

### 3. Waste

Related to its primary argument, above, that a new crude oil storage facility in Houston would benefit the public by decreasing market congestion costs, VMH also argues that recent events in 2020 further warrant additional crude oil storage to prevent waste.<sup>106</sup> Specifically, the coronavirus pandemic destroyed demand and the Saudi/Russia fight over market share caused a production surge.<sup>107</sup> According to VMH, events like this, while extreme, highlight that Texas needs more storage space for crude oil and that, with a lack of available storage, producers of surplus crude will have no option but to shut in production.<sup>108</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 16-17.

<sup>102</sup> *Id.* at 17.

<sup>103</sup> *Id.* at 19-22.

<sup>104</sup> *Id.* at 22.

<sup>105</sup> *Id.* at 23.

<sup>106</sup> VMH Ex. 64 (Fielden Decl.).

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *Id.* at 2.



### C. Opposition by Magellan

Magellan opposes VMH's request, highlighting that: VMH does not have a pipeline, does not have any crude oil storage tanks, does not have any customers, and does not even have authority from its board to build a crude oil storage project.<sup>109</sup> Magellan argues that the Commission has never ordered a connection to an unbuilt pipeline and should not do so here, where VMH has not shown a rational commercial basis for a connection that is not supported by the market.<sup>110</sup> In further support, Magellan provides testimony from the below witness.

- *Mark Roles* (fact and expert), Vice President, Commercial – Crude Oil, at Magellan Midstream, based in Tulsa, Oklahoma. Mr. Roles discusses the HDS and Magellan's various other connection agreements, as well as Magellan's negotiation efforts with VMH. Mr. Roles also offers opinions on the reasonableness of VMH's requested interconnection, and on whether forcing Magellan to connect with VMH would be necessary or in the public interest.<sup>111</sup>

#### 1. Proposed Interconnection Terms

Magellan argues that its treatment of VMH in their negotiation process has been fair and appropriate, given the state of VMH's incomplete facilities and unknown expected use by shippers. Despite Magellan's view that there is a lack of shipper interest for VMH's planned storage terminal, Magellan offered to make the requested connection "pursuant to a reasonable agreement to govern the construction, maintenance, and operation of the physical connection between the HDS and VMH's speculative pipeline."<sup>112</sup> However, VMH rejected Magellan's offer and instead proposed alternative terms and conditions that, according to Magellan, would limit Magellan's legitimate business activities with respect to the HDS and allow VMH "unprecedented control over HDS operations."<sup>113</sup>

Magellan explains that connection agreements between common carrier pipelines typically set forth the terms and conditions of the physical connections between their respective assets, and they usually arise from commercial negotiations that resulted in commitments from one or more shippers to move certain volumes of product across the connection.<sup>114</sup> Connection agreements are not "precursors to marketing efforts for undeveloped projects," and they are not intended to establish commercial terms of service and do not cover rates, tariffs, or other matters of interest to shippers that may move barrels across the connection.<sup>115</sup>

According to Magellan, VMH's proposed connection terms are unreasonable and would restrict Magellan's ability to meet its obligations to its actual customers

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<sup>109</sup> Hearing Tr. (Nov. 19, 2019) at 88-90 (Ackerman testifying); see also Magellan Br. at 1.

<sup>110</sup> Magellan Br. at 1.

<sup>111</sup> See Magellan Ex. 1 (Roles Test.).

<sup>112</sup> Magellan Br. at 19.

<sup>113</sup> *Id.*; Magellan Ex. 1 (Roles Test.) at 18-19.

<sup>114</sup> Magellan Ex. 1 (Roles Test.) at 8.

<sup>115</sup> *Id.* at 8, 22.

and the public.<sup>116</sup> Such restrictions, Magellan argues, are neither appropriate nor standard in the industry for a connection agreement.<sup>117</sup> Magellan's evolving business plans and fluctuating market conditions may dictate future tariff amendments or changes in the services offered on the HDS, and Magellan is not required to give up its ability to make such changes as part of making a connection with another common carrier pipeline for the interchange of crude oil.<sup>118</sup> It is undisputed that VMH is not a shipper, and limiting Magellan's rights to change its tariff terms and the services provided on the HDS would give VMH rights that even shippers do not have.<sup>119</sup> According to Magellan, the terms and conditions that VMH has asked be included in a connection order would "effectively give VMH significant control over the operation of the HDS without its having to bear any of the commercial risk."<sup>120</sup>

Responding to VMH's issue with WTI crude nominations under the HDS Tariff, Magellan maintains that its practice is consistent with the requirements under Commission Rule § 3.71 (Pipeline Tariffs).<sup>121</sup> Magellan disputes that this proceeding is the appropriate forum to discuss the properness of its tariff terms because VMH is not a shipper and therefore lacks standing to challenge terms under a tariff meant only for shippers. According to Magellan, no shipper has complained (to Magellan) about the WTI nomination terms under the HDS Tariff, and Magellan's shippers "appreciate [Magellan's] quality control program."<sup>122</sup> Magellan states that its WTI labeling rules under the HDS Tariff "simply let buyers know that the subject crude oil has remained in Magellan's control" and that, regardless of labeling designation (WTI, Domestic Sweet, etc.), Magellan still delivers to shippers the identical crude oil that was delivered to Magellan.<sup>123</sup>

## 2. Cost to Magellan & Alternative Pipelines

Magellan argues that VMH's failure to provide information regarding any shipper's planned use of the requested connection makes it impossible for Magellan to ensure it can provide reliable service to the public.<sup>124</sup> Because the volumes, origins, destinations, grades, and timing of any shipments that may use the connection are all "unknowns and speculative" at this point, Magellan states that it is not possible to evaluate whether the expenses involved in taking on the risks of the requested connection will impair Magellan's ability to meet its public duties as a common carrier.<sup>125</sup>

Magellan also argues that the requested connection between the VMH Terminal and the HDS is not required because there are several other common carrier crude oil pipeline distribution systems in the vicinity of the VMH Terminal to which it could

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<sup>116</sup> Magellan Br. at 19.

<sup>117</sup> Magellan Ex. 1 (Roles Test.) at 18.

<sup>118</sup> *Id.* at 22.

<sup>119</sup> Magellan Br. at 20.

<sup>120</sup> Magellan Ex. 1 (Roles Test.) at 23.

<sup>121</sup> *Id.* at 25-27; Magellan Br. at 21.

<sup>122</sup> Magellan Ex. 1 (Roles Test.) at 27; Magellan Br. at 21.

<sup>123</sup> Magellan Ex. 1 (Roles Test.) at 27.

<sup>124</sup> Magellan Br. at 17.

<sup>125</sup> *Id.*

theoretically connect and to which VMH has sought connections.<sup>126</sup> These include pipelines owned and/or operated by Enterprise, Kinder Morgan, TransCanada, and Phillips 66.<sup>127</sup> With respect to the Enterprise pipeline system, VMH admits that it could obtain access to crude oil from the same producing basins (Permian, Eagle Ford) and trading hub (Cushing, Oklahoma) as the HDS, as well as to similar destination points, including all Houston area refineries and some crude oil marine terminals.<sup>128</sup> Connections with the Kinder Morgan pipeline and the TransCanada pipeline would give the VMH Terminal access to crude oil from the Eagle Ford, through Kinder Morgan, and Canada and Cushing, through TransCanada.<sup>129</sup> Because VMH also could connect its planned storage facility with these other common carrier pipelines in the Houston area, Magellan argues that a forced connection with Magellan's HDS is not an actual necessity.<sup>130</sup>

### 3. The Market for Crude Storage in the Houston Area

Responding to VMH's assertion that its planned crude storage terminal will alleviate market congestion in the Houston crude oil distribution network, Magellan argues that the record contains no evidence that any shipper will be unable to deliver crude oil to Houston-area refineries or marine terminals for loading onto ships if the requested connection is not made.<sup>131</sup> Magellan notes that VMH does not contend that any crude oil will be unable to make it to market if there is no connection between the HDS and the VMH Terminal,<sup>132</sup> and that VMH acknowledges it would be "impossible to predict" whether a lack of a connection between the HDS and the VMH Terminal would prevent any shipper from delivering any crude oil to a marine terminal for export.<sup>133</sup> The most that can be said about the requested connection is that it would "potentially add additional storage and dock capacity to the massive number of storage and dock facilities already in existence in the Houston area."<sup>134</sup>

Magellan argues that there is no evidence that a connection between the HDS and the VMH Terminal would have any effect on any alleged congestion in the Houston crude oil distribution network. An increased demand for export capacity, even if it exists, does not equate to an actual necessity for the specific connection at issue.<sup>135</sup> VMH acknowledges that it had not performed a study on the effect or impact of congestion if the Commission were to order VMH's requested interconnection, and VMH knows of no shipper unable to get its crude oil to a marine terminal for export in the Houston area.<sup>136</sup> Contrary to VMH's claims, no shippers are requesting additional storage options, Magellan's own facilities are not at full capacity, and the recent 2020 events actually have decreased the market demand for new storage.<sup>137</sup>

<sup>126</sup> Hearing Tr. (Nov. 19, 2019) at 110-11 (Ackerman testifying).

<sup>127</sup> *Id.* at 111 (Ackerman testifying).

<sup>128</sup> *Id.* at 111-12 (Ackerman testifying).

<sup>129</sup> *Id.* at 113 (Ackerman testifying).

<sup>130</sup> Magellan Br. at 7-8.

<sup>131</sup> *Id.* at 8.

<sup>132</sup> Hearing Tr. (Nov. 19, 2019) at 117 (Ackerman testifying).

<sup>133</sup> *Id.* at 202-03 (Fielden testifying).

<sup>134</sup> Magellan Br. at 9.

<sup>135</sup> *Id.* at 11.

<sup>136</sup> *Id.*

<sup>137</sup> Magellan Ex. 1 (Roles Test.) at 9; Magellan Ex. 36 (Declaration of Brett Hunter on behalf of Magellan, dated June 1, 2020 (the "Hunter Decl.)) at 3.

## VII. LEGAL ANALYSIS AND FINDINGS

The Commission's job here is not to decide whether Houston needs another crude storage facility. VMH is not seeking permission in this case to build one, but rather to force a connection of its planned, yet unbuilt, pipeline segments with Magellan's nearby HDS facility at Shell Dock Road Junction. The need for the connection and the need for the storage facility are separate things, and the Commission need only concern itself here with the former.

The Commission also should reject requests to create broad new legal duties for pipelines through litigation, rather than formal rulemaking. The appropriate forum for regulators to establish broad regulated duties and public policy objectives is formal agency rulemaking—not litigation. As explained in more detail below, Magellan currently owes no legal duties to VMH, and VMH has not shown how Commission action here to force an interconnection would be necessary or required to cure any other broken regulated duty by Magellan or to prevent waste. Determining this requested connection necessary or "required in the public interest" then, as VMH proposes, improperly asks the Commission to search for a legal duty or public policy objective outside of those in current existence, established through prior agency rulemaking, legislation, or court decisions. Where no existing legal duty by Magellan is being violated (or is in imminent risk of being violated) and no legislative mandate upon the Commission is in jeopardy (such as preventing waste), forcing a pipeline to interconnect or extend its facilities is not proper.

Despite the years of discussions between VMH and Magellan for this potential connection, these companies remain in the negotiation phase and will remain there until VMH completes its planned storage terminal and builds connecting pipeline segments that reach Magellan's HDS, thereby triggering Magellan's regulated duties under existing Texas law to interconnect with VMH and to do so lawfully.<sup>138</sup> At that time, should it ever happen, the Commission then may intervene, if needed, to enforce Magellan's regulated duties. Right now, however, the only duties that Magellan may assume with respect to VMH and its unbuilt facilities are contractual, and regulators do not belong in private contract negotiations.

### A. VMH Did Not Prove All Elements of Its Claims

Though styled a complaint, the claims VMH makes in this docket are for a Commission-directed connection of facilities with Magellan, functioning similarly to an application.<sup>139</sup> As treated separately below, VMH has not proven entitlement to its requested relief, either under Section 111.023 or Section 111.137.

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<sup>138</sup> See Tex. Nat. Res. Code §§ 111.023(a) ("A common carrier shall exchange crude petroleum tonnage with each like common carrier."), 111.023(c) ("A common carrier pipeline under like rules shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline."); see *also* §§ 111.015 (Transportation Without Discrimination), 111.017 (Equal Compensation for Like Service).

<sup>139</sup> In its November 14, 2018 "Supplement to Complaint," VMH supplemented its requested relief to request, among other things, that the Commission require Magellan "to make the interconnection without discrimination." Construing this as a standalone discrimination claim, Magellan moved for its dismissal. The ALJ granted the motion, reasoning that it "is improper as a discrimination claim because VMH has not pleaded facts supporting that Magellan currently owes any duty to VMH" and also "is improper—and unnecessary—as a condition to VMH's requested interconnection because a lawful interconnection is presumed under [Sections 111.023 and 111.137]."

## 1. Pipeline Interconnection (Section 111.023)

To prevail in a claim under Section 111.023 (Exchange of Facilities) subpart b, VMH must prove that “a necessity exists” requiring Commission action to compel an interconnection with Magellan’s HDS facilities.<sup>140</sup> The relevant language relied upon by VMH reads:

*When a necessity exists, the Commission may require connections and facilities for the interchange of crude petroleum tonnage to be made at every locality reached by both pipelines, subject to the rules and rates made by the Commission.*<sup>141</sup>

VMH and Magellan offer very different views on the scope and applicability of the above statutory language. According to VMH, a necessity exists here because Magellan’s HDS has existing access to all inbound crude, major refineries, and outbound pipelines within the Houston Gulf Coast area, and therefore it would be extraordinarily difficult, if not impossible, for VMH to replicate Magellan’s HDS.<sup>142</sup> According to Magellan, the above language does not pertain to this case because VMH has not yet built its planned pipeline segments needed to connect its storage facility with Magellan’s nearby Shell Dock Road Junction facility, and therefore there are no localities yet reached by both pipelines.<sup>143</sup> Even if Section 111.023 does apply, Magellan argues that there are other, alternative pipeline distribution systems that are accessible to VMH, and so a forced connection at Magellan’s Shell Dock Road Junction location is not necessary.<sup>144</sup>

The original Proposal for Decision attempted to resolve the above language (subpart b) with language in another subpart under the same statute (subpart a).<sup>145</sup> In their exceptions to the PFD, both VMH and Magellan disagreed with the PFD’s construction of these subparts under Section 111.023 (Exchange of Facilities). Consequently, that analysis has been reconsidered and now does warrant revision. The full text of Section 111.023, including all three subparts, reads:

- (a) *A common carrier shall exchange crude petroleum tonnage with each like common carrier.*
- (b) *When a necessity exists, the Commission may require connections for the interchange of crude petroleum tonnage to be made at every locality reached by both pipelines, subject to the rules and rates made by the Commission.*
- (c) *A common carrier pipeline under like rules shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline.*

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<sup>140</sup> Tex. Nat. Res. Code § 111.023(b).

<sup>141</sup> *Id.*

<sup>142</sup> Compl. at 6; VMH Trial Br. at 9.

<sup>143</sup> Magellan Br. at 3-4.

<sup>144</sup> *Id.* at 7-8 (“These include pipelines owned and or [sic] operated by Enterprise, Kinder Morgan, TransCanada, and Phillips 66.”).

<sup>145</sup> See PFD at 24-25 (construing subpart (a) to require pipelines to make initial connections only, and construing subpart (b) to apply only to requests for subsequent additional connections).

Of the above three subparts, only subparts (a) and (c) directly impose duties on carrier pipelines. Subpart (b), by contrast, grants authority to the Commission. As the imposition of duties on market participants is functionally different than a grant of authority to the regulator, it is not necessary here to construe subpart (b) in a way that narrows the plain-language scope of subparts (a) or (c)—or vice versa. The original PFD erred in doing so. Accordingly, the Commission’s authority under subpart (b) may be considered with respect to VMH’s request.

Regardless the arguments by VMH and Magellan about which circumstances, if any, may qualify as a “necessity” under subpart (b), other language in this subpart imposes an express condition precedent that both pipelines share a common locality, and an implied condition precedent that both pipelines have existing physical infrastructure rather than mere permitting. Magellan correctly highlights that both these required conditions are missing here. Uncontroverted evidence establishes: (1) VMH’s facilities do not reach Magellan’s Shell Dock Road Junction location; and (2) VMH, at this time, does not yet have an operational pipeline capable of exchanging crude. For this alone, VMH’s claim under Section 111.023 fails.

Even if the above conditions precedent had been satisfied, a necessity does not exist here to warrant Commission action under subpart (b). On this point, neither VMH nor Magellan offered persuasive arguments. Magellan argues that there are other nearby alternative pipeline distribution systems accessible to VMH—namely those owned by Enterprise, Kinder Morgan, TransCanada, and Phillips 66—and therefore Magellan’s HDS is not the only interconnection option for VMH. This argument fails because the existence of other nearby pipeline systems is irrelevant. All Texas crude pipelines are subject to regulated duties, including those imposed by subparts (a) and (c) that are not qualified or limited based on the existence or nonexistence of nearby third-party pipelines. The scenario offered by Magellan, if followed, would allow for pipelines collectively to avoid each’s individual duties—something that would frustrate, rather than facilitate, the transportation of crude oil in Texas and thereby undercut the Legislature’s clear intent with Section 111.023. For VMH’s argument that a necessity does exist, VMH states that an interconnection with Magellan is necessary because Magellan’s sizable HDS footprint in the Houston Gulf Coast area would be too difficult for VMH to replicate. VMH does not need the Commission’s help to avail itself of Magellan’s expansive HDS, however—VMH just needs to finish building its planned connecting pipeline segments to Magellan’s Shell Dock Road Junction facility and arrange for customers. Existing law already requires pipelines such as Magellan to install receipt and delivery facilities and to exchange crude petroleum tonnage with other like pipelines.<sup>146</sup> VMH admittedly has not attempted to exchange crude tonnage with Magellan and is unaware of any patron on Magellan’s system that has asked Magellan to install new receipt and delivery facilities nearby to VMH’s planned storage terminal. Because existing Texas law already provides a path for the relief VMH seeks in this proceeding and there are no broken regulated duties by Magellan to remedy, there is no necessity here for the Commission to use its authority under Section 111.023, subpart (b).

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<sup>146</sup> Tex. Nat. Res. Code § 111.023(a), (c).

## 2. Enlargement of Facilities (Section 111.137)

As a threshold matter, Magellan disagrees that Section 111.137 applies here. Magellan highlights that this statute originated in the Common Purchaser Act of 1930, which generally prohibits a buyer of crude oil from discriminating among the parties from whom it buys, and therefore—according to Magellan—pertains not to the interchange of crude oil between common carriers but instead to gathering pipelines whose facilities may require an extension/enlargement to provide service to unconnected, producing oil wells.<sup>147</sup> Magellan also argues that this statute does not apply here because the scope of equipment needed to accomplish VMH's requested interconnection is fairly minimal—essentially just “taps, flanges, and valves”<sup>148</sup>—and therefore is not a true extension or enlargement of Magellan's HDS junction facility. Both these arguments by Magellan construe Section 111.137 too narrowly. Regardless the origin of Section 111.137, it now exists among the general statutes in the Common Carrier Act's “Powers and Duties of the Commission” subchapter,<sup>149</sup> outside and away from the statutes grouped specifically for common purchasers.<sup>150</sup> Furthermore, the plain language of Section 111.137 speaks not only to pipelines but also to the extension of “crude petroleum storage tanks”—a type of facility incapable of directly serving producing oil wells, argued by Magellan as dispositive.

On whether the minimal physical scope of a request under Section 111.137 qualifies as a true “enlargement” or “extension” of a common carrier's facilities, the Legislature imposes no minimum thresholds,<sup>151</sup> and so this is properly addressed in each case as a question of fact. Here, VMH seeks installation of new equipment beyond what currently exists at the terminal endpoints of Magellan's HDS facility. Albeit minimal, this is an enlargement/extension and so Section 111.137 applies.

To prevail in a claim under Section 111.137 (Enlargement and Extension of Facilities), VMH must prove that its requested extension of Magellan's HDS facility (1) is reasonable, (2) the expense involved will not impair Magellan's ability to perform its duty to the public, and (3) is required in the public interest. As treated separately below, VMH proved just two of these elements.

### a. The First Two Elements, Proved by VMH

VMH proved, by a preponderance of the evidence, two of the three elements of its Section 111.137 claim: (1) that the physical scope of its requested extension of Magellan's Shell Dock Road Junction facility is reasonable; and (2) that the cost to Magellan to enlarge/extend this facility to serve VMH will not impair Magellan's ability to perform its duty to the public.

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<sup>147</sup> Magellan Trial Br. at 2-4, 11-13; Magellan Br. at 3, 12-14.

<sup>148</sup> VMH Ex. 3 (Ackerman Test.) at 16.

<sup>149</sup> Tex. Nat. Res. Code Chapter 111 (Common Carrier Act), Subchapter E (Powers and Duties of the Commission).

<sup>150</sup> *Id.*, Subchapter D (Common Purchasers).

<sup>151</sup> See, e.g., *Prop. Cas. Insurers Ass'n of Am. v. Tex. Dep't of Ins.*, 07-07-0057-CV, 2008 WL 4425520, at \*2 (Tex. App.—Amarillo Sept. 30, 2008, no pet.) (“We read every word [of a statute] as if it were deliberately chosen and presume that omitted words were excluded purposefully.”).

### 1. Reasonableness

VMH established that the physical scope of the enlargement/extension of Magellan's HDS facility at Shell Dock Road Junction, consistent with VMH's request, is reasonable. Uncontroverted evidence supports that the new facilities requested of Magellan are minimal—including essentially just taps, flanges, and valves<sup>152</sup>—and are necessary to accomplish hookups to VMH's planned inbound and outbound connecting pipelines. This is not specialty or otherwise unusual equipment that may be unfamiliar to a large common carrier pipeline such as Magellan, but rather is standard industry equipment that Magellan already is required to install for some shippers.<sup>153</sup>

### 2. Cost to Magellan

VMH also established that the cost to Magellan for the above work will not impair Magellan's ability to perform its duty to the public. Though existing Texas law likely already requires Magellan to pay for some of this equipment,<sup>154</sup> VMH offers here to pay the entirety of it—including Magellan's share.<sup>155</sup> Magellan nevertheless takes issue with this, arguing that the connection—once made—may present additional "risks" and "liabilities" in terms of servicing the connection in the future since there are no guarantees of additional revenue for Magellan.<sup>156</sup>

On this element, Magellan conflates the costs of the new/added facilities with the future costs to service and manage them. The plain language of Section 111.137 speaks only to the former, while the latter is part of a common carrier's ordinary business operations. Here, VMH only asks that Magellan install minimal equipment needed to connect to VMH's planned inbound and outbound pipeline segments, and the evidence supports that this new equipment would cost Magellan nothing. Furthermore, existing Texas law already requires Magellan to install essentially the same equipment for receipt and delivery of crude petroleum along its system.<sup>157</sup> Potentially doing for VMH what Magellan already is required to do under Texas law would not impair Magellan's duty to serve the public—it would be part of it.

Magellan's real issue appears not to be the upfront cost of this new equipment, but rather with the associated ongoing operational expenses that Magellan would incur to manage and service a connection such as this one, where so little is known about its expected use or about VMH's unbuilt future facilities. As explained above, the plain language of Section 111.137 speaks only to the costs of the new/added facilities, not to a pipeline's operational expenses thereafter to conduct its normal business operations. The Legislature's evident focus here is ensuring that the public is not harmed, not that the carrier pipeline be adequately compensated for its trouble. Once the interconnection is made, then relief under Section 111.137 is complete.

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<sup>152</sup> VMH Ex. 3 (Ackerman Test.) at 15-16.

<sup>153</sup> See Tex. Nat. Res. Code § 111.023(c) ("A common carrier pipeline under like rules shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline.")

<sup>154</sup> *Id.*

<sup>155</sup> VMH Ex. 3 (Ackerman Test.) at 9.

<sup>156</sup> See Magellan Reply Br. at 16-17.

<sup>157</sup> See Tex. Nat. Res. Code § 111.023(c) ("A common carrier pipeline under like rules shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline.")



Thereafter, the pipeline resumes its normal business operations, including the undisturbed ability to offer its new connection partner lawful terms for their interconnection relationship that are appropriate for their unique circumstances, even for a connection compelled by the Commission.<sup>158</sup>

### **b. The Final Element, Not Proved by VMH**

The third and final element of the Section 111.137 claim is that the requested enlargement or extension of Magellan's facility be "required in the public interest." The meaning of this language is the most contested issue between VMH and Magellan in this case. As treated below, VMH failed to prove this element.

Determining what is "required in the public interest" is a two-step process: *first*, identifying a proper public interest; and *second*, determining whether the requested enlargement/extension of the pipeline's facility is required to achieve it. For the first step (identifying a proper public interest), the Commission is limited to public interest objectives that already have been defined and established through legislation, court decisions, or agency rulemaking. Administrative adjudication is not the appropriate forum for regulators to create new, generally-applicable duties or public policy objectives. This practice is known as adjudicative rulemaking and it is strongly disfavored by Texas courts.<sup>159</sup> Accordingly, the Commission here should not consider, for the first time, what may or may not be a new public interest objective; rather, the Commission need only concern itself with identifying applicable *existing* public interest objectives—already defined and established previously by the Legislature, the Commission, or the courts.

Where a proper public interest is identified, the second step is to determine whether the requested enlargement or extension of the pipeline's facility is required to achieve it. The Legislature's strong word choice in "required" must be given full effect. It is not enough to show that extending a pipeline's facilities may further some identifiable public interest target; the extension must be *required* to achieve it. Put differently, where an existing, already-defined public interest is in jeopardy and no other remedy is reasonably available besides enlarging/extending a common carrier's facility, only then is relief under Section 111.137 appropriate.

Here, VMH primarily attempts to satisfy this element by arguing that its planned crude storage terminal, once built, will provide shippers a new crude storage option in the Houston area and therefore will alleviate market congestion costs.<sup>160</sup>

<sup>158</sup> See *Railroad Commission v. Rio Grande Valley Gas Co.*, 405 S.W.2d 304, 311-12 (Tex. 1966) ("A failure to agree when there is a dispute concerning the legal rights of the parties does not necessarily mean that they will continue to disagree when such rights have been settled. Here, the Commission has determined that [the pipeline] must extend its lines to connect with [a well] and take his gas without discrimination. We approve these holdings. It is not to be anticipated that hereafter no agreements will be made by the parties or that in the absence of agreement, the [pipeline] will adopt an unreasonable plan for ascertaining the price to be paid . . .").

<sup>159</sup> See, e.g., *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) ("A presumption favors adopting rules of general applicability through the formal rulemaking procedures as opposed to administrative adjudication."); *Amarillo Indep. Sch. Dist. v. Meno*, 854 S.W.2d 950, 957 (Tex. App.—Austin 1993, writ denied) ("When an administrative agency implements new requirements of general applicability, it ordinarily does so through formal rule-making procedures . . .").

<sup>160</sup> Hearing Tr. (Nov. 19, 2019) at 193 (Fielden testifying) ("Actually, the opinion is that there's congestion in the Houston distribution system that causes price volatility."), and at 195 (Fielden testifying) ("Q: And your opinion

VMH clearly and very thoroughly established that a new storage facility in Houston, once built, would give shippers more options for storing their crude, but VMH is not asking the Commission's permission here to build a new storage facility. The focus of a Section 111.137 claim is *Magellan's* facilities, not VMH's, and VMH has not shown how added connection equipment at Magellan's Shell Dock Road Junction facility would alleviate market congestion when VMH's facilities are themselves not yet built. Also problematic with this argument is that it asks the Commission to establish through litigation, rather than rulemaking, an industry-wide public policy goal to alleviate market congestion costs by "requiring as many connections as can be justified by investors and shippers."<sup>161</sup> The Commission certainly is empowered to make such a broad determination, if it so chooses, but the appropriate forum for creating public interest goals of general applicability is rulemaking, not litigation.<sup>162</sup>

Largely in the alternative, VMH also offers (1) that Magellan may be violating certain regulatory duties, and (2) that its requested connection may prevent waste. Though argued by VMH largely in the alternative, *these* are precisely the types of scenarios under Texas law that, if proven, could warrant relief under Section 111.137. The Texas Supreme Court has held that remedying a broken regulatory duty by a pipeline can be an appropriate use of the Commission's authority to force the pipeline to extend its facilities,<sup>163</sup> and the Legislature has charged the Commission broadly with preventing waste.<sup>164</sup> Both these are existing, already-defined public interest goals and therefore are appropriate to consider here. The proper question, then, is whether the requested connection with Magellan's Shell Dock Road Junction facility is required either (1) to remedy a broken regulated duty by Magellan, or (2) to prevent waste. As treated separately below, the answer is no for both.

### 1. *Magellan's regulated duties*

Remedying a broken regulatory duty by a pipeline is an appropriate public interest to consider under a Section 111.137 claim. In one of the few cases on record dealing with the Railroad Commission ever ordering a pipeline to extend its facilities, albeit in the common purchaser context, the Commission ordered a pipeline to extend its gathering line to serve a gas well, finding that such an extension was required to remedy a broken regulatory duty (in that case, requiring the pipeline to purchase gas without discrimination).<sup>165</sup> On appeal, Texas Supreme Court acknowledged the Commission's "wide and extensive regulatory power to accomplish [statutory]

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is that congestion and the price volatility can be relieved through greater access to third-party terminal storage and dock assets. Correct? A: "That is correct, yes.")

<sup>161</sup> VMH Ex. 18 (Fielden Test.) at 23.

<sup>162</sup> See, e.g., *Rodriguez*, 997 S.W.2d at 255; *Meno*, 854 S.W.2d at 957.

<sup>163</sup> *Rio Grande Valley Gas Co.*, 405 S.W.2d at 304 (Texas Supreme Court reversing the judgment of the District Court and holding that a pipeline's violation of existing statutory duties is an appropriate circumstance for the Railroad Commission to compel the pipeline to extend its facilities to remedy the statutory violation).

<sup>164</sup> See, e.g., Tex. Nat. Res. Code § 85.041 (Acts Prohibited in Violation of Laws, Rules, and Orders) *et seq.*; see also, e.g., *Texaco, Inc. v. R.R. Comm'n*, 583 S.W.2d 307, 310 (Tex. 1979) ("It is now well settled that the Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights."); *R.R. Comm'n v. Shell Oil Co.*, 380 S.W.2d 556, 559 (Tex. 1964) (same).

<sup>165</sup> *Rio Grande Valley Gas Co.*, 405 S.W.2d at 310.

objectives” and affirmed the lawfulness of a finding by the Commission that the pipeline extension ordered was “required in the public interest.”<sup>166</sup>

### Magellan’s Duties with Respect to VMH’s Planned Facilities

Here, VMH plans to operate a crude oil storage facility, as well as side-by-side common carrier pipelines. While VMH intends that both these facilities, once built, will work together for the common purpose of providing storage service to customers, they are treated differently for regulatory purposes and therefore each entity type—the storage terminal and the pipelines—must be analyzed separately to properly determine whether Magellan has violated a regulatory duty with respect to either VMH entity.

For VMH the (planned) storage facility and terminal, nothing in the express language of the Common Carrier Act imposes duties upon common carriers to directly serve completed crude storage facilities, not to mention future nonoperational ones. VMH does not argue otherwise and therefore has not shown that Magellan has violated—or even owes—any regulatory duty with respect to providing direct service to VMH’s planned crude storage terminal.

For VMH the (planned) connecting pipelines, things are different. There are clear, unambiguous statutory duties under Section 111.023 (Exchange of Facilities) requiring that common carrier pipelines: “shall exchange petroleum tonnage with each like common carrier”; and “shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on the pipeline.”<sup>167</sup> VMH has not shown, however, that either of these duties applies yet to Magellan. While the evidence supports that VMH has received permits for its planned pipelines and acquired the necessary rights-of-way,<sup>168</sup> uncontroverted evidence also supports that: VMH has not yet built these planned, future pipelines; VMH has not attempted to exchange petroleum tonnage with Magellan, or vice versa; and no patrons or shippers have asked Magellan to move their crude product from Magellan’s HDS to VMH’s storage facility, or vice versa. At this time, then, Magellan owes no duties under Section 111.023 to VMH, and VMH has not shown that Magellan has violated any duties thereunder with respect to anyone else.

Somewhat less clear and less straightforward are the duties that connecting common carrier pipelines may owe to each other under Sections 111.015 (Transportation Without Discrimination) and 111.017 (Equal Compensation for Like Service). The relevant language of these statutes reads:

***Section 111.015, Transportation Without Discrimination.***  
*Subject to the law and the rules prescribed by the Commission, a common carrier shall receive and transport crude petroleum delivered to it for transportation and perform its other related duties without discrimination.*

<sup>166</sup> *Id.* at 310-11.

<sup>167</sup> Tex. Nat. Res. Code § 111.023(a), (c) (emphasis added).

<sup>168</sup> VMH Ex. 3 (Ackerman Test.) at 8; VMH Ex. 3-E (VMH Pipeline Permits).

**Section 111.017, Equal Compensation for Like Service.** (a) *No common carrier in its operations as a common carrier may charge, demand, collect, or receive either directly or indirectly from anyone a greater or lesser compensation for a service rendered than from another for a like and contemporaneous service.*

Somewhere between these two laws may exist a duty for pipelines to treat each other without discrimination when interconnecting, though both contemplate such a duty springing to life *after* service has begun, not before.<sup>169</sup> Here, the evidence supports that: no patron, shipper, customer, or pipeline has delivered to Magellan crude petroleum for transportation to or from VMH's planned storage facility; and Magellan has not rendered any service for VMH, directly or indirectly.

VMH and Magellan remain in the negotiation phase for agreeable terms of their prospective interconnection and business relationship. For what VMH is asking, however—for Magellan to install and maintain facilities along its HDS for the receipt and delivery of crude petroleum—there is nothing the Commission could order now that is not *already* required of Magellan under existing Texas law, once VMH: completes its crude storage terminal facility; builds the inbound and outbound pipeline segments needed to reach Magellan's Shell Dock Road Junction hub; and secures customers who direct Magellan to transport their crude volumes to VMH.<sup>170</sup> Given this, VMH's assertion that it is being "forced" by Magellan to bring this claim strains reason. On the contrary, VMH appears to be the one situated to force Magellan to make a lawful connection when VMH accomplishes the above steps. Should VMH so act, then the interconnection terms at that time offered by Magellan may be different than now, with Magellan having new regulated duties then owed relating to VMH's completed facilities. VMH is fully empowered to force that result on its own either in continued negotiations with Magellan or by deciding to accomplish the above steps, both of which are paths to VMH's desired relief that do not require involvement by the Commission.

#### Magellan's Practice of Downgrading WTI Crude that Leaves its System

As explained above, VMH argues that Magellan's recent practice of automatically downgrading the product grade of oil that leaves the Magellan system from WTI to a cheaper and lower product grade, Domestic Sweet, is unlawful. According to VMH, this strongly incentivizes shippers to keep their barrels on the Magellan system, including using storage facilities in the Houston area owned either by Magellan or a Magellan affiliate, rather than opting to utilize third-party storage facilities such as the one VMH plans to construct. According to VMH, this practice by Magellan violates Commission Rule § 3.71 (Pipeline Tariffs).<sup>171</sup> Though VMH requests

<sup>169</sup> Both statutes use the past tense: "*delivered to it*" (Section 111.015); "*for a service rendered*" (Section 111.017). Construing the Common Carrier Act, words in the past tense are not interchangeable with present or future tenses. See Tex. Gov't Code §§ 311.002 (Application), 311.012 (Tense, Number, and Gender).

<sup>170</sup> See Tex. Nat. Res. Code §§ 111.023(a) (requiring Magellan to exchange crude tonnage with VMH), 111.023(c) (requiring Magellan to install and maintain facilities/equipment needed to receive and deliver crude to VMH), and 111.015, 111.017 (potentially requiring Magellan not to discriminate against VMH, once service is rendered).

<sup>171</sup> See Commission Rule § 3.71(6) ("A pipeline may deliver to consignee either the identical oil received for transportation, subject to such consequences of mixing with other oil as are incident to the usual pipeline

that any connection order issued by the Commission include language expressly prohibiting this practice by Magellan,<sup>172</sup> VMH does not present that grievance here as a standalone enforcement or discrimination claim. Accordingly, it is properly considered herein only within the context of VMH's claim under Section 111.137.

Whether considered as a possible compliance violation under Rule § 3.71(6) or else as otherwise possibly unlawful behavior under the Common Carrier Act,<sup>173</sup> Magellan's practice of automatically downgrading the product grade (and value) of crude that leaves the Magellan family of pipeline/storage facilities raises obvious flags of potentially anti-competitive behavior. Magellan's business footprint in the Houston crude market is significant, with diverse revenue sources including both transportation and storage facilities. The evidence supports that Magellan has either full or joint ownership of three Houston-area crude storage terminals,<sup>174</sup> and that VMH's planned storage facility, once built, would compete with Magellan for business. The evidence also supports, however, that Magellan has made connections with other unaffiliated pipelines, delivers crude oil to competing storage terminals in which Magellan has no ownership interest, and earns the majority of its revenue in the Houston market from deliveries to third-party terminals or refineries.<sup>175</sup> A pipeline manipulating the product grade of crude to discourage shippers from offloading to a competitor potentially may be unlawful, but there is insufficient evidence here to substantiate VMH's allegations against Magellan.

The claims in this docket pertain only to compelling a physical interconnection between pipeline facilities. Expectedly, the bulk of evidence and argument from the parties was focused on that primary relief, rather than the lawfulness of Magellan's WTI downgrading practices. VMH does offer some evidence on this—namely, Magellan's latest HDS Tariff memorializing its WTI nomination terms<sup>176</sup> and the testimony of a VMH executive stating that these terms would harm VMH's customers<sup>177</sup> and would "impact" VMH.<sup>178</sup> This may suffice to confer standing on VMH to challenge the lawfulness of this conduct in a different type of proceeding—and to more fully develop the record on this issue—but it is not enough to satisfy the preponderance threshold here.

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transportation, or it may make delivery from its common stock at destination; provide, if this last be done, the delivery shall be of substantially like kind and market value.").

<sup>172</sup> Supp. Compl. ¶ 2 ("VMH supplements its requested relief to expressly request that the Commission require Magellan . . . (iv) to receive, transport, and deliver crude petroleum of like kind and value based on its physical characteristics in a manner required by law and to not apply any quality specification or other tariff provision in a manner that determines or changes the classification of any product based on the carrier of such product either upstream or downstream of the VMH or otherwise impose terms and conditions that are different than those imposed on any other shipments or movements to or from any other connecting pipeline or terminaling facility.").

<sup>173</sup> See, e.g., Tex. Nat. Res. Code §§ 111.015 (Transportation Without Discrimination), and 111.016 (Discrimination Between Shippers).

<sup>174</sup> East Houston Terminal, Seabrook Logistics Terminal (joint), and Galena Park Terminal. See VMH Ex. 3 (Ackerman Test.) at 11.

<sup>175</sup> See Magellan Ex. 1 (Roles Test.) at 8; Hearing Tr. (Nov. 20, 2019) at 134-35, 140 (Roles testifying).

<sup>176</sup> VMH Ex. 3-G (HDS Tariff) §§ 25 (Definitions), 70 (Nominations).

<sup>177</sup> VMH Ex. 3 (Ackerman Test.) at 15; *but see* Hearing Tr. (Nov. 19, 2019) at 140 (Ackerman testifying) ("Q: You understand that Magellan will deliver the identical oil that it receives at a receipt point to another delivery point in a batch shipment of that particular oil if that's what's requested by the shipper? A: Yeah, we understand that's the process.").

<sup>178</sup> Hearing Tr. (Nov. 19, 2019) at 171:7-11 (Ackerman testifying) ("But I do think that the tariff, for example, on the WTI spec, that's a tariff that impacts VMH, and that's a tariff that ultimately, you know, does impact it because that tariff defines a product by where that barrel ends up as opposed to what its characteristics are.").

For the foregoing reasons, VMH has not shown that Magellan's treatment of WTI nominations under its HDS Tariff violates any regulatory duties. Therefore, further consideration is unnecessary for purposes of VMH's Section 111.137 claim. This is not a final determination that this practice by Magellan is lawful, however, and should carry no precedential value or preclusive effect should the Commission decide to revisit this issue on its own motion or upon complaint by an interested party.

## *2. The Commission's charge to prevent waste*

One of the Commission's strongest and broadest powers conferred by the Legislature is to prevent waste.<sup>179</sup> Notwithstanding any pipeline's full compliance with all its regulated duties, the Commission nevertheless still may require it to enlarge or extend its facilities under Section 111.137 if doing so is required to prevent waste. Here, VMH highlights the 2020 coronavirus pandemic and Saudi/Russia dispute over market share to argue that, without sufficient storage availability, Texas producers of surplus crude may have no other option in the future but to shut in production.<sup>180</sup>

Just as with VMH's primary argument, above, that its planned storage terminal would alleviate crude congestion costs in the Houston area, VMH misses the mark here by confusing the need for the storage facility with the need for the connection. At issue in a Section 111.137 claim are Magellan's facilities, not VMH's, and VMH has not shown how added connection equipment at Magellan's Shell Dock Road Junction could prevent waste when, as things are currently, VMH's facilities remain unbuilt and therefore unable to make connections with anyone.

## **B. Action by the Commission Premature**

Everything VMH asks the Commission to do in this case already is required under existing Texas law, but VMH first must complete its crude storage terminal and pipeline facilities to trigger Magellan's regulated duties. At that time, should it occur, the Commission then may intervene to ensure Magellan's compliance, if needed. Action by the Commission now is premature, however, as VMH has shown no unlawful conduct by Magellan or cause to prevent waste.

As discussed above, requests for interconnection, though styled as complaints, function similarly to applications. VMH's claims in this case were allowed to proceed despite only partial progress toward completion of its planned facilities. This allowed VMH the opportunity to accomplish this adjudicative process concurrently with the large-scale construction project described in its pleading, while not foreclosing potential paths for VMH to attempt to prevail under rarely-invoked statutes for which very little statutory or caselaw guidance is available. The path ultimately chosen by VMH required, at minimum, substantial completion of pipelines by the time of trial to make interconnection at Magellan's Shell Dock Road Junction hub physically possible.

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<sup>179</sup> See, e.g., Tex. Nat. Res. Code § 85.041 (Acts Prohibited in Violation of Laws, Rules, and Orders) *et seq.*; see also, e.g., *R.R. Comm'n of Tex. v. Lone Star Gas Co., a Div. of Enserch Corp.*, 844 S.W.2d 679, 687 (Tex. 1992) ("[T]he legislature expressed its intent that the Commission have authority to prevent every kind of wasteful practice . . . whether specifically enumerated in the statutes or not."); *R.R. Comm'n v. Shell Oil Co.*, 206 S.W.2d 235, 241 (Tex. 1947) (same).

<sup>180</sup> VMH Ex. 64 (Fielden Decl.) at 2.

Absent this, granting relief to VMH would be premature for the Commission, even though considering VMH's claims was not.

### VIII. CONCLUSION

VMH did not prove entitlement to its claims here, and the recommendation therefore is that the Commission deny VMH's requested relief. For VMH's claim under Section 111.023 (Exchange of Facilities), Commission action is not proper because VMH and Magellan do not share a common locality—a condition precedent for relief under subpart (b)—and because a necessity does not exist for Commission action. For its claim under Section 111.137 (Enlargement and Extension of Facilities), Commission action is not proper because VMH did not prove a crucial element—that the new facilities it wants Magellan to construct are required in the public interest.

### IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law contained in the Amended Proposed Final Order, appended to this First Amended PFD as Attachment 5, are incorporated herein by reference. Consistent with Commission Rule § 1.121(f), amendments are noted with specificity.<sup>181</sup>

**SIGNED on January 29, 2021.**

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John Dodson  
Administrative Law Judge

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James Currier  
Technical Examiner

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Rose Ruiz  
Technical Examiner

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<sup>181</sup> See Commission Rule § 1.121(f) ("Amendments adopted by the Commission shall be noted with specificity in the Commission's final order.").