

123 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

BP West Coast Products LLC

Docket No. OR07-20-001

v.

SFPP, L.P.

ORDER ON REHEARING

(Issued May 5, 2008)

1. The Commission's December 14, 2007 Order in the captioned docket dismissed BP West Coast Products, LLC's (BP West Coast) August 27, 2007 complaint against SFPP, L.P. (SFPP).¹ The complaint had alleged that SFPP's July 1, 2007 index-based rate increases resulted in rates that were unjust and unreasonable. BP West Coast filed a request for rehearing, which the Commission denies.

Background

2. On June 28, 2007, the Commission accepted SFPP's proposal in Docket No. IS07-229-000 to increase its rates pursuant to the Commission's oil pipeline indexing regulations.² After review of the relevant SFPP filing, the Commission concluded that SFPP established that its 2006 costs increased by some 15.3 percent over its 2005 cost of service, as reflected on page 700 of SFPP's 2006 FERC Form No. 6 Report. This percentage increase exceeded the 4.3186 percentage rate index increase that the Commission approved and permitted to be effective on July 1, 2007. The Commission also rejected Indicated Shippers' protest that SFPP's rates were unjust and unreasonable at the time it made its index-based filing. The Commission held that an attack on the cumulative increases under the indexing regulations or an attack on the base rates must be

¹ *SFPP, L.P.*, 121 FERC ¶ 61,243 (2007) (December 14 Order).

² *SFPP, L.P.*, 119 FERC ¶ 61,330 (2007) (June 28 Order).

made through a complaint, not a protest.³ Therefore the Commission permitted the index-based increases to become effective subject to refund in those proceedings in which SFPP's rate filings were under investigation.⁴

3. On August 27, 2007, BP West Coast filed a complaint alleging that SFPP's July 1, 2007 index-based rate filing resulted in rates that were unjust and unreasonable. The complaint was grounded in BP West Coast's position that any recovery in excess of a pipeline's cost of service means that the underlying rates are unjust and unreasonable, and therefore the Commission should deny an index-based rate increase as long as a pipeline is over-recovering its cost of service. The complaint asserted in part that SFPP's 2006 FERC Form No. 6 demonstrates that SFPP is already over-recovering its cost-of-service and under a Commission order dated June 6, 2007, this provides reasonable grounds to conclude that the resulting rates are unjust and unreasonable.⁵ The complaint also purported to address alleged deficiencies in how SFPP calculated the dollar amount of its cost increase from 2005 through 2006.

4. On November 9, 2007, the Commission issued related orders⁶ limiting the scope of the June 6 Order to cases where: (1) the pipeline is substantially over-recovering its costs; and, (2) the index-based increase would substantially exacerbate that increase due to the difference between the dollar amount of the pipeline's actual cost increases and the additional revenue that would be generated by the indexed-based increases. The December 14 Order concluded that the complaint failed to meet this standard. The Commission held that SFPP's actual cost increases exceeded the rate increase permitted under the index in 2007, and therefore any existing over-recovery was necessarily reduced, and not exacerbated, by the rate increase. The December 14 Order also held that the complaint appeared to conflate an attack on the index-based increase for 2007 with an attack on the cumulative increases SFPP may have taken over time, the base rate, and possible SFPP's accounting procedures. The December 14 Order held that these were all separate causes of action and should be clearly delineated in any complaint. The

³ *Id.* P 6-7.

⁴ This reflects the Commission's determination that its refund authority is limited to proceedings involving an oil pipeline rate filing and does not extend to those in which the investigation is the result of a complaint against an oil pipeline. *See SFPP, L.P.*, 121 FERC ¶ 61,163 (2007) (November 14 Order).

⁵ *SFPP, L.P.*, 119 FERC ¶ 61,241 (2007) (June 6 Order).

⁶ *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 and *Tesoro Refining and Marketing Company v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,142 (2007) (collectively the November 9 Orders).

complaint was therefore dismissed in its entirety with an admonition that all future complaints should honor the procedural distinctions summarized in that order.⁷ BP West Coast filed a timely rehearing request on January 14, 2008.

Discussion

5. BP West Coast filed a rehearing request asserting that the Commission: (1) improperly dismissed the complaint because the shipper failed to show a reasonable basis to allege that the rate increase was so substantially in excess of any actual cost increase that the pipeline should be required to prove that the new rate was unjust and unreasonable; (2) effectively precluded any complaint against index rate increases; (3) improperly accepted the pipeline's claims of cost increases without any proof of those increases; (4) effectively permitted an oil pipeline to have permanent cost increase that cannot be challenged by either protest or complaint; and (5) failed to properly apply the substantially increase in the over-recovery standard. As discussed further below, none of these assertions have merit.

6. The place to begin is 18 C.F.R. §343.2(c)(1) which provides in part:

A protest or complaint filed against a rate proposed or established under § 342.3 [indexing] of the chapter must allege reasonable grounds for asserting that ... the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable...⁸

The Commission construes this language as comparing the results of the rate increase to cost increases that are actually incurred by the carrier. This is because application of the index results in a rate increase that increases revenues either on a percentage basis or a dollar basis. As the December 14 Order explained, the Commission only applies a percentage test when reviewing a protest and normally applies that test for complaints. The Commission uses a dollar comparison only under the limited circumstances as discussed in the November 9 Orders and the December 14 Order as well.

7. However, in either case the increase in revenue results from a percentage that is applied against a dollar base, which compares the pipeline's costs at the end of two different time frames. Thus, if the costs at the end of 2005 are \$100, and are \$110 at the end of 2006, the increase in the pipeline costs is \$10, or 10 percent. If the permitted index increase is 4 percent, the rates in effect at the end of 2006 may be increased by 4

⁷ December 14 Order, 121 FERC *passim*.

⁸ 18 C.F.R. §343.2(c)(2) (2007).

percent. This means that the percentage increase in revenue is by definition less than percentage increase in costs by definition, and in most cases the dollar increase in revenue is likely to be less than the dollar increase in the costs. Where this is the case, the increase that results from the application of the index cannot meet the regulatory standard because the increase from the rate did not exceed the pipeline's actual cost increases.

8. In fact, in the instant case SFPP experienced an increase in costs of \$16,403,222 from December 31, 2005 to December 31, 2006. Application of the permissible index increase to SFPP's December 31, 2006 revenues of \$139,172,954 results in a revenue increase of about \$6,010,323. Thus, the actual revenue increase based on the December 31, 2006 revenues was less than the actual increase in the costs from 2005 through 2006. Therefore, the Commission properly found that the complaint failed to meet the regulatory threshold test in 18 C.F.R. §343.2(c)(1). This is true even though the pipeline might continue to over-recover its cost of service as BP West Coast asserted in its complaint.⁹ Since the Commission has clearly permitted complaints against yearly index increases, BP West Coast's second assertion, that the Commission is precluding any complaint against index-based increases, is unfounded.¹⁰ The cases in theory can be repetitive, but this is inherent in the simplified procedure that the indexing procedure is intended to implement.¹¹ Thus, while BP West Coast may disagree with the

⁹ In such a case the proper complaint is a complaint against the base rates that are the source of the over-recovery, regardless of whether the over-recovery is caused by cumulative increases in the index or some more fundamental change in the pipeline's revenues or cost-of-service.

¹⁰ Several are now at hearing or in settlement negotiations. *E.g. Calnev Pipe Line, LLC* (Calnev), Docket No. IS06-296-002, Order of the Chief Judge Holding Proceedings in Abeyance and Appointing Settlement Judge issued August 7, 2007; Status Report filed by Calnev dated February 8, 2008 stating that the parties had reached an agreement in principle. *See also ExxonMobil Oil Corporation v. SFPP, L.P.* and *BP West Coast Products, LLC v. SFPP, L.P.*, 122 FERC ¶ 61,129 (February 13, 2008), submitting complaints against SFPP's July 1, 2005 index-based rate increase for hearing, noting in part the serious ongoing negotiations in other index-based rate cases.

¹¹ Order No. 561 at 30,948. *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, FERC Stats. & Regs., Regs. Preambles, January 1991-June 1996 ¶ 30,985 (1993), 58 F.R. 58753 (Nov. 4, 1993), Order No. 561; *order on reh'g*, Order 561-A, FERC Stats. & Regs., Regs. Preambles, January 1991-June 1996 ¶ 31,000 (1994), 59 F.R. 40242 (Aug. 8, 1994); *aff'd*, *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); *aff'd* *Association of Oil Pipe Lines v. FERC*, 281 F.3d 239 (D.C. Cir. 2002) *order on remand*, *Five-Year Review of Oil Pipeline Pricing Index*, 102 FERC ¶ 61,195 (2003).

Commission's emphasis on administrative efficiency in handling protests and complaints against index-based rate increases, this is essential given that there are over 320 index rate filings made in the second quarter of each calendar year. The reasons for this are explained in detail in the December 14 Order and its cited orders and need not be repeated here.¹² As stated in the December 14 Order, a complaint must clearly distinguish between a challenge to a single year's increase and a complaint against any cumulative increases or the base rate. The December 14 Order concluded that BP West Coast's complaint was directed against the July 1, 2006 index-based increase and then at best made references to other concerns.¹³

9. The remaining assertions are equally off the mark. BP West Coast asserts that the Commission accepts the index calculations provided by the pipeline without an opportunity for challenge by shippers. However the December 14 Order expressly stated that parties with standing could file complaints asserting that the calculations were performed incorrectly using the pipeline's existing cost of service factors and, by extension, its accounting procedures. The December 14 Order also stated that the Commission would normally conduct an audit if it has any concern that the mechanical annual determination of the pipeline costs, including annual adjustments to such factors as the cost of capital. BP West Coast asserts that all the underlying work papers are in the control of the pipeline. This is true, but many of the important source numbers are reflected in the detailed numbers in the pipeline's FERC Form No. 6. The second point in this regard is that any complaint must clearly state its purposes and reasons.

10. BP West Coast also asserts that the Commission permits pipelines to make permanent index-based increases without any possibility of review. While not an issue in this case, the essence of this charge is that if a rate is set in response to a complaint, it is then indexed forward and some of these index-increases may be beyond review by the time a final rate is in effect. The short answer is that BP West Coast has no standing to raise the issue here because it has not complained against the base rate and as such has suffered no injury relevant to its complaint. In any event, the relief is to file multiple complaints against the index increase and the cumulative increases as BP West Coast itself suggests. This may be repetitive, but it is intrinsic to the indexing procedure and enables the challenges that BP West Coast claims it cannot make.

11. Finally, BP West Coast asserts that the Commission erred in failing to apply the standard that permits a complaint to lie if (1) the pipeline is substantially over-recovering its costs and (2) the index-based increase would further exacerbate that over-recovery. It asserts that SFPP was over-recovering its 2006 cost-of-service by \$15,585,398 at the end

¹² December 14 Order, 121 FERC at P 6, 10. *See also* June 28 Order, 119 FERC at P 5-7 and the orders cited.

¹³ December 14 Order, 121 FERC at P 2, 5-6, 8, 11-12.

of 2006 and that the increased revenues from the July 1, 2007 index-based increase as applied to SFPP's December 31, 2006 revenues would increase this over-recovery by \$6,010,323. It concludes that this meets the standard. As already explained, this argument is incorrect. The index methodology works by comparing, in this case, 2005 year end costs (and over-recoveries) to 2006 year end costs (and over-recoveries). Thus, as the second example in BP West Coast's affidavits shows, the over-recovery it posits as of December 31, 2005 was some \$29,499,586. This over-recovery was reduced by the cost increases of \$16,403,222 and increased by any revenue growth, in this case \$2,489,034, for an over-recovery at the end of 2006 of \$15,585,398. The projected increase in the over-recovery during the effective period of the next increase is \$6,010,323.¹⁴ The resulting projected over-recovery for the full year 2007 is \$21,595,721, which is less than the \$29,449,586 for the calendar year 2005. Thus, the Commission correctly dismissed the instant complaint.

The Commission orders:

BP West Coast's request for rehearing is denied for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ Technically the revenue increase would be for only 6 months in a calendar year. However, since the relevant figures are not necessarily available, the projected revenue increase is assumed effective January 1 to compare the any "over-recovery" existing on the year end Page 700 for the calendar years 2005 and 2006.