

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eighty-Eight Oil LLC
Complainant,

v.

Docket No. OR06-7-000

Tesoro High Plains Pipeline Company
Respondent.

and

Tesoro High Plains Pipeline Company

Docket No. IS06-248-001

(Not Consolidated)

ORDER SETTING COMPLAINT FOR HEARING AND
DENYING REHEARING

(Issued October 2, 2006)

1. On April 10, 2006, Eighty-Eight Oil LLC (Eighty-Eight) filed a complaint in Docket No. OR06-7-000 alleging that Tesoro High Plains Pipeline Company's (Tesoro PL) denial of service to Eighty-Eight for the interstate transportation of crude oil under Tesoro PL's FERC Tariff No. 3 was unjust, unreasonable, and unduly discriminatory. On April 12, 2006, in Docket No. IS06-248-000, Tesoro PL filed FERC Tariff No. 5 to cancel FERC Tariff No. 3 to eliminate pipeline movements of crude petroleum from points in Montana and North Dakota to the Fryburg Station, North Dakota. On May 11, 2006, the Commission issued an order accepting FERC Tariff No. 5 to become effective April 14, 2006, as proposed (May 11 Order).¹ On June 12, 2006, Eighty-Eight filed a request for rehearing of the May 11 Order.

¹ Letter Order, 115 FERC ¶ 61,163(2006).

2. This order denies Eighty-Eight's request for rehearing. However, as discussed below, the Commission deems it in the public interest to establish a hearing with respect to certain issues raised by Eighty-Eight's complaint.

The Pleadings

3. While these proceedings have not been consolidated the parties have treated them as such in the pleadings and have referred to both dockets in many of these filings. It will be helpful to list the pleadings before describing their content.

4. Eighty-Eight filed the complaint on April 10, 2006, alleging that Tesoro PL denied it services provided for in Tesoro PL's FERC Tariff No. 3. On April 12, 2006 in Docket No. IS06-248-000, Tesoro PL filed FERC Tariff No. 5, cancelling FERC Tariff No. 3. On April 27, 2006, Eighty-Eight filed a motion to intervene in Docket No. IS06-248-000 together with a protest. On May 1, 2006, Tesoro PL filed an answer to both the complaint and protest of Eighty-Eight in Docket No. IS06-248-000. On May 11, 2006, the Commission issued an order accepting Tesoro PL's April 12, 2006 filing. On May 26, 2006, Eighty-Eight filed a motion and a response to Tesoro PL's answer to the protest and complaint. On that same day, May 26, 2006, Little Missouri Pipeline Company (LMP), an affiliate of Eighty-Eight and an owner of an oil pipeline involved in these proceedings filed a motion to intervene in both proceedings. On June 12, 2006, Eighty-Eight filed for rehearing of the Commission's May 11, 2006 Order accepting Tesoro PL's FERC Tariff No. 5. On June 12, 2006, Tesoro PL filed an answer in opposition to LMP's intervention. On June 21, 2006, LMP filed a reply to Tesoro PL's answer opposing LMP's intervention. On July 5, 2006 Tesoro PL filed to respond to Eighty-Eight's answer and request for rehearing, and LMP's reply to Tesoro PL's answer. On July 28, 2006 LMP filed an answer to Tesoro PL's response of July 5, 2006.

5. The Commission's rules generally prohibit replies to answers unless otherwise ordered by the Commission.² In this case the parties have filed such replies, which include attached affidavits as to the factual background. The affidavits offered are in conflict as to many matters.³ Accordingly, the Commission will allow the pleadings

² See 18 C.F.R. § 385.213(a)(2) and § 385.713(d)(1) (2006).

³ The following affidavits were submitted:

1. Affidavit of Jerry Herz, Exhibit D to April 12, 2006 Complaint;
2. Verified Statement of Jerry Herz, Exhibit D to April 27, 2006 Protest of Eighty-Eight;

(continued)

Docket Nos. OR06-7-000 and IS06-248-001

since they assist in the Commission's decision-making process. The Commission also grants the motion of LMP to intervene for good cause shown.

Background

6. While the parties are in dispute over certain matters, the following recitation sets forth matters that are not in dispute.

7. Tesoro PL owns and operates a pipeline system that transports crude oil between Montana and North Dakota. In 2004, Tesoro PL had proportioned FERC Tariff No. 3 which included routes to Fryburg Station, North Dakota. Shippers can access this destination via a six-inch, 19.2 mile pipeline lateral that branches off from the main terminal line to Mandan, North Dakota before the Tree Top Station. At Fryburg Station the lateral connects with the LMP pipeline, which is an interstate crude oil pipeline currently owned by Bridger Pipeline LLC (Bridger) and, Eighty-Eight. LMP provides transportation service from the Fryburg Station to the Baker Station, Montana.

8. Prior to May 2004, Eighty-Eight shipped crude on Tesoro PL to Fryburg Station under FERC Tariff No. 3, but did not make any shipment there after May 2004. In December 2005, Eighty-Eight informally nominated volumes for January 2006 under Tesoro PL's FERC Tariff No. 3 for delivery to the Fryburg Station. Eighty-Eight then

(continued)

3. Sworn Declaration of John W. Moore, Vice-President of Tesoro PL, Exhibit C to March 1, 2006 Answer of Tesoro PL;

4. Affidavit of Jerry Herz, Operations Supervisor for Eighty-Eight, Exhibit A to May 26, 2006 Reply of Eighty-Eight to Tesoro PL;

5. Affidavit of Henry A. True, Business Development Representative for LMP, Exhibit A to May 26, 2006, LMP Motion to Intervene;

6. Sworn Declaration of S. Shannon Flowers, Manager, Crude Supply for TRM, Exhibit A to Tesoro PL's July 5, 2006 response;

7. Sworn Declaration of Henry A. True, Exhibit A to July 28, 2006, Answer of LMP; and,

8. Sworn Declaration of Gay Browning, employee of Bridger Pipeline, Exhibit B to July 28, 2006, answer of LMP.

formally tendered nominations of 190 barrels per day for February, March, April and May 2006.⁴ Tesoro PL declined to provide the requested service.

9. During this period the following communications were sent between the parties. A letter dated January 10, 2006, from Bridger to Tesoro PL stated:

The Little Missouri System has been idled for almost two years. Due to shipper requests, Bridger Pipeline plans to reactivate the Little Missouri System to allow crude oil to move from Fryburg, ND to Butte Pipe Line at Baker, MT.

Bridger is currently undertaking the necessary steps to reactivate the Little Missouri and will begin shipping on February 1, 2006. We believe that shippers would be willing to ship on Tesoro's tariff movements into Fryburg on that same date. Bridger requests that Tesoro High Plains Pipeline take the necessary steps to reactivate the segment of pipeline that delivers crude oil into the Little Missouri System at Fryburg, ND so that shippers can realize the benefit of Tesoro's existing tariff.⁵

10. Tesoro PL responded to Bridger in a letter dated February 17, 2006, from John Moore to H.A. True. The letter stated:

We have reviewed your letter dated January 10, 2006, regarding the Fryburg destination on Tesoro High Plains Pipeline (THPP). In that letter you refer to Bridger Pipeline LLC's intention to reactivate the Little Missouri Pipeline System. Bridger Pipeline is also requesting that THPP reactivate our idle segment of the THPP system that delivers local Williston Basin crude oil into the Little Missouri Pipeline System. As you know, both systems were idled several years ago due to lack of shipper interest for this movement of crude oil.

At the present time, the only destination on the THPP pipeline that has the capability of delivering local crude oil into the Little Missouri Pipeline System is Fryburg Station. However, the segment of THPP's gathering

⁴ Tesoro PL denied Eighty-Eight's nomination for deliveries into Fryburg Station for May, 2006 by e-mail dated April 24, 2006, stating "that destination is not operational and is no longer a part of [Tesoro PL's] FERC Tariff." Exhibit B to Herz's Statement of May 26, 2006.

⁵ Exhibit D to affidavit of John Moore, attached to Tesoro PL's answer.

Docket Nos. OR06-7-000 and IS06-248-001

pipeline system that delivers crude oil into Fryburg has not been operational for a considerable period of time. In order to reactivate this idle pipeline, Tesoro PL will need to perform an overall integrity evaluation of the system. This evaluation and any resulting pipeline integrity work will likely require several months to complete.⁶

The letter also raised concern about the sulfur content of the deliveries.

11. Bridger responded in a letter dated March 17, 2006. The letter stated:

At the request of shippers, Bridger Pipeline, operator of Little Missouri Pipeline, has made Little Missouri Pipeline ready to receive tenders and shipments from Tesoro High Plains Pipeline and other connecting carriers including truck facilities at Fryburg, ND. Bridger will accept from Tesoro High Plains Pipeline sweet crude having less than .5% Sulfur. Per our discussion, we anticipate shipments to begin on May 1st, 2006 and will make the necessary arrangements.⁷

12. In response, Tesoro PL advised Eighty-Eight that it could not reactivate the Fryburg Station without a substantial capital investment and a commitment by Eighty-Eight as to future volumes to justify that capital investment.

13. On April 10, 2006, in Docket No. OR06-7-000, Eighty-Eight filed its complaint alleging that Tesoro PL illegally denied it the requested services under Tesoro PL's FERC Tariff No. 3. On April 12, 2006, in Docket No. IS06-248-000 Tesoro PL filed FERC Tariff No. 5 to cancel FERC Tariff No. 3 which eliminated all movements to the Fryburg Station.

14. This order will first address the rehearing request since it presents a legal question which we can resolve without reference to the conflicting affidavits. Moreover, the ruling on that request will limit the issues in the complaint proceeding.

⁶ Exhibit E to Moore affidavit.

⁷ Exhibit F to Moore affidavit.

A. Cancellation of Service to the Fryburg Station in Docket No. IS06-248-000

1. The May 11 Order

15. On April 12, 2006, in Docket No. IS06-248-000, Tesoro PL filed FERC Tariff No. 5 to cancel FERC Tariff No. 3 to eliminate pipeline movements of crude petroleum from points in Montana and North Dakota to Fryburg Station, North Dakota, to become effective April 14, 2006. The cancellation would eliminate service on the Fryburg Lateral, a six-inch, 19.2 mile branch off of Tesoro PL's main pipeline going to Mandan, North Dakota, immediately before Tree Top Station, which runs south to Fryburg Station, North Dakota. In support of the cancellation Tesoro PL stated that it had not operated the Fryburg lateral for a considerable period of time. Moreover, it stated that in order for it to reactivate the idle pipeline, it would have to perform an overall integrity evaluation of the system, and would also have to make considerable investment of capital. Consequently, Tesoro PL cancelled the rates and routes to the Fryburg Station, with no further rate or routing available to that destination.

16. In its April 27, 2006 protest to this filing, Eighty-Eight stated that one of the routes cancelled by Tesoro PL is the subject of the complaint proceeding in Docket No. OR06-7-000. Eighty-Eight contended that by cancelling service to Fryburg Station prior to the resolution of the complaint proceeding, Tesoro PL was attempting to avoid resolution of the issues raised in the complaint. Eighty-Eight asserted that the cancellation of these services terminates all viable options for the interstate transportation of crude produced in Central and Western Montana and eastern North Dakota. Eighty-Eight argued that Tesoro PL was violating its duty under section 1(4) of the Interstate Commerce Act (ICA) to furnish transportation upon reasonable request and to establish a reasonable through route with other common carriers to other markets. Eighty-Eight contended that cancelling service to Fryburg Station would also subject shippers to an undue and unreasonable disadvantage, and provide Tesoro PL's affiliate, Tesoro Refining and Marketing (TRM) with an undue and unreasonable advantage, in violation of section 3 (1) of the ICA. Eighty-Eight requested the Commission to reject the filing, or in the alternative either hold Tesoro PL's filing in abeyance pending the outcome of the complaint proceeding or consolidate the filing with the complaint proceeding.

17. In its tariff filing in Docket No. IS06-248-000, Tesoro PL stated that it has not operated the Fryburg Lateral for a considerable period of time and that it was incapable of receiving and discharging crude oil at Fryburg Station. Accordingly, the Commission concluded in the May 11 Order that FERC Tariff No. 5, which cancelled routes on the Fryburg Lateral, constituted a complete abandonment of service on that segment of Tesoro PL's system. The order pointed out that it is well settled that the Commission does not have jurisdiction over oil pipeline abandonments, and, therefore, held that it

lacked the authority to reject or hold in abeyance Tesoro PL's filing, citing *Arco Pipeline Company*, 55 FERC ¶ 61,420 (1991) (*Arco*). Accordingly, the Commission accepted FERC Tariff No. 5 to become effective April 14, 2006, as proposed. The order added that the Commission would address the issues raised by Eighty-Eight in its complaint in the ongoing proceeding in Docket No. OR06-7-000.

2. Eighty-Eight's Request for Rehearing

18. Eighty-Eight contends that the Commission erred in relying upon *Arco* for the proposition that the Commission does not have jurisdiction over an oil pipeline's abandonment and thus erroneously accepted Tesoro PL's filing. Eighty-Eight argues that the instant case can be distinguished from the *Arco* case, as well as other cases regarding termination of service and pipeline abandonment. What distinguishes this case, Eighty-Eight argues, is that it involves "a carrier's tariff cancellation filed in direct response to a complaint and resulted in a discriminatory effect in favor of the carrier's affiliated company."⁸ Eighty-Eight asserts that contrary to the reasons set forth by Tesoro PL why it cancelled the service, "the real reason for cancelling the routes was to avoid dealing with the allegations in Eighty-Eight's Complaint."⁹

19. Eighty-Eight also contends that Tesoro PL's cancellation of service to Fryburg Station, while maintaining service on its system to Mandan, where its affiliate TRM operates a refinery, discriminates against shippers in favor of TRM, as more fully explained in the complaint.

20. Thus, Eighty-Eight argues, while it is true that the Commission does not have jurisdiction with respect to an oil pipeline's termination of service, it does have broad statutory responsibility to prevent behavior that is unlawful and discriminatory not only in intent, but also in application, both as to shippers and interstate commerce, as in the present situation. In support of rejecting Tesoro PL's filing, Eighty-Eight cites to *Lakehead Pipe Line Co., L.P.*, 65 FERC ¶ 63,021, 65,125 (1993) (*Lakehead*). There, it contends, the Commission required the carrier to reinstall a pipeline that was physically removed and thus provide service to a delivery point that was cancelled because the termination of service, and removal of the pipeline, was in violation of section 3(1) of the ICA.

⁸ Rehearing request at 6.

⁹ *Id.* at 6-7.

21. Eighty-Eight asserts that, under ICA section 1(4), a common carrier has the duty to “establish reasonable through routes with other common carriers.” Cancellation of service to Fryburg Station, in conjunction with Tesoro PL’s cancellation of other services eliminates all viable options for interstate transportation out of North Dakota for crude oil produced in Central and Western Montana as well as Eastern North Dakota. Thus, Eighty-Eight argues the Commission erred in failing to address whether Tesoro PL violated its duty to establish through routes with other common carriers to other markets.

22. Finally, Eighty-Eight states that Tesoro PL’s cancellation of service to Fryburg Station will affect the throughput on Tesoro PL which will continue to operate to Mandan. Thus, Eighty-Eight argues, as the Commission held in *Amoco Pipeline Co.*, 83 FERC ¶ 61,156 (1998) (*Amoco*), the Commission has jurisdiction over Tesoro PL’s filing since Tesoro PL is not proposing to discontinue all service along its system.

3. Discussion

23. The Commission denies rehearing. FERC Tariff No. 5 cancels all service on the Fryburg lateral to Fryburg Station. As such it constitutes an abandonment of service over which the Commission has no jurisdiction. Both the Commission and the courts have repeatedly stated that “the Commission ... lacks jurisdiction over abandonment of service by an oil pipeline.”¹⁰ The reason for this is that:

the Interstate Commerce Act (ICA) does not give the Commission jurisdiction over abandonment of facilities and the services associated with such facilities. Indeed, the Commission has found repeatedly that it has no jurisdiction over oil pipeline abandonment (citations omitted).¹¹

As the United States Court of Appeals for the District of Columbia succinctly stated “[oil] pipeline companies may abandon service at will (which would be unlawful for many other utilities).”¹²

24. Eighty-Eight’s attempt to distinguish this case from that settled rule is without merit. The fact that a complaint is pending concerning conduct prior to the cancellation does not undermine the settled precedent. Moreover, cases cited by Eighty-Eight are not

¹⁰ *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271 P 28 (2003).

¹¹ *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 at 61,864 (2002).

¹² *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486 at 1509 n.51 (1984).

on point. The *Lakehead* case was not an abandonment case but a rate case and the citation was a recitation by the Administrative Law Judge of certain principles applicable to oil pipelines, none of which are relevant here.

25. Eighty-Eight's reliance on *Amoco* is similarly misplaced. In *Amoco* the Commission found that there was not an abandonment of service because the pipeline sought to cancel only certain origin points on that line, while keeping other origin points in operation. This, the Commission held, was not an abandonment as contemplated by the *Arco* case. Here there is a complete abandonment of service on the Fryburg lateral. The fact that the main line to Mandan continues does not negate the fact that Tesoro PL completely cancelled all service on the Fryburg lateral.

26. This case is similar to *Plantation*. There, the pipeline proposed to abandon its pipeline and facilities used to transport petroleum products to Chattanooga and Knoxville, thereby making continued service to Chattanooga and Knoxville on this line impossible. The Commission found cancellation of *Plantation's* rate schedule for service to Chattanooga and Knoxville manifested a complete abandonment of service over which the Commission would have no jurisdiction. The Commission distinguished *Amoco* stating:

However, *Amoco* involved cancellation of points of origin along a pipeline that would continue to be in service after the cancellations were made, for service to points downstream of the cancelled points. That is not the case here....¹³

Here too, continued service to Fryburg Station on this line would no longer be possible. The fact that the main line to Mandan continued does not negate the fact that all service on the Fryburg lateral was cancelled.

27. Moreover, in *Amoco*, when the Commission found it had jurisdiction, the Commission held that "Amoco's assertion that the origin points have been substantially underutilized for a long period of time is sufficient justification for cancellation of the tariffs from those origin points."¹⁴ Here too, there is no dispute that the Fryburg lateral has not been utilized since May 2004.

28. Accordingly, the Commission denies Eighty-Eight's request for rehearing of the May 11 Order.

¹³ 98 FERC at 61,685.

¹⁴ 83 FERC at 61,673.

B. The Complaint Proceeding in Docket No. OR06-7-000

29. Eighty-Eight contended that Tesoro PL illegally failed to render the service that Eighty-Eight had nominated to Fryburg Station that Tesoro PL was required to provide under Tesoro PL's effective FERC Tariff No. 3. It is undisputed that until May 2004 there were crude oil shipments under that tariff. After that date, there were no crude oil shipments to Fryburg Station. Starting in December 2005, there were discussions between Tesoro PL and Eighty-Eight¹⁵ about the resumption of shipments by Eighty-Eight to Fryburg Station. Eighty-Eight made nominations for crude oil shipments to Fryburg Station for January, February, March, April and May 2006,¹⁶ under Tesoro PL's FERC Tariff No. 3, but Tesoro PL did not provide the service. The Commission accepted Tesoro PL's filing to abandon service to Fryburg Station effective April 14, 2006.

30. Eighty-Eight's version of the events set forth in the affidavits submitted by Eighty-Eight and LMP follows.¹⁷

31. In May 2004, LMP stopped pumping crude oil because shippers ceased nominating volumes for movement from Fryburg Station to Baker Station. However, Eighty-Eight states that LMP has been prepared and willing to accept nominations at any time between May 2004 and the present. In fact, Bridger never informed Tesoro PL that, effective May 1, 2004, LMP would no longer take nominations into its pipeline from Fryburg Station. In fact, in December 2004, crude oil owned by TRM was transported on LMP from Tesoro PL's tank at Fryburg Station to Baker, Montana.

32. In December 2005, Eighty-Eight informally nominated volumes for transportation to Fryburg Station, under Tesoro PL's tariff FERC Tariff No. 3. In January, February, March and April 2006, Eighty-Eight formally nominated volumes under the same tariff route. Tesoro PL denied all of these nominations, even though its FERC Tariff No. 3 provided for this transportation.

33. On January 5, 2006, Mr. John True, of Bridger, met with Mr. John W. Moore of Tesoro PL, and informed him that Bridger was taking steps to ensure that LMP was ready

¹⁵ Reference to Eighty-Eight also includes its parent and affiliates.

¹⁶ Eighty-Eight made nominations for May 2006, but the Commission's May 11, 2006 Order granted Tesoro PL's filing eliminating movements to Fryburg Station, effective April 14, 2006.

¹⁷ The affidavits are listed *supra*, n.3.

to provide service and preparing to take shipments from Fryburg Station to Baker Station per shipper requests. Mr. True requested that Tesoro PL take the necessary steps to be prepared to again deliver crude into LMP at the Fryburg Station.

34. Eighty-Eight states that at no time during this conversation did Mr. Moore state or even suggest that Tesoro PL's line to Fryburg Station had been taken out of service. Additionally, Mr. Moore gave no indication that there were any operational problems, safety issues related to line pressure, or any environmental issues related to the location of Tesoro PL's pipeline in an environmentally sensitive area, or the need for hydrostatic testing of the pipeline.

35. On January 10, 2006, Mr. True sent a letter to Mr. Moore informing him that Bridger planned to reactivate LMP to allow movements from Fryburg Station to Baker Station, *supra*, P 9. Additionally, the letter informed Mr. Moore that shippers had also requested that LMP take deliveries of crude oil from Tesoro PL, as had been done in the past and as Tesoro PL's tariffs still permitted. The letter stated that the crude being shipped to the Fryburg Station would be light sweet crude with 0.2% sulfur or less.

36. On February 17, 2006, Tesoro PL informed Bridger, by letter, *supra*, P. 10, that in order to reactivate the Tesoro PL line to the Fryburg Station, Tesoro PL would have to perform an overall integrity evaluation of the system, which would require several months to complete. Tesoro PL also stated that the crude oil on its pipeline was a common stream, transporting crude oil at or below 0.5% sulfur content, and that it would not be able to segregate a stream to meet a 0.2% sulfur requirement delivered into LMP.

37. In March 2006, Mr. Herz was told by Tesoro PL that it would not accept Eighty-Eight's nominations for April 2006 because Tesoro PL could not segregate a crude oil stream to meet the 0.2% sulfur requirement that Bridger required for transportation along LMP.

38. On March 17, 2006, Mr. True advised Tesoro PL's representative Mr. Moore that LMP was prepared to accept Tesoro PL's common stream. In response to the question as to when Tesoro PL would begin deliveries to LMP, Mr. Moore informed Eighty-Eight that Tesoro PL would complete the evaluation of its pipeline and be prepared to ship crude oil on May 1, 2006. These conversations were confirmed by a faxed letter from Mr. True to Mr. Moore, *supra*, P.12.

39. On March 31, 2006, in a telephone conversation with Mr. True, Mr. Moore stated that Tesoro PL believed that prior to any reactivation of the Fryburg Station, it would have to install an origin pump station, in addition to integrity testing of the line. Mr. Moore also stated that the Tesoro PL line servicing Fryburg Station had been taken out of

service, that Tesoro PL would be willing to reactivate its service to Fryburg Station only if it received long-term volume commitments for shipments to the Fryburg Station.

40. On April 3, 2006, Tesoro PL notified Eighty-Eight that Tesoro PL could not provide the requested service since it had disconnected the pipeline servicing Fryburg Station. Mr. Moore advised Mr. Herz that Tesoro PL would have to perform an integrity assessment and would have to install a new origin pump station, which would cost approximately \$750,000 to \$1 million. Mr. Moore further stated that Tesoro PL would have to contact other shippers to see if there would be sufficient crude oil shipments to justify the expense, but implied that if Eighty-Eight was willing to pay for the replacement facilities, Tesoro PL would be amenable to bringing the line back into service.

41. Eighty-Eight states that in view of Tesoro PL's "unwillingness to provide the service offered in its tariff, after months of indication that it would be able to, Eighty-Eight had no choice but to file its complaint."¹⁸

42. In the complaint, Eighty-Eight asserts that as a result of not being able to ship its crude to the markets it sought, Eighty-Eight was forced to sell its crude oil to Tesoro LP's affiliate, TRM, at a price below that which it would have received if it had sold the crude at the other markets. Illustrative of the losses it suffered, Eighty-Eight contends that the lower price it received for the sale of the crude to TRM in February 2006, caused it to receive \$2,178.01 less in revenues from the sale.

43. Eighty-Eight contends that even though the number of barrels nominated by it during this period may not be large,¹⁹ it represented Eighty-Eight's effort to "expand competition for this sweet crude by opening a new market for it."²⁰ Thus, Eighty-Eight argues, Tesoro PL's actions "caused undue harm to Eighty-Eight, in terms of lost profits and, even more importantly, lost opportunities to develop new markets."²¹

44. Eighty-Eight requests the Commission to order Tesoro PL to pay damages, interest and costs, and to require Tesoro PL to provide the service outlined in Tesoro PL's tariff at the rates offered in its tariff.

¹⁸ May 26, 2006 Reply of Eighty-Eight at 9-10.

¹⁹ In every month, Eighty-Eight nominated only 190 barrels per day.

²⁰ Complaint at P 19.

²¹ *Id.* at P 23.

45. Tesoro PL presents a different version of these events.²² It states that from at least January 2002 until April, 2004, TRM nominated and shipped crude oil from Fryburg Station on the LMP line to Baker, Montana. In April 2004, Mr. True of LMP advised Mr. Flowers of Tesoro PL that the LMP pipeline was suspending further operations and would not accept nominations to Baker, MT. Mr. Flowers states that he was told by Mr. True that the level of nominations on the LMP line had been so small that its management decided that it would no longer operate the line.

46. When LMP informed Tesoro PL that, effective May 1, 2004, LMP would no longer take nominations into its pipeline for delivery from Tesoro PL's Fryburg Station, Tesoro PL idled its pipeline spur to Fryburg and de-activated Fryburg as a destination. Tesoro PL did not receive any nominations for deliveries into Fryburg Station from May 1, 2004 until the present controversy developed with Eighty-Eight.

47. When the LMP refused to accept further crude oil nominations after May 2004, TRM needed to dispose of approximately 16,000 barrels of crude oil that had been stranded in its tank in the Fryburg Station. After much discussion, Mr. Flowers states that LMP agreed to transport this inventory in December 2004. Tesoro PL states that this is the only shipment of crude oil that Tesoro PL or TRM made on LMP after May 2004.

48. After LMP stopped providing service in May 2004, Tesoro PL started increasing the line pressure and the flow rate on its main pipeline to permit greater throughput of Eastern Montana and Western North Dakota crude oil production on the overall pipeline system. As a result, it could no longer use the spur line to Fryburg Station since it operated at a lower maximum pressure than the new pressure on the Tesoro PL main line, and as a result, the spur line was taken out of service.

49. Tesoro PL states that to bring the line to Fryburg Station back into service would require a significant capital investment. Tesoro PL would need to spend approximately \$200,000 to \$300,000 in pressure testing and overall integrity work. Since the lateral spur connection from the Tesoro PL mainline to Fryburg Station traverses highly sensitive and remote terrain, precautions would have to be taken during the pressure testing and any future operation of this pipeline spur. In addition, Tesoro PL states, in order to deliver crude oil to Fryburg Station, Tesoro PL would have to build a new origin pump station at the Tree Top Station,²³ because the line pressure of the Tesoro PL main

²² Tesoro PL's version is set forth in the affidavits of John Moore, and Shannon F. Flowers.

²³ The Fryburg lateral branches off the main line near the Tree Top station.

line is greater than the acceptable injection pressure that the spur lateral to the Fryburg Station can sustain.

50. Tesoro PL estimated the cost of a new origin pump station at approximately \$700,000 to \$800,000. Thus, the current estimate for the cost of the total integrity testing expense work and the capital improvement of an origin pump station to place the Fryburg lateral back into service could easily exceed \$1,000,000.²⁴

51. Mr. Moore states that Tesoro PL's first contact with Eighty-Eight and its affiliated companies with respect to resumption of shipments to the Fryburg Station occurred in a January 5, 2006, meeting with Mr. True.

52. At that meeting, Mr. Moore states that Mr. True acknowledged that the LMP had not shipped any crude oil during the past two years and could not at that time receive crude oil deliveries from the Fryburg Station. Mr. True indicated that Bridger was planning on reactivating the LMP in the future and, when activated, would only receive a crude oil stream with an "ultra-sweet" sulfur specification of 0.2% or less. These matters were confirmed in the January 10, 2006, letter from Mr. True to Tesoro PL, *supra*, P 9.

53. In its February 17, 2006, reply to that letter, Tesoro PL repeated the problems it would incur with crude shipment of 0.2% sulfur. In addition, that letter pointed out that since the spur line to Fryburg has been idled for an extended period of time, Tesoro PL would initially have to perform an overall integrity evaluation of the system, which could take several months to complete.

54. The letter also stated that before proceeding with further evaluation of the costs involved in re-establishing the Fryburg Station, Tesoro PL needed assurance that the Tesoro PL common stream would meet the LMP's product specifications.

55. On March 17, 2006, Mr. Moore states he had a conversation with Mr. Herz at Eighty-Eight, who indicated that Eighty-Eight would like to nominate crude oil for delivery into Fryburg Station. Mr. Moore states he reviewed with Mr. Herz the problem of resuming delivery that he had discussed with Mr. True. That afternoon Mr. Moore received a fax from Eighty-Eight stating that "Bridger will accept from Tesoro Pipeline sweet crude oil having less than 0.5% wt Sulfur." The letter also indicated that the LMP would accept shipments on May 1, 2006.

²⁴ Tesoro PL notes that Eighty-Eight's nominations in each of the months in 2006 were 190 barrels per day, which would not justify the estimated capital investment.

Docket Nos. OR06-7-000 and IS06-248-001

56. Mr. Moore states that after receipt of that fax, Tesoro PL resumed its evaluation of the environmental and economic feasibility of establishing a new Fryburg destination and concluded that the previous cost estimate of \$1,000,000 to reactivate the Fryburg Station was correct.

57. On Friday, March 31, 2006, Mr. Moore notified both Mr. True and Mr. Herz of this conclusion. Mr. Moore advised Mr. True that in view of the magnitude of capital expenditure, Tesoro PL would need assurance that shippers would transport adequate volumes to Fryburg Station before Tesoro PL undertook more extensive efforts. Mr. Moore also asked whether Eighty-Eight was willing to enter into a term commitment that would justify Tesoro PL's capital investment. Instead of a positive reply, Eighty-Eight filed its complaint.

58. Tesoro PL states that it should have formally cancelled each of its tariffs to the Fryburg Station in May 2004 when Eighty-Eight and its affiliates closed LMP. Tesoro PL states that the desirability of formally cancelling the Fryburg Station became evident this year. Tesoro PL therefore published Supplement No. 2+ to FERC No. 3 on March 2, 2006, formally cancelling a number of routes to Fryburg Station but not all since Eighty-Eight had indicated a desire to explore the possibility of establishing a new service to Fryburg Station.

59. Tesoro PL states that after Eighty-Eight filed its complaint, Tesoro PL filed FERC Tariff No. 5 to cancel the remaining routes to the Fryburg Station since it was evident Eighty-Eight would not make the necessary commitment.

60. Tesoro PL contends that for the past two years LMP has not been prepared to accept common stream crude oil from Tesoro PL at the Fryburg Station, and was not scheduled to begin service until May 1, 2006. Therefore, Tesoro PL argues, Eighty-Eight never had the capability of receiving the crude oil it nominated for shipment to Fryburg Station. Tesoro PL refers to Item No. 35, "Destination Facilities," of Tesoro PL's rules and regulations tariff (FERC Tariff No. 2 and supplements thereafter), which requires the shipper to furnish evidence "that consignee has provided necessary facilities to which carrier is connected and has made necessary arrangements for accepting delivery of shipments promptly on arrival at destination...." Tesoro PL asserts that Eighty-Eight could not furnish such evidence since LMP was not in service and Tesoro PL was therefore entitled to refuse the nominations.

61. Tesoro PL also contends that Tesoro PL could not use the lateral line to Fryburg Station without incurring a completely unacceptable environmental risk that needed further assessment before it could resume shipment on the Fryburg lateral. Moreover, the line pressure of the Tesoro PL pipeline made it impossible to use the existing Fryburg

lateral as it is designed today. Tesoro PL asserts that Eighty-Eight was aware of these operational constraints.

62. Tesoro PL disputes Eighty-Eight's claim that Tesoro PL's course of conduct is designed to benefit its affiliate, TRM. Prior to May 2004, when both the LMP and the Fryburg line were open, TRM shipped crude oil to the Fryburg Station. Tesoro PL states there is no way in which Tesoro PL can establish a new Fryburg destination for either Eighty-Eight or TRM in view of the cost involved and the minimal anticipated throughput.

63. Moreover, Tesoro PL argues that there is no merit to Eighty-Eight's claims that it is being placed at a competitive disadvantage by having to use trucks to transport crude oil for 50 miles. Tesoro PL asserts it is very common to truck oil for that small distance for the quantity of oil that Eighty-Eight nominated, namely, only 190 barrels per day.

64. For all these reasons, Tesoro PL argues the Commission should dismiss Eighty-Eight's complaint.

65. In response, Eighty-Eight asserts that many of Tesoro PL's contentions are not correct. Eighty-Eight states that LMP never cancelled its service from Fryburg Station to Baker Station. This service, it contends, remained available for use by shippers pursuant to Bridger Pipeline LLC tariff FERC Tariff No. 8 and Supplements thereto.²⁵

66. Eighty-Eight also asserts that in its communications with Mr. Moore prior to March 31, 2006, at no time did Mr. Moore suggest that Tesoro PL's line to Fryburg Station had been taken out of service. Additionally, Eighty-Eight asserts that Mr. Moore did not indicate that there were any operational problems along the pipeline, any safety issues related to line pressure, or any environmental problems associated with the pipeline's location or the need for hydrostatic testing.²⁶

67. Mr. True asserts that it was not until March 31, 2006, that Mr. Moore conveyed any information regarding operational problems on Tesoro PL's line to Fryburg Station. That conversation was the first time that Tesoro PL indicated that the line servicing the Fryburg Station had been taken out of service.²⁷ Additionally, at no time during any of the conversations with Tesoro PL was there mention that there were any safety or

²⁵ True affidavit P 7.

²⁶ *Id.* at P 22.

²⁷ *Id.* at P 23.

Docket Nos. OR06-7-000 and IS06-248-001

environmental issues with Tesoro PL's pipeline. LMP first learned of these alleged safety and environmental problems in Tesoro PL's answer filed on May 1, 2006.

Discussion

68. When the complaint in Docket No. OR06-7-000 was filed on April 10, 2006, Tesoro PL's FERC Tariff No. 3 was in effect. However, subsequently the Commission issued an order on May 11, 2006, accepting Tesoro PL's FERC Tariff No. 5 which cancelled FERC Tariff No. 3 effective April 14, 2006. In this order, we are denying rehearing of the May 11, 2006 Order, so effective April 14, 2006, Tesoro PL did not have a tariff offering service to the Fryburg Station. Accordingly, the issues raised by the complaint relate only to matters preceding April 14, 2006.

69. Eighty-Eight alleges that Tesoro PL illegally denied it the service it was entitled to receive for the nominations it made pursuant to Tesoro PL's FERC Tariff No. 3 involving shipment to Fryburg Station for January, February, March, and April 2006. It is not disputed that until its cancellation of FERC Tariff No. 5, FERC Tariff No. 3 was in effect and that Tesoro PL thus was holding out to provide the service specified in the tariff.

70. As outlined above, the parties dispute many crucial factors, such as whether the LMP had been taken out of service in May 2004, and when did Tesoro PL advise Eighty-Eight that there were operational and safety concerns, and financial considerations, before the Fryburg lateral would be able to resume operation.

71. Moreover, each party interprets the communication between them in this period in a different way. Thus, Tesoro PL asserts that in Eighty-Eight's March 17, 2006 letter to it, Eighty-Eight indicated that "LMP would be prepared to accept shipment on May 1, 2006," so that until that date, Eighty-Eight admitted that LMP was not in a position to accept delivery at the Fryburg Station.²⁸ Eighty-Eight argues that Tesoro PL "has misconstrued the intent behind the March 17, 2006 letter ... faxed to them." The intent of this letter in Eighty-Eight's view was to confirm that Tesoro PL would commence service deliveries beginning May 1, 2006, not to suggest that the LMP would be unable to accept crude oil until May 2006.²⁹

72. The Commission finds that Eighty-Eight's complaint meets the threshold requirements set forth in section 385.206 of the Commission's regulations which establishes requirements applicable to all complaints filed with the Commission. The

²⁸ Moore affidavit P 11.

²⁹ True affidavit of May 26, 2006 at P 29.

parties have raised disputed and material issues concerning whether Tesoro PL violated its statutory obligations in denying service to Eighty-Eight until its FERC Tariff No. 3 was cancelled and if it did, what remedy, if any, is appropriate. Moreover, as stated above, any remedy will be limited to events preceeding April 14, 2006. These issues require further investigation. Accordingly, the Commission will accept the complaint, but because the current record in this proceeding does not contain sufficient evidence to enable the Commission to resolve the issues, it is appropriate for the Commission to provide for hearing procedures to examine the issues. Since the parties were unable to resolve their dispute through the alternative dispute resolution process, the Commission concludes that it will not refer the matter to a settlement judge.

The Commission orders:

(A) Eighty-Eight's request for rehearing of the May 11 Order in Docket No. IS06-248-000 is denied.

(B) Pursuant to the authority of the Interstate Commerce Act, particularly sections 13(1) and 15(1) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Eighty-Eight's complaint in Docket No. OR06-7-000.

(C) Pursuant to section 375.304 of the Commission's regulations, 18 C.F.R. § 375.304 (2002), the Chief ALJ shall designate a Presiding ALJ for the purpose of conducting a hearing. The Presiding ALJ is authorized to conduct further proceedings pursuant to this order and the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.