

121 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP West Coast Products, LLC

Docket No. OR07-8-001

v.

SFPP, L.P.

ORDER DENYING REHEARING

(Issued November 9, 2007)

1. This order addresses a rehearing request by SFPP, L.P. (SFPP) of the June 6, 2007 order¹ in Docket No. OR07-8-001, which the Commission denies.²

The Rehearing Request

2. The June 6 Order accepted a complaint by BP West Coast Products, LLC (BP West Coast) against the rate increase SFPP took on July 1, 2005, pursuant to the Commission's indexing regulations, 18 C.F.R. § 342.3.³ The complaint had alleged that (1) SFPP was already substantially over-recovering its costs, and (2) while SFPP's costs increased by only 0.3 percent, the index-based increase was 3.6 percent. Based on page 700 of SFPP's 2004 FERC Form No. 6, this resulted in an additional over-recovery of SFPP's costs by some \$4,500,000 and purportedly increased SFPP's total over-recovery

¹ *BP West Coast Products, LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241 (2007) (June 6 Order).

² This order on rehearing contains the standard to be applied to the August 1, 2007 complaint addressed by a companion order in Docket No. OR07-16-000, *Tesoro Refining and Marketing Company v. Calnev Pipe Line, L.L.C.*

³ 18 C.F.R. § 342.3 (2007).

from some \$16 million to some \$20 million.⁴ Given those facts, the Commission held that BP West Coast had satisfied the standard for filing a complaint against an indexed based increase contained in 18 C.F.R. § 343.2(c)(1), which provides in part that a “complaint ... filed against a rate ... established pursuant to § 342.3 ... 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 resulting rate is unjust and unreasonable”⁵

3. SFPP filed a rehearing request of the June 6 Order. It first asserts that the Commission erred in stating that a “complaint will meet the standards of [18 C.F.R. § 343.2(c)(1)] if it establishes that the pipeline appears to substantially over-recover its costs at the time files to increase rates under” the Commission’s indexing methodology. It further asserts that the Commission erred in failing to dismiss BP West Coast’s complaint given that the Commission had previously rejected protests to the same increase for which it was prepared to accept a complaint. SFPP argues that the Commission has consistently held that its indexing methodology relies solely on the comparison of Page 700 of the pipeline’s FERC Form No. 6 in successive years. Thus, to determine whether an increase is appropriate on July 1, 2005, the Commission compares the operating costs in 2003 with the costs in 2004. SFPP asserts this focuses on the comparison of the percent increase in the pipeline’s costs to the percent increase permitted by the annual index. SFPP argues that the Commission has only used this comparison of percentage increases to determine whether the resulting increase is so substantially in excess of the carrier’s actual cost increases that the resulting rate is unjust and unreasonable.

4. SFPP argues that prior to the June 6 Order the Commission had never compared the increase in costs to the pipeline’s existing profit margins. Thus, it concludes, the Commission arbitrarily changed the interpretation of its indexing regulations and effectively modified those regulations without notice and opportunity for comment. SFPP characterizes the June 6 Order as containing an appearance test and states that it will have serious practical consequences. It asserts that Colonial Pipeline reflected a cost increase of approximately 6 percent on Page 700 of its FERC Form No. 6 and an over-recovery of approximately \$73 million, or about 11 percent. Similarly, it argues that Inland Pipeline showed a cost increase of .4 percent and an over-recovery of some 29 percent based on its 2006 Page 700.⁶ It concludes that the June 6 Order has exposed pipelines to complaints that it would not have accepted before and is inconsistent with the Commission’s position that a complainant must challenge the base rate filing by a

⁴ June 6 Order at P 10.

⁵ 18 C.F.R. § 343.29(c)(1) (2007).

⁶ The amount of the permitted increase effective July 1, 2007 was 4.3168 percent.

complaint against that rate, not the level of an indexed increase that the Commission had previously found acceptable. Finally, it states that the Commission had previously rejected a protest against the same July 1, 2005 increase under the same standard that it applied in accepting the complaint.

Discussion

5. The Commission denies SFPP's rehearing request that the Commission never compare the additional return under an index filing to an over-recovery reflected on Page 700 of the pipeline's FERC Form No. 6. The Commission first concludes that it is reasonable under certain very limited circumstances to compare the rate increase that will result from application of the index methodology to a pipeline's over recovery. SFPP is correct that the June 6 Order contains a revised interpretation of 18 C.F.R. § 343.2(c) and is one that the Commission had not previously had occasion to address. This does not mean that the interpretation is arbitrary. The section states that a complainant must allege reasonable grounds for asserting that a rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the resulting rate is unjust and unreasonable. This language would support an interpretation providing for the review of either a percentage increase or a dollar increase since the phrase "substantially in excess" is open to either. Section 343.2(c)(1) does not state how any quantitative analysis should be performed or that such an analysis must be the same for all circumstances.

6. SFPP is also correct that the Commission uses a percentage comparison test in the context of a protest to an index-based filing to assure that the indexing procedure remains a simple and efficient procedure for the recovery of annual cost increases.⁷ This screening approach at the suspension phase is a snap shot approach that avoids extensive arguments over issues of accounting accuracy and rate reasonableness within the time limits available for Commission review, and highlights the simplicity of the filing procedure. It also precludes the use of the protest procedure to complicate what should in most cases be merely a price adjustment that is capped at the industry's average annual cost increases. Thus, it is only in rare instances where the divergence between the cost increase (or decrease) in percentage terms is so great as to raise an issue of reasonableness that the Commission will investigate an index filing,⁸ or where unique factual situations establish that the pipeline is already recovering its actual costs incurred in the prior year.⁹ While the burden is on the pipeline in a suspension proceeding, this approach still serves to discourage unnecessary litigation because of the high standard

⁷ See *SFPP, L.P.*, 119 FERC ¶ 61,330 (2007) and *Calnev Pipe Line, L.L.C.*, 119 FERC ¶ 61,332 (2007) for a recent affirmation of this approach and its rationale.

⁸ See *Calnev Pipe Line, L.L.C.*, 115 FERC ¶ 61,387 (2006).

⁹ See *SFPP, L.P.*, 117 FERC ¶ 61,271 (2006), *reh'g denied*, 120 FERC ¶ 61,245 (2007).

involved and the fact that the Commission's decision not to investigate is not subject to judicial review.¹⁰

7. A complaint involves a different procedural framework. First, the burden to meet the threshold standard and to prove the resulting rate is unreasonable rests with the complainant. The burden placed on the complainant of going forward and prevailing increases the likelihood that there are sufficient sums in dispute to warrant an investigation which reduces the risk of unnecessary litigation. This risk is further reduced given discretion the Commission has either whether to investigate the complaint, or not, and the more extended time frame in which it has to exercise that discretion. The quick snapshot approach that underpins the percentage based approach used in assessing an index-based suspension proceeding is less relevant in a complaint proceeding for this reason. Given the fact that section 343.2(c)(1) applies to either complaints or protests and that the procedural framework for each is different, it is not arbitrary for the Commission to apply different interpretations of the regulation in these different contexts and to place greater emphasis on a review of accounting accuracy and rate reasonableness in assessing a complaint. Applying the same standards to both suspension and complaint proceedings would effectively deprive shippers of any opportunity to question the rate levels and the returns resulting from the pipeline's annual index-based rate filings based on changes in the dollar yield from the rate index.

8. Indeed, the instant case demonstrates why this is the case. On the face of SFPP's 2005 index filing the pipeline has an over-recovery of some \$16 million and the resulting rate increase would have increased that return by an additional \$4 million on the face of SFPP's index filing. This represented an increase in SFPP's return of some 25 percent, a percentage increase of the magnitude involved here would certainly trigger a complaint against the cumulative increase in the base rate, a more complicated proceeding in that it involves the review of all elements of the pipeline's cost of service. In the instant case, only the amount of the increase and the mechanics of how the increase was calculated may be examined. Commission policy precludes an analysis of the reasonableness of the underlying cost of service factors embedded in the pipeline's cost of service, which limits the scope of the proceeding and preserves at least part of the Commission's simplicity goal that is the hallmark of its rate cap indexing methodology.¹¹

9. For these reasons the Commission concludes that it is not arbitrary to apply a wider range of factors in reviewing a complaint against an index-based rate increase than in reviewing a protest filed against the same increase for a given year. SFPP is correct, however, that the June 6 Order as written could have some unintended consequences.

¹⁰ Cf. *ExxonMobil Oil Corporation v. FERC*, unpublished decision dated February 27, 2007, (D.C. Cir. No. 05-1471.)

¹¹ June 6 Order at P 9.

The June 6 Order states that the complaint would meet the standard in section 343.2(c) if at the time of filing the pipeline was substantially over-recovering its costs. The phrasing did not incorporate the fact that application of the index methodology would substantially exacerbate the over-recovery because the increase substantially exceeded the actual increase (in dollar amounts) of the pipeline's costs. This could lead to a denial of an index-based increase in a year in which the pipeline's cost increase exceeded or was in the same range as the index amount and thus there was no material change in its return.

10. SFPP is correct that if a shipper wishes to challenge the accumulated return from a series of index-based increases, the shipper must file a complaint under section 13 of the Interstate Commerce Act against the base rate so increased. The overly broad language of the June 6 Order did not recognize this important distinction between the impact of a single year's indexed-based increase and an investigation of the cumulative return over several years, which requires a more complex inquiry. The Commission therefore clarifies that for the complaint to establish reasonable grounds to conclude that the resulting rate is unjust and unreasonable, it must show (1) that the pipeline is substantially over-recovering its cost of service and (2) that the indexed based increase so exceeds the actual increase in the pipeline's cost that the resulting rate increase would substantially exacerbate that over-recovery. Otherwise SFPP's request for rehearing is denied.

The Commission orders:

SFPP's request for rehearing in Docket No. OR07-8-001 is denied for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Jr.,
Acting Deputy Secretary.