

139 FERC ¶ 61,278
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur.

NuStar Logistics, L.P.

Docket Nos. IS12-314-000
IS12-314-001

ORDER ACCEPTING AND SUSPENDING TARIFFS, SUBJECT TO HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued June 29, 2012)

1. On May 29, 2012, NuStar Logistics, L.P. (NuStar) submitted revised tariff records and requested that the Commission permit them to become effective July 1, 2012.¹ Valero Marketing and Supply Company (Valero) filed a motion to intervene and protest challenging proposed FERC Tariff Nos. 67.2.0, 69.2.0, 71.2.0, and 72.2.0. NuStar filed a response to the protest, arguing that it lacks merit and that the Commission should dismiss it.

2. As discussed below, the Commission accepts and suspends the tariff records listed in the Appendix to become effective July 1, 2012, subject to refund and subject to the outcome of hearing and settlement judge procedures.

NuStar's Initial Filing

3. NuStar states that it proposes to increase its rates by the annual change in the Producer Price Index for Finished Goods plus 2.65 percent in accordance with section 342.3 of the Commission's regulations² and the Commission's notice in Docket

¹ The tariff records are listed in the Appendix to this order, with the exception of FERC Tariff No. 75.3.0, which NuStar withdrew on June 20, 2012

² 18 C.F.R. § 342.3 (2011).

No. RM93-11-000, issued May 15, 2012.³ NuStar asserts that its proposed rates do not exceed the applicable ceiling level. Further, states NuStar, the schedule attached to its filing calculates the maximum index ceiling rates for July 1, 2012 to June 30, 2013, and reflects both existing rates and the proposed increased rates. Finally, NuStar states that it has changed the “Compiled By” and telephone number information on the title page of each tariff, except for FERC Tariff No. 70.4.0. NuStar explains that it changed the title page of FERC Tariff No. 70.4.0 in a previous filing.

Valero’s Protest

4. Valero protests FERC Tariff Nos. 65.6.0, 66.3.0, 68.2.0, 70.4.0, 73.3.0, 74.3.0, and 75.3.0, which seek index-based rate increases of approximately 8.6 percent. Valero states that it has not protested other tariffs included in NuStar’s Filing because it does not ship under those tariffs.

5. Valero argues that NuStar’s FERC Form No. 6, Page 700 for 2011, shows that it seeks a rate increase so substantially in excess of its cost changes that the proposed rates that the Commission should find them to be unjust and unreasonable. Valero points out that the Commission previously has stated that FERC Form No. 6, Page 700 can serve as the basis of a protest against proposed index-based rate increases.

6. In fact, continues Valero, NuStar’s FERC Form No. 6 demonstrates that NuStar experienced a cost decrease of \$1 million from 2010 to 2011 and that NuStar experienced no actual cost increase that would justify the proposed rate increase. Specifically, Valero states that NuStar experienced a cost decrease of 1.5 percent, although it proposes to increase its rates by 8.6 percent, resulting in an actual revenue increase of 10.16 percent.⁴ In particular, Valero asserts that NuStar has reported interstate operating revenue of \$64.3 million in 2011 on Page 700 of its FERC Form No. 6, but that it has included only revenue associated with Account 200 Gathering Revenue, Account 210 Trunk Revenue, and Account 220 Delivery Revenue. Valero asserts that NuStar has excluded all revenue associated with Account 250 Rental Revenue and Account 260 Incidental Revenue that NuStar reported on Page 301 of its 2011 FERC Form No. 6. Valero further asserts that the Commission should reject the tariffs it challenges or suspend them pending the filing of a corrected FERC Form No. 6 and related Page 700, along with a complete

³ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, 139 FERC ¶ 61,123 (2012).

⁴ Valero explains at length the specific items analyzed by its expert, Dr. Daniel S. Arthur. Motion to Intervene and Protest of Valero Marketing and Supply Company, June 13, 2012, at 4-8 and Exhibit C.

explanation and justification (including workpapers) for NuStar's treatment of Rental and Incidental Revenue.

NuStar's Response

7. In response, NuStar contends that Valero's protest presents an inaccurate assessment of NuStar's accounting treatment of its non-transportation revenues. NuStar argues that the Commission should follow its rule of reviewing an index filing in light of the FERC Form No. 6, Page 700 data rather than engaging here in complex revisions to those data. NuStar cites the standard established in the Commission's Regulations:

A protest or complaint filed against a rate proposed or established pursuant to § 342.3 of this chapter must allege reasonable grounds for asserting that the rate violates the applicable ceiling level, or 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.⁵

8. NuStar acknowledges that its costs as reported in Page 700 of the 2011 FERC Form No. 6 diminished very slightly, by approximately 1.5 percent, but it contends that this is not surprising in light of the approximately 12 percent decline in total barrels that it transported on its pipeline. Further, states NuStar, the Commission also requires that, for the divergence in costs and increased revenues to be so significant as to make the index increase unreasonable, the pipeline cannot be under-earning, as measured by the costs and revenues shown in Page 700.⁶

9. NuStar argues that, because the index filing is a streamlined process, the Commission evaluates protests by using the Page 700 data, without the types of adjustments proposed by Valero. Moreover, continues NuStar, even if the Commission were to look behind the revenue data in Page 700, NuStar did not err in its determination of revenues. Citing its own expert, NuStar challenges the adjustments proposed by Valero's expert in his analysis. NuStar contends that the Commission should reject Valero's protest and its request for re-filing NuStar's FERC Form No. 6 for 2011 and resubmission of the tariffs.

⁵ 18 C.F.R. § 343.2(c)(1) (2011).

⁶ NuStar cites *Shell Pipeline Company, L.P.*, 104 FERC ¶ 61,021, at P 9 (2003) (footnote omitted). See also *Shell Pipeline Company, L.P.*, 102 FERC ¶ 61,350 (2003).

10. NuStar asserts that the indexing methodology is a “streamlined procedure,”⁷ and, “[t]o maintain the relative simplicity of the oil indexing process,” the Commission relies on “the data reported in the carrier’s FERC Form No. 6, Page 700.”⁸ NuStar states that, although these cases generally dealt with the “comparative” test of costs and index, the holdings clearly apply to the related questions of whether the pipeline’s FERC Form No. 6, Page 700 for 2011 shows that it is failing to recover its cost of service.

Commission Analysis

11. Valero contends that NuStar’s 2011 FERC Form No. 6, Page 700, shows a rate increase substantially in excess of NuStar’s costs, which Valero claims have decreased. Valero’s expert would adjust the data on NuStar’s Page 700. However, NuStar claims that its revenues have decreased and that it is under-recovering its costs.

12. To maintain the relative simplicity of the oil indexing process, the Commission evaluates a protest to an index-based tariff filing using the data reported in the carrier’s FERC Form No. 6, Page 700 data in a “percentage comparison test.”⁹ The percentage comparison test is a very narrow test that “compare[s] the Page 700 cost data contained in the company’s annual FERC Form No. 6 to the data that is reflected in the index filing for a given year with the data for [the] prior year. . . .”¹⁰ This test is the “preliminary screening tool for pipeline [index-based] rate filings,”¹¹ and is the sole means by which

⁷ NuStar cites, e.g., *Belle Fourche Pipeline Co.*, 127 FERC ¶ 61,131, at P 12 (2009).

⁸ NuStar cites *SFPP, L.P.* 135 FERC ¶ 61,274, at P 9 (2011).

⁹ *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082, at P 10 (2010) and *SFPP, L.P., et al.*, 129 FERC ¶ 61,228, at P 7 (2009). The Commission will not consider protests that raise arguments beyond the scope of the percentage comparison test. The Commission will apply a wider range of factors beyond the percentage comparison test in reviewing a complaint against an index-based rate increase. *See id.* P 11 (*citing BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 8-9 (2007)).

¹⁰ *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082 at P 10; *BP West Coast Products, LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261, at P 8 (2007). The percentage comparison test compares proposed changes in rates against the change in the level of a pipeline’s cost of service.

¹¹ *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, 59 Fed. Reg. 59,137 (November 16, 1994), FERC Stats. & Regs. ¶ 31,006, at 31,168, *order on reh’g*, Order No. 571-A, 69 FERC ¶ 61,411 (1994).

the Commission determines whether a protest meets the section 343.2(c)(1) standard.¹² As NuStar concedes, its cost of service as reported in Page 700 of the Form No. 6 dropped by approximately 1.5 percent. A 1.56 percent decrease in costs combined with the proposed index-based rate increase of 8.6 percent would still provide NuStar an approximately 10.16 percent revenue increase.

13. The Commission previously found that a similar, above 10 percent magnitude of divergence between the pipeline's change in costs, as expressed in percentage terms, and the proposed rate increase raises an issue of reasonableness that the Commission will investigate.¹³ Application of the percentage comparison test thus shows that NuStar's index adjustment may be unjust and unreasonable and, therefore, worthy of further scrutiny. Accordingly, the Commission will accept and suspend the tariffs listed in the Appendix to become effective July 1, 2012, subject to refund, and subject to the outcome of hearing and settlement judge procedures.

The Commission orders:

(A) The Commission accepts and suspends the tariff records listed in the Appendix to become effective July 1, 2012, subject to refund, and subject to the outcome of hearing and settlement judge procedures.

¹² *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 6 (2007) (“[T]he 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. [Footnote omitted.] 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.”).

¹³ *See Calnev Pipe Line, L.L.C.*, 115 FERC ¶ 61,387, at P 10-11 (2006) (*Calnev*). In *Calnev*, the pipeline proposed an index-based rate increase of 6.15 percent, but had experienced a 4.8 percent cost decrease, which would have resulted in a 10.95 percent increase in revenue if the Commission allowed the index increase. The Commission concluded a 10.95 percentage increase may be unjust and unreasonable and set the matter for hearing.

(B) Pursuant to the authority contained in the Interstate Commerce Act, particularly sections and 15(1) and 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by NuStar's tariff filing.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge (Chief ALJ) is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief ALJ designates the settlement judge. If the parties decide to request a specific settlement judge, they must make their request to the Chief ALJ within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief ALJ on the status of the settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a Presiding Administrative Law Judge (ALJ) for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief ALJ of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, an ALJ, to be designated by the Chief ALJ, shall, within fifteen (15) days of the date of the ALJ's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The ALJ is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Clark is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

NuStar Logistics, L.P.
FERC Oil Tariff
Oil Pipeline Tariffs

Tariff, FERC No. 65.6.0, 65.6.0
Tariff, FERC No. 66.3.0, 66.3.0
Tariff, FERC No. 67.2.0, 67.2.0
Tariff, FERC No. 68.2.0, 68.2.0
Tariff, FERC No. 69.2.0, 69.2.0
Tariff, FERC No. 70.4.0, 70.4.0
Tariff, FERC No. 71.2.0, 71.2.0
Tariff, FERC No. 72.2.0, 72.2.0
Tariff, FERC No. 73.0.0, 73.3.0
Tariff, FERC No. 74.3.0, 74.3.0