

140 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

SFPP, L.P.

Docket No. IS11-444-001

ORDER DENYING MOTION TO REOPEN RECORD
OR REMAND FOR FURTHER PROCEEDINGS

(Issued July 11, 2012)

1. On March 16, 2012, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision¹ granting the Shippers'² February 3, 2012 Motion for Summary Disposition. The I.D. held that there were no disputed issues of fact, and accepting SFPP's factual assertions and supplemental data, SFPP was not entitled to apply any index rate increase for the July 1, 2011 to June 30, 2012 period on SFPP's West Line and therefore SFPP's proposed index-based rate increase for the West Line has been shown to be unjust and unreasonable. On April 16, 2012, SFPP submitted its Brief on Exceptions which included a Motion to Reopen the Record or in the Alternative, Remand for Further Proceedings. Shippers and Commission Trial Staff filed briefs Opposing Exceptions and included therein responses to SFPP's motion. For the reasons set forth, both the Motion to Reopen the Record and the alternative Motion to Remand, are denied.

¹ *SFPP, L.P.*, 138 FERC ¶ 63,017 (2012) (I.D.).

² "Shippers" are comprised of the following parties: BP West Coast Products LLC; Chevron Products Company; ConocoPhillips Company; Continental Airlines, Inc.; ExxonMobil Oil Corporation; HollyFrontier Refining and Marketing Company LLC; Navajo Refining Company LLC; Northwest Airlines, Inc.; Southwest Airlines Co.; Tesoro Refining and Marketing Company; US Airways, Inc.; Valero Marketing and Supply Company; and Western Refining Company LP.

Background

2. SFPP is a common carrier oil pipeline that transports refined petroleum in interstate commerce in six Western and Southwestern states. On May 27, 2011, SFPP submitted a tariff filing proposing to implement a system-wide 6.8819 percent index-based transportation rate increase, pursuant to 18 C.F.R. § 342.3 (2011), for the July 1, 2011 to June 30, 2012 period on SFPP's four lines on the West Coast, but later limited the request to only the West Line. After numerous shippers protested SFPP's filing, on June 30, 2011, the Commission accepted and suspended the subject tariff records, to become effective July 1, 2011, subject to refund, hearing and settlement judge procedures.³

3. As explained in the Hearing Order, 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 Federal Energy Regulatory Commission (FERC) Form No. 6, page 700 in a "Percentage Comparison Test." This test compares the page 700 cost data contained in the company's annual FERC Form 6 to the data in the index filing for a given year with the data for the prior year. Using this test, the Commission found that SFPP's revised FERC Form No. 6 showed a total cost-of-service decrease between 2009 and 2010 of approximately 4.0 percent. The Commission found that a 4.0 percent decrease in costs combined with the proposed index-based rate increase of 6.9 percent would provide SFPP an approximately 10.9 percent revenue increase under its transportation rates.

4. Given this difference between SFPP's change in costs and the proposed index-based rate increase, the Commission set the matter for hearing because SFPP's proposed index-based rate increases might have been so substantially in excess of its change in actual costs that the proposed rates might have been unjust and unreasonable.⁴

5. On September 21, 2011, SFPP filed a Motion for Abeyance asserting that the West Line rates were subject to another proceeding, IS08-390-000, and rulings in that proceeding would impact this proceeding. That docket involved SFPP's June 30, 2008 tariff filing to increase its West Line rates, effective August 1, 2008, pursuant to 18 C.F.R. § 342.4 (2011). Unlike the simplified index-based rate increase involved here, such a rate increase involves a full cost-of-service review.

³ *SFPP, L.P.*, 135 FERC ¶ 61,274 (2011) (Hearing Order). On September 30, 2011, SFPP filed a notice withdrawing all suspended tariffs except for its West Line.

⁴ *Id.* at P 12.

6. When SFPP filed the Motion for Abeyance, the West Line rates had been established in Docket No. IS08-390-000 by Opinion No. 511 (issued February 17, 2011),⁵ and collected by SFPP subject to refund and further Commission order on protests and rehearing requests.
7. SFPP stated in the Motion for Abeyance that it needed to normalize or eliminate (as appropriate) any West Line costs incurred in 2009 and 2010 that would otherwise distort an analysis of whether the indexed rates were substantially in excess of the costs incurred. SFPP claimed that because in Opinion No. 511 the Commission required SFPP to recover its actual West Line regulatory litigation costs through a surcharge mechanism, the Commission had in effect ruled that SFPP's regulatory litigation expenses may not be included in its cost-of-service.
8. On November 23, 2011, the ALJ issued an Order Denying Motion for Abeyance and Addressing Pending Procedural Issues. The order held that it was not appropriate to hold the proceeding in abeyance. Furthermore, the order stated that the issue to be adjudicated in this proceeding is whether SFPP's proposed index-based rate increase for the West Line is just and reasonable, and that the scope of the evidence considered in this proceeding is not limited to a preliminary review of SFPP's FERC Form No. 6 data but must be relevant to the issue to be adjudicated.
9. On December 13, 2011, SFPP filed direct testimony to support its proposed rate increase. In that testimony, SFPP claimed it calculated its cost-of-service consistent with Opinion No. 511. SFPP stated it also excluded from the 2009 and 2010 West Line interstate cost-of-service all West Line costs recovered through a surcharge mechanism including its regulatory litigation costs from Docket No. IS08-390-000 and costs associated with the transmission of Ultra Low Sulfur Diesel (ULSD). SFPP filed Supplemental Testimony on January 9, 2012.
10. On February 3, 2012, the Shippers filed a Motion for Summary Disposition, and on February 21, 2012, Trial Staff filed in support of Shippers' motion. On February 21, 2012, SFPP filed an Answer in Opposition to the Motion for Summary Disposition, and a Motion for Leave to File Supplemental Direct Testimony. SFPP requested abeyance due to the pending litigation in Docket No. IS08-390-000. On March 5, 2012, SFPP filed an Errata to their February 21, 2012 filing.
11. In its answer, SFPP urged the Commission to deny the Shippers' motion for summary disposition. SFPP also requested leave to file a second round of supplemental

⁵ *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 (2011).

direct testimony, which it attached to the response. SFPP stated this testimony raised the issue of whether SFPP was under-recovering its cost-of-service in 2010.

12. Shippers and Trial Staff objected to SFPP's request to file supplemental direct testimony. They argued such material did not raise any factual disputes and SFPP's supplemental testimony was irrelevant to an index calculation. They contended that while summary disposition may be rare, it is warranted in this proceeding to avoid a waste of hearing resources because only one legal issue is in dispute and there are no factual issues in dispute since they had accepted SFPP's factual assertions.

13. On March 6, 2012, the ALJ held oral argument on Shippers' Motion for Summary Disposition. The ALJ granted SFPP's request to file supplemental data and accepted the March 5, 2012 Errata. The ALJ granted Shippers' Motion for Summary Disposition and subsequently issued the I.D.

The I.D.

14. For the purposes of the motion for summary disposition, the Shippers and Trial Staff accepted the accuracy of each of SFPP's factual assertions, including the allocations of costs to the West Line, and SFPP's revisions, updates, and corrections to its cost data. The ALJ stated that Shippers' motion raised two issues: The first was "Is SFPP entitled, as a matter of law, to remove its litigation expenses from its 2009 and 2010 costs of service for purposes of calculating the year-to-year percentage change in costs?"

15. The second issue was "If SFPP is permitted to remove its 2009 and 2010 litigation expenses for purposes of calculating its year-to-year percentage change in costs, is SFPP entitled to a rate increase of approximately 4 percent to compensate for its actual increase in costs, or is it entitled to the full index increase of 6.9 percent?" However, since the ALJ held that SFPP was not entitled to remove those costs, the I.D. did not address the second issue.

16. The ALJ stated that Shippers and Trial Staff had accepted SFPP's factual submission which included the March 5, 2012 Errata. SFPP's submission indicated that the revised calculations of 2010 revenues and costs with "the 'corrected' litigation surcharge costs included reflect an over-recovery of revenues by 1.16 percent; [and] with the 'corrected' litigation surcharge costs excluded from the analysis, SFPP would be under-recovering its revenues by 3.97 percent."⁶

⁶ I.D., 138 FERC ¶ 63,017 at P 35.

17. The ALJ ruled at the hearing, which was followed by a formal order, “that the litigation surcharges must be included, must be included in the analysis.”⁷ The ALJ stated the ruling that litigation surcharges must be included is based on the fact that the index methodology is meant to be a summary proceeding, not a full litigation of actual costs, not a full rate case, not a full evidentiary gladiator-type proceeding with respect to revenues.⁸

18. The ALJ stated that while the issue of whether a company should include litigation costs when comparing its cost-of-service data in an index methodology case may be an issue of first impression “when the Commission determines whether a pipeline’s indexed rate increase is so substantially in excess of actual cost increases that the resulting rate would be unjust and unreasonable, the Commission compares the pipeline’s Form 6 cost-of-service for the prior year with its current Form 6 data and ... this has always included litigation costs.”⁹ The fact that these litigation costs are recovered via a surcharge made them no less a cost of providing service.¹⁰

19. At the end of the oral argument and as set forth in the I.D., the ALJ held:

For purposes of adjudication of the Motion for Summary Disposition, with litigation surcharge costs **included**, the undisputed facts as established by SFPP’s March 5, 2012 Errata indicate that the revised 2009 and 2010 calculations result in an **over-recovery** of 1.16 percent. Therefore, as a matter of law, because SFPP is not entitled to apply any index rate increase for the July 1, 2011 to June 30, 2012 period on the West Line, SFPP’s proposed index-based rate increase for its West Line has been shown to be unjust and unreasonable.¹¹

20. The ALJ stated that since there were no disputed issues of fact a hearing was not necessary, and granted Shippers’ Motion for Summary Disposition.

⁷ Transcript, March 6, 2012 oral argument at 167-68.

⁸ *Id.* at 168.

⁹ I.D., 138 FERC ¶ 63,017 at P 38.

¹⁰ *Id.*

¹¹ *Id.* P 39.

SFPP Motion and Responses

21. On April 16, 2012, SFPP filed its Brief on Exceptions and included therein a Motion to Reopen the Record. SFPP asks the Commission to admit the 2011 West Line Cost and Revenue Data (WC 2011 Data). SFPP asserts these data show that even after SFPP applied the 2011 Index Rate Increase to West Line rates, the West Line still under-recovered its 2011 cost-of-service by over \$9,000,000.¹²

22. SFPP argues that it meets the “good cause” requirement under Rule 716 to support the admission of this evidence into the record.¹³ SFPP asserts the Commission may reopen the record when a party “demonstrates extraordinary circumstances” that outweigh the need for finality in the administrative process recognizing that the change in circumstances “is more than just material; the change must go to the heart of the case.”¹⁴ Here, SFPP argues, the data it seeks to admit in the record, 2011 West Line cost and Revenue Data, goes to the heart of the dispute in this case—whether the Commission should permit SFPP to apply the 2011 Index to its West Line rates. SFPP contends the data show that even after it applies the 2011 Index Rate Increase to its West Line rates, the West Line still under-recovered its 2011 cost-of-service by a significant margin.

23. SFPP contends the Commission permits a pipeline to apply the full index to its rates, regardless of whether the pipeline experienced a cost decrease in the index year at issue, if the pipeline can show it is still under-recovering its cost-of-service after application of the index to its rates, citing *Rocky Mountain Pipeline System*, 115 FERC ¶ 61,390 (2006); *BP West Coast Products LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241 (2007); *Shell Pipe Line Co.*, 102 FERC ¶ 61,350 (2003).

24. Therefore, SFPP argues that if the West Line Cost and Revenue Data are not admitted in the record in this proceeding there will not be an adequate basis on which the

¹² In a supporting affidavit by Thomas A. Turner, affiant concludes that whether Docket No. IS08-390 litigation expenses are excluded or included in the calculations, SFPP would suffer a revenue deficiency in excess of \$9,000,000.

¹³ Rule 716, 385 C.F.R. § 716 (2011) provides that the Commission “may, for good cause ... reopen the evidentiary record in a proceeding for the purpose of taking additional evidence.”

¹⁴ Citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services*, 127 FERC ¶ 61,269, at P 26 (2009) (citing *CMS Midland, Inc., Midland Cogeneration Venture Ltd. Partnership*, 56 FERC ¶ 61,177, at 61,624 (1991); *U.S. Dept. of Energy—W. Power Admin.*, 100 FERC ¶ 61,194, at P 17 (2002)).

Commission can make a decision. SFPP asserts these data, which it needed to show that it was still under-recovering its West Line cost-of-service even after application of the 2011 Index—the 2011 West Line Cost and Revenue Data—were not available to SFPP until after issuance of the I.D.

25. SFPP argues it would have had the opportunity to present the data in the normal course of this proceeding had the ALJ not prematurely ended the proceeding by granting summary disposition.

26. SFPP asserts it requested at the outset that the Commission hold this proceeding in abeyance because of concern that evidence, such as the 2011 West Line Cost and Revenue Data, would not be available until a later date, but the ALJ denied that request. SFPP concludes that now that its concerns have materialized, it would be inequitable to prevent it from entering the 2011 West Line Cost and Revenue Data into the record when from the outset it maintained this proceeding should be held in abeyance to insure development of a complete and accurate record.

Opposition to Motion

27. Indicated Shippers and Trial Staff oppose the Motion to Reopen the Record on the ground that SFPP's 2011 data is not relevant to the issue presented. They both contend that none of the arguments advanced by SFPP in its motion have any merit.

28. They argue that when ruling on proposed index increases, the Commission confines its inquiry to comparing the year-to-year change in costs as reflected in the pipeline's FERC Form No. 6 filings for the two preceding years, and does not wait for the facts to develop in related cost-of-service cases, which data SFPP conceded is subject to revision during the course of ongoing litigation.

29. They assert that contrary to SFPP's claim, SFPP would not have had the opportunity to present its 2011 data in the normal course of the proceeding. SFPP already filed its direct testimony and two rounds of supplemental testimony. Thus SFPP could only file rebuttal testimony on the evidence already submitted.

30. According to Trial Staff, SFPP's contention that the 2011 data goes to the very heart of the dispute in this case is "simply untrue."¹⁵ Trial Staff asserts "the very heart of the dispute here is whether SFPP has shown that the index-based rate increase should be applied to SFPP's West Line rates, which has nothing to do with a cost-of-service review

¹⁵ Trial Staff Response at 38.

for the West Line rates in any year.”¹⁶ Rather, what is at issue in the instant proceeding is the difference between SFPP’s 2009 and 2010 costs, and neither the 2011 costs nor revenue are involved.

31. With respect to SFPP’s contention that the I.D. did not address the 2011 West Line cost and revenue data because the data were not available to SFPP until after the issuance of the I.D., Trial Staff and Indicated Shippers respond that this is beside the point because the 2011 data is simply irrelevant. They maintain that under-recovery of SFPP’s 2011 cost-of-service is not an issue in the instant proceeding, which deals with an index-based rate proposal under section 342.3 of the Commission’s regulations.

32. They point out that at the March 6, 2012 oral argument counsel for SFPP conceded that if the record included cost-of-service data for 2009-10 then there would be a fully-developed record on which the ALJ could make her analysis of the issue presented.¹⁷ They suggest counsel for SFPP did not argue that 2011 data would be more relevant. Finally, they contend that the cases cited by SFPP to support its motion are not on point and do not support SFPP’s position.

Discussion

33. We will deny the motion to reopen the record because the material SFPP seeks to include is irrelevant to the issue. On May 27, 2011, SFPP filed to implement an index-based increase under section 342.3 of the Commission’s regulations to be effective July 1, 2011. SFPP’s proposed tariffs would increase its rates by 6.9 percent on the West Line. In the Hearing Order the Commission found that SFPP’s Form No. 6 for the year 2009 and 2010 showed the cost-of-service decreased approximately 4 percent so a proposed index-based 6.9 percent increase indicated a divergence of such magnitude that required investigation.

34. Indexing cases are intended to be streamlined proceedings that do not delve into cost-of-service issues. The only relevant evidence in indexing cases is the change in the pipeline’s cost-of-service in the two years *preceding* the index increase, and that later-developed data is irrelevant.

35. Here, the ALJ applied the proper standard for an indexing proceeding, which is to compare the pipeline’s change in costs in the two years prior to the index increase. The ALJ found that the disparity between the two was so substantial as to make the proposed

¹⁶ *Id.*

¹⁷ Tr. p. 152.

index-based rate increase unjust and unreasonable. SFPP now seeks to reopen the record to introduce SFPP' 2011 revenue data to show it would under-recover its costs absent the proposed index-based rate increase. However, those data are not relevant when a shipper challenges an index-based rate change.

36. The key issue here was how to apply the prior years' cost comparison test to determine what SFPP should include as costs, and this turned on whether it should include or remove litigation expenses for purposes of calculating the year-to-year percentage change in cost. The ALJ determined that such litigation costs are a component of the pipeline's cost-of-service and must be treated the same as other costs, and could not be removed. Based upon this finding, the ALJ granted the Shippers' motion for summary disposition because SFPP's own calculation showed that with litigation costs included there was an over-recovery of 1.169 percent and therefore "SFPP is not entitled to apply an index rate increase for the July 1, 2011 to June 30, 2012 period."¹⁸

37. SFPP asserts that its motion to reopen the record finds support in *Shell Pipeline Co.*, 102 FERC ¶ 61,350 (2003); *Rocky Mountain Pipeline System*, 115 FERC ¶ 61,390 (2006) (*Rocky Mountain*); and *BP West Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,195 (2007). We disagree that these cases create a general rule that if a pipeline can show that it is under-recovering its costs at any point, even well after the index increase went into effect, it is permitted to automatically apply the index increase to its rates. Contrary to SFPP's position these cases are consistent with Commission policy that index rate proceedings are to be conducted on a streamlined basis, without regard to further developments in related cost-of-service cases.

38. In *Rocky Mountain*, the pipeline filed an index rate increase and on the same day, filed a cost-of-service increase. The Commission approved the index increase because it was properly calculated, and then established a hearing for the cost-of-service filing.¹⁹ Here, the proposed index rate increase was set for hearing. Thus, *Rocky Mountain* does not support SFPP's request to introduce in this proceeding evidence of full calendar year 2011 costs and revenue to justify the subject index rate increase.

39. In *Shell* a party protested a pipeline's proposed index increase on the grounds that the index increase was substantially in excess of the pipeline's actual cost increases and therefore should be rejected because the increase would result in unjust and unreasonable

¹⁸ I.D., 138 FERC ¶ 63,017 at P 39. If SFPP believes that it is under-recovering its cost-of-service, it always has the ability to file a new cost-of-service case.

¹⁹ *Rocky Mountain*, 115 FERC ¶ 61,390 at PP 16-17.

rates. The Commission held the protesting shipper did not have standing but added that even if it were to consider the protest, the pipeline had shown a persisting under-recovery of its costs in the three years preceding the proposed increase. That case is inapposite to SFPP's claim that it is entitled to offer evidence of its calendar year 2011 costs and revenues to justify an index increase that the record showed would over-recover the changes in 2009-2010 costs.

40. Finally, *BP West Coast*, which involved intertwined multiple index increases with a cost-of-service filing is also not comparable to the instant case. There in April 2005, SFPP filed a cost-of-service case in which it designed rates that would become effective on June 1, 2005, and projected to result in revenues that would not recover SFPP's full cost-of-service. SFPP then applied the 2005 index increase to those new rates, effective July 1, 2005, and subsequently applied the 2006 index adjustments as well, effective July 1, 2006. The Commission approved the 2006 index increase simply by comparing SFPP's change in costs as reflected in its prior two years' FERC Form 6 filings (6.6 percent) to the index increase (6.1485 percent). On rehearing, the Commission affirmed its decision, holding that SFPP would not over-recover its cost of service as set forth in its cost-of-service rate filing, even after applying both the index increase and the cost-of-service increase.²⁰

41. SFPP's reference to *PacifiCorp v. Reliant Energy Services Inc.*²¹ (Motion at 48-49) is in fact precedent to deny the motion. In *PacifiCorp*, the Commission declined to reopen the record, as SFPP concedes, where the information already in the record provided a sufficient basis for its conclusions, and the new evidence "[would] not change the outcome of the proceeding." This is the case in the proceeding at bar. Admitting the West Line cost and revenue data would not change the outcome of this proceeding, even assuming *arguendo* that the parties accept the accuracy of the 2011 cost and revenue data. Such data would not be determinative of the issue in this proceeding, which is the justness and reasonableness of SFPP's proposed index-based rate increase based on cost changes from 2009 to 2010, where 2011 data would not be relevant.

42. When ruling on a proposed index increase, the Commission confines its inquiry to comparing the year-to-year change in costs as reflected in the pipeline's FERC Form 6 filings for the two preceding years. Consistent with this policy we deny SFPP's request that its 2011 revenue data, offered in 2012, should be permitted in ruling on its proposed index increase, which would have been effective July 2011.

²⁰ *BP West Coast Products, LLC*, 121 FERC ¶ 61,195 at P 7.

²¹ 103 FERC ¶ 61,355 at P 80 (2003).

43. Accordingly, we deny the motion to reopen the record.²²

The Commission orders:

SFPP's motion to reopen the record or remand for further proceedings is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² This order in no way passes upon SFPP's Brief on Exceptions to the I.D. which the Commission will address in a subsequent order.