

121 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tesoro Refining and Marketing
Company

Docket No. OR07-16-000

v.

Calnev Pipe Line, L.L.C.

ORDER DISMISSING COMPLAINT

(Issued November 9, 2007)

1. This order addresses a complaint filed by Tesoro Refining and Marketing Company (Tesoro) against Calnev Pipe Line, L.L.C.'s (Calnev) index-based rate increases effective July 1, 2005, 2006, and 2007. The instant order follows the standard established by a companion order on rehearing in Docket No. OR07-8-001.¹ Thus, for the reasons discussed below, the Commission dismisses this complaint.

The Complaint

2. On August 1, 2007, Tesoro filed a complaint against Calnev Pipe Line's indexed-based increases effective July 1, 2005, 2006, and 2007.² It asserts that a review of Page 700 of Calnev's Forms No. 6 for all three years demonstrates that Calnev had a substantial over-recovery in each of these years. Tesoro also asserts that Calnev's over-recovery would have been even greater if the increase in Calnev's return was adjusted to reflect that the increase in Calnev's throughput was relatively greater than the increase in its costs. It further argues that a June 6, 2007 order addressing an indexed-based filing by SFPP, L.P. (SFPP) held that a pipeline would not be permitted to take an index-based

¹ See *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 (2007).

² See 18 C.F.R. §342.3 (2007) for the annual indexing procedure.

increase if the pipeline was already substantially over-recovering its cost-of-service.³ Given the returns on Page 700 of Calnev's FERC Forms No. 6 for the years 2005, 2006, and 2007, Tesoro opines that it has established reasonable grounds to conclude that the increase in Calnev's rates so substantially exceeds the actual increase in Calnev's costs that the resulting rates are unjust and unreasonable.

3. Calnev filed an answer to the complaint. It 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 6 in successive years. Thus, to determine whether an increase is appropriate on July 1, 2005, the Commission compares the pipeline's costs in 2003 with the costs in 2004. Calnev asserts this focuses on the comparison of the percent increase in operating costs to the percent increase permitted by the annual index. Calnev argues that the Commission only uses 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. It further argues that prior to the June 6 Order the Commission had never compared the increase in costs to the pipeline's existing profit margins. Calnev therefore concludes that the Commission arbitrarily changed the interpretation of its indexing regulations and effectively modified those regulations without notice and opportunity for comment.⁴

4. Moreover, Calnev asserts that its costs increased from 2004 to 2005 by 6.3 percent while the permitted increase was 6.1485 percent for the index year beginning July 1, 2006. Calnev bases the calculation included with its answer on a corrected FERC Form No. 6 filed after the Commission set the initial filing for hearing.⁵ With regard to the increase effective July 1, 2007, Calnev asserts that its costs increased by 5.81 percent from 2005 to 2006 and the permitted increase under the indexing methodology was 4.3186 percent for the same period. Thus, in both years Calnev's cost increases actually exceeded the percentage increase allowed by the index methodology. Calnev therefore argues that Tesoro failed to establish reasonable grounds to conclude that the increase in the rates so substantially exceeds the actual increase in its costs that the resulting rates

³ See *BP West Coast Products, LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241 (2007) (June 6 Order).

⁴ Calnev refers to a rehearing request of the June 6 Order filed by SFPP for examples of how pipelines could be denied an increase because the pipeline was over-recovering its cost-of-service.

⁵ See *Calnev Pipe Line L.L.C.*, 115 FERC ¶ 61,387 (2006). Calnev filed a motion requesting the Commission to terminate the investigation in light of its corrected 2005 FERC Form No. 6. However, the proceeding had already been assigned to an Administrative Law Judge and the discretion to determine whether to terminate the proceeding based on the corrected FERC Form No. 6 resides there.

were unjust or unreasonable in either year. Finally, it argues that there is no merit to the proposed cost adjustments Tesoro advances in its complaint. Tesoro filed an answer to Calnev's answer that adds little to the record. Accordingly, the answer is rejected pursuant to Rule 213 of the Commission's procedural rules.⁶

Discussion

5. The Commission dismisses the complaint against Calnev's July 1, 2005, 2006, and 2007 index-based rate increases. In doing so, it will first clarify the June 6 Order upon which Tesoro relies. It is true that the June 6 Order states that the complaint against SFPP would meet the standard in section 343.2(c) if at the time of filing the pipeline was substantially over-recovering its costs. However this language, although overly broad, did not recognize the important distinction between the impact of a single year's increase from the application of the indexing methodology and the cumulative return over several years, which requires a more complex inquiry. The phrasing Tesoro relies on did not incorporate the facts upon which the Commission based its June 6 Order. These were (1) that on the face of the relevant Page 700, SFPP was over-recovering its cost-of-service by some \$16 million, and (2) that the indexed-based increase would further increase that over-recovery by some \$4 million, or some 25 percent. For this reason, the increase in the dollar amount of the pipeline's return was sufficient to meet the standard of section 343.2(c).

6. As discussed in the companion order, the phrase upon which Tesoro relies did not incorporate the central holding of the June 6 Order, which was that in the cited SFPP case, the application of the index methodology would have substantially exacerbated SFPP's already substantial over-recovery of its cost-of-service. The Commission therefore clarifies that for a 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 operating cost that the resulting rate increase would substantially exacerbate that over-recovery. Absent this qualification, application of the June 6 Order could lead to a denial of an index-based increase in a year where the pipeline's cost increase exceeded or was in the same range as the index amount and thus resulted in little or no material change in the pipeline's return.

7. In fact, that is precisely what could occur if the Commission accepted the instant complaint. Calnev established that the increases taken July 1, 2006 and 2007 were based on cost increases that were actually more than the increases permitted by the index, and that the index increase failed to enable Calnev to recover all of its actual cost increases. Moreover, the Commission relies solely on Page 700 of the pipeline's FERC Form No. 6 in evaluating this type of complaint. Calnev is correct that if a shipper wishes to

⁶ 18 C.F.R. §385.213 (2007).

challenge the cumulative increases embedded in the base rates or the cost components of those rates, the shipper must file a complaint under section 13 of the Interstate Commerce Act against those base rates.⁷ Tesoro has not done so. Thus, Tesoro's arguments that Calnev's return is understated in the complaint years for various reasons are simply irrelevant. Complaining shippers must present those arguments in a complaint against the base rates. Likewise, since the Calnev's revised 2005 FERC Form No. 6 was filed without challenge, this latest version controls for the review of this complaint. Calnev's July 2006 and July 2007 index based increases did not substantially exacerbate its current over-recovery. Tesoro's complaint does not meet the standard contained in section 343.2(c) of the Commission's regulations. Finally, the complaint against the July 1, 2005 increase was filed on August 1, 2007 and is time barred given the strict two year statute of limitations under the Interstate Commerce Act.⁸ Given this result, it is not necessary to reach Calnev's arguments regarding the holding of the June 6 Order.

The Commission orders:

The complaint filed in the captioned docket is dismissed for the reasons stated in the body of the order.

By the Commission.

(S E A L)

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

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 Section 16(3)(b) of the IC Act.