

121 FERC ¶ 61,239
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.

BP West Coast Products LLC and
Chevron Products Company,

Docket No. OR07-14-000

v.

SFPP, L.P.
Calnev Pipe Line LLC
Operating Limited Partnership D
Kinder Morgan Energy Partners, L.P.
Kinder Morgan Management LLC
Kinder Morgan General Partner, Inc.
Kinder Morgan, Inc.
Knight Holdco, LLC

ORDER ON COMPLAINT

(Issued December 7, 2007)

1. BP West Coast Products LLC (BP) and Chevron Products Company (Chevron) challenge the cash management plans of SFPP, L.P. (SFPP) and Calnev Pipe Line LLC (Calnev). BP and Chevron claim that SFPP and Calnev were four years late in filing their cash management plans with the Commission. BP and Chevron also challenge the accuracy of financial reporting in the FERC Form No. 6 Annual Report of SFPP and Calnev. The Commission finds that these allegations are not supported by evidence sufficient to merit a hearing at this time, and we dismiss the complaint.

I. Background

2. On July 5, 2007, BP and Chevron filed a complaint against SFPP, Calnev, and several of its affiliates. The complaint was answered on July 25, 2007 by SFPP, Calnev, and those affiliates. As part of their answer, the affiliates moved to dismiss themselves as parties to the complaint. BP and Chevron responded by filing an answer to the motions to dismiss on August 9, 2007, and the affiliates of SFPP and Calnev answered that answer on August 29, 2007.

A. The Parties

3. SFPP and Calnev are oil pipelines that serve the interior of California, Nevada, Arizona, and Oregon. BP and Chevron are shippers of refined petroleum products on those common carrier pipeline systems. SFPP and Calnev are affiliated with numerous entities, including the entities named by BP and Chevron in their complaint: Operating Limited Partnership D (OLP-D), Kinder Morgan Energy Partners, L.P. (KMEP), Kinder Morgan Management LLC (Kinder Management), Kinder Morgan General Partner, Inc. (KMGPI), Kinder Morgan, Inc. (KMI), Knight Holdco, LLC (Knight Holdco) (collectively, the Kinder Affiliates).

B. The Knight Holding Company Structure

4. SFPP and Calnev are owned and controlled within a holding company structure. Specifically, OLP-D is a Delaware limited partnership that owns and controls SFPP and Calnev. OLP-D owns all of Kinder Morgan Pipeline LLC and owns a 99.5 percent general partnership interest in SFPP.¹ In turn, Kinder Morgan Pipeline LLC owns all of Calnev. The ownership and control of OLP-D is structured so that a 98.9899 percent limited partnership interest is owned by KMEP, a publicly-traded Delaware limited partnership and a 1.0101 percent general partner interest is owned by KMGPI, a Delaware corporation. KMGPI also owns the general partner interest in KMEP.

5. Kinder Management is a limited liability company that has been delegated substantially all of the management duties of KMGPI, including KMGPI's duties of management related to KMEP, OLP-D, SFPP and Calnev. The voting shares of Kinder Management are owned by KMGPI.

6. KMI is a Kansas corporation that indirectly owns all the outstanding interests in KMGPI. Knight Holdco indirectly owns all the outstanding stock of KMI. Thus, Knight Holdco is a Delaware limited liability company that indirectly owns and controls SFPP and Calnev. Knight Holdco is owned by KMI Management Group, Goldman Sachs, AIG, Carlyle Partners IV, and Carlyle Riverstone III. The KMI Management Group consists of interests ultimately owned by Richard Kinder (chairman and CEO of KMI and President of KMGPI, Kinder Management, SFPP, and Calnev), William Morgan, Fayez Sarofim, and Michael Morgan.

II. The Complaint

7. BP and Chevron allege that the manner in which SFPP and Calnev are controlled by the Kinder Affiliates comprises a threat to the obligations of SFPP and Calnev under

¹ A 0.5 percent limited partnership interest in SFPP is owned by Santa Fe Pacific Pipelines, Inc.

the Interstate Commerce Act (ICA). In their complaint, BP and Chevron make three general requests for action by the Commission.² First, they request that the Commission determine whether SFPP and Calnev have complied with their obligations under the Commission's cash management regulations. Second, BP and Chevron seek review of the financial accounts of SFPP and Calnev, suspecting inaccurate FERC Form No. 6 Annual Reports. Third, BP and Chevron renew their motion to compel SFPP, KMGPI, and/or KMI to pay interim reparations or place funds in escrow that they submitted in another Commission proceeding.³

8. As evidence that SFPP and Calnev are not in compliance with applicable cash management regulations, BP and Chevron assert that they could not find any public record that SFPP and Calnev properly filed their cash management plans at the Commission. Based on this failure to comply with the Commission's regulations, BP and Chevron are concerned that cash from SFPP and Calnev may not be properly accounted for, and could be in the process of being stripped away from the pipelines.⁴

9. In addition to the lack of cash management agreements, BP and Chevron claim that SFPP, Calnev, and its controlling affiliates intend to strip SFPP and Calnev of value to increase the amount of cash that can flow to its controlling affiliates, ultimately leading to the inability of the pipelines to pay their costs without an increase in rates. BP and Chevron argue that the business strategy of Knight Holdco is to "strip, flip, and skip" the assets of SFPP and Calnev. According to BP and Chevron, this strategy means that cash will be stripped away from SFPP and Calnev, then the assets of SFPP and Calnev will be sold (flipped), and after all of the assets are sold, the owners of Knight Holdco will have their cash free and clear (skip).⁵

10. BP and Chevron also complain that the business arrangements of Richard Kinder will encourage him to manage SFPP and Calnev using the "strip, flip, and skip" strategy. In particular, they assert that if Richard Kinder fails to increase the cash distributions to Knight Holdco to nearly double the present rate by 2010, then the owners of Knight Holdco can remove him as chief manager.⁶

² Complaint at 8.

³ This motion was filed on November 21, 2006 in Commission Docket Nos. OR92-8 and OR96-2, *et al.*

⁴ *Id.* at 15.

⁵ *Id.* at 5-6.

⁶ *Id.* at 6-7.

11. BP and Chevron criticize the master limited partnership (MLP) model for regulated pipelines, claiming that distributions to limited partners can be similar to a Ponzi scheme where new investors pay old investors.⁷ They argue that most of the cash raised by MLPs over the next few years will be raised for the sole purpose of paying off investors, and only a small portion will be used to fund infrastructure investment and operations. BP and Chevron claim that instead of attracting capital to the energy infrastructure, the MLP does the opposite: it extracts capital.

12. Looking at SFPP's Form No. 6, BP and Chevron complain that SFPP's balance sheet cannot be taken at "face value" because certain footnotes and entries raise questions about SFPP's finances, and that the balance sheet suggests that SFPP may actually be insolvent.⁸ In particular, BP and Chevron question a \$375 million liability of SFPP to its affiliates, raising the ability of Knight Holdco to "call in" that liability to force SFPP into voluntary bankruptcy. They also question footnotes which assert that negative cash balances were reclassified to current liabilities. They also ask where SFPP has recorded its liability for some \$77 million in reparations in Form No. 6. Because of their doubts on the financial condition of SFPP, BP and Chevron assert that SFPP may not be able to borrow funds in order to pay its debts. They further claim that Knight Holdco would rather place SFPP into voluntary bankruptcy than pay reparations.⁹ Although the allegations against Calnev are not as detailed as those made against SFPP, BP and Chevron also complain that Calnev's balance sheet suggests insolvency.¹⁰

13. Regarding the Commission's jurisdiction, BP and Chevron assert that the Commission has the authority to "inquire into and report on the management of the business of persons controlling" SFPP and Calnev, according to section 12(1)(a) of the ICA. They also assert that the Commission has authority to "institute an inquiry ... concerning ... any question" arising under the relevant portions of the ICA, based on section 13(2) of the ICA.¹¹

III. Notice and Interventions

14. Public Notice of the complaint was issued on July 10, 2007, with interventions, protests, and answers due on or before July 25, 2007. In response to the filing, motions to intervene were submitted on July 25, 2007 by ConocoPhillips Company, Valero

⁷ *Id.* at 15-17.

⁸ *Id.* at 17-26.

⁹ *Id.* at 25-26.

¹⁰ *Id.* at 26-27.

¹¹ *Id.* at 28-29.

Marketing and Supply Company, and by a group of airlines consisting of America West Airlines, Inc., U.S. Airways, Inc., Southwest Airlines Co., Continental Airlines, Inc., and Northwest Airlines, Inc. These intervenors expressed their support for the position of BP and Chevron in their complaint.

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹² the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

IV. Answer of SFPP and Calnev

16. In answer to the complaint, SFPP and Calnev point out that they filed cash management agreements with the Commission on May 29, 2007. They also explain that except for these cash management agreements, they are not obligated to submit to the Commission any other documents related to their cash management plan. However, SFPP and Calnev acknowledge their obligation to maintain a variety of supporting documents related to their cash management activity.¹³

17. SFPP and Calnev claim that BP and Chevron fail to provide any factual justification regarding why the Commission should order an accounting, as the reasoning used to support the claims of questionable accounting is based on mischaracterizations of FERC Form No. 6. In particular, SFPP and Calnev argue that they are capable of paying reparations or refunds if ordered, based upon a definition of solvency applied by the Commission in a recent order, and based upon a report that they attach to their answer.¹⁴ They state that SFPP has already paid \$44.9 million in reparations in 2003, and a \$105 million reserve was established in 2005 on financial statements of SFPP.

18. SFPP and Calnev also claim that Knight Holdco cannot force SFPP and Calnev into bankruptcy, since Kinder Management is responsible for managing the business for KMEP and its subsidiaries. In addition, a group of investors without any interest in Knight Holdco and the independent directors of Kinder Management have the right to veto such a bankruptcy.¹⁵

19. According to SFPP and Calnev, their financial condition is not precarious. First, they point out that FERC Form No. 6 is based on historical costs, not fair value. Second,

¹² 18 C.F.R. § 385.214 (2007).

¹³ Answer of SFPP and Calnev at 7, fn. 18 (Pipeline Answer).

¹⁴ Pipeline Answer at 7-10, citing to Exhibit No. 6, Testimony of Corporate Valuation Advisors, Inc.

¹⁵ Pipeline Answer at 11-12.

they claim that the ability to pay refund obligations is not measured by comparing current liabilities to current assets. Third, they state that nearly three-quarters of SFPP's current liabilities are owed to a related party, and they claim that the related party does not expect or require payment within the next twelve months. Fourth, they have evidence that SFPP could borrow at least \$1 billion.¹⁶ Fifth, actual cash distributions from SFPP and Calnev do not exceed distributable cash flow for the three and six month periods ending June 30, 2007 according to KMEP's July 18, 2007 earnings release.¹⁷

20. SFPP and Calnev noted that even if the pipelines cannot pay their debts, KMEP has an investment grade credit rating, and that testimony of the General Counsel of Knight Holdco states that regulatory commissions could look to KMEP for payment of reparations, irrespective of questions of KMEP's technical liability for SFPP's debt obligation.¹⁸

21. SFPP and Calnev deny that Knight Holdco directly controls them. SFPP and Calnev point out that a majority of the directors at Kinder Management are independent and that the affairs of KMEP and Kinder Management are limited by certain governing documents, so that Knight Holdco only has limited control over KMEP and ultimately SFPP and Calnev.¹⁹

22. Regarding the renewed motion to compel, SFPP and Calnev suggest that the proceeding where the original motion was filed affords the Commission an appropriate proceeding for exploration of that issue.²⁰ In any event, the actual calculation of reparations has not been completed, so a reparations award is premature at this time.²¹

V. Answer and Motion to Dismiss of the Kinder Affiliates

23. In their answer and motion to dismiss, the Kinder Affiliates assert that the relationships among the Kinder Affiliates are not as complex as alleged by the complainants, and that these relationships are clear. The Kinder Affiliates argue that they have prepared a clear description of these relationships in a verified statement attached to their answer.

¹⁶ *Id.* at 13-14.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 21-22.

²⁰ *Id.* at 15.

²¹ *Id.* at 22-23.

24. The Kinder Affiliates seek to be removed as parties from this dispute, claiming that the Commission's jurisdiction is limited to common carriers such as SFPP and Calnev. They state that the Commission has the authority to "inquire into and report on the management of the business of persons controlling" SFPP and Calnev under section 12(1)(a) of the ICA. They assert that this section of the ICA does not provide the Commission with authority to require the Kinder Affiliates to pay reparations. It is rather concerned with the collection of information.²²

25. Further, the Kinder Affiliates assert that the cash management plans do not subject the Kinder Affiliates to the jurisdiction of the Commission, as the Commission's reporting requirements for such plans are imposed on the jurisdictional entities, not the Kinder Affiliates.²³ They warn that if the Kinder Affiliates are successfully named in this complaint, then future litigants will name unregulated affiliates in their complaints.²⁴

26. Regarding solvency, the Kinder Affiliates argue that BP and Chevron have failed to provide any reasonable basis for contending that SFPP and Calnev are insolvent, based upon a definition of solvency applied by the Commission in a recent order, and based upon the verified statement attached to their answer.²⁵

27. Regarding the MLP business model, the Kinder Affiliates assert that MLP arrangements for energy concerns were specifically encouraged by Congress through amendments to the tax code. Moreover, the Commission has recognized the trend to greater use of MLPs in the pipeline industry with its recent proposed Policy Statement on allowing MLPs in the proxy group for determining the return on equity for gas and oil pipelines.²⁶

VI. Answer of BP and Chevron to Motions to Dismiss

28. In response to the motions to dismiss of SFPP, Calnev, and the Kinder Affiliates, the complainants assert that the Commission cannot dismiss a complaint merely because the respondent claims that the allegations are not true. BP and Chevron state that they are ready to prove all material points made in their complaint.

²² Answer of the Kinder Affiliates at 12-13 (Kinder Answer).

²³ *Id.* at 15.

²⁴ *Id.* at 23.

²⁵ *Id.* at 18-20

²⁶ *Id.* at 21; citing to *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 120 FERC ¶ 61,068 (2007).

29. Regarding the cash management plans, BP and Chevron ask that the Commission not ignore its regulations requiring cash management, especially because the cash management plans recently filed by SFPP and Calnev are supposed to be effective some four years prior to their execution (executed on May 25, 2007, with an effective date of June 30, 2003). The complainants also ask that the Commission recognize some 44 pipeline safety incidents at the United States Department of Transportation (USDOT) since January 2003, as evidence that should suffice to raise the issue of whether the cash needed by the pipelines is being improperly removed by the Kinder Affiliates.²⁷

30. Regarding FERC Form No. 6, the complainants repeat their request that the Commission explore the various footnotes and entries submitted by SFPP and Calnev so that cash flow at those pipelines can be fully understood. The complainants believe that after an investigation of those footnotes and entries, the Commission could arrive at the conclusion that SFPP and Calnev are insolvent.

31. The complainants allege that the Kinder Affiliates are properly before the Commission because the Commission has the jurisdiction to explore whether or not the Kinder Affiliates are wrongly removing cash from the SFPP and Calnev pipelines. BP and Chevron warn that if the Commission grants the motions to dismiss, the Kinder Affiliates will be able to remove all the cash from the pipelines without any accountability.

32. Finally, BP and Chevron argue that the motions to dismiss the complaints are “in reality” motions for summary judgment, and that the Commission cannot simply dismiss a complaint if the respondent states that the allegations are not true.

VII. Answer of the Kinder Affiliates to the Answer of BP and Chevron

33. In response to the answer of complainants, the Kinder Affiliates filed an answer and motion for leave to answer addressing the USDOT safety incidents and the Commission’s standard of review in assessing whether to order a hearing on a complaint. With respect to the USDOT safety issue, the Kinder Affiliates assert that USDOT did not make findings that the pipelines were poorly maintained. With respect to the standard of review, the Kinder Affiliates urge the Commission to exercise its authority to make a preliminary determination that the complainants are not entitled to relief.

²⁷ BP and Chevron Answer at 6.

VIII. Discussion

A. Procedural Matters

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁸ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answer of the Kinder Affiliates and the BP and Chevron answer because they have provided information that assisted us in our decision-making process.

B. Standard of Review

35. In initiating a complaint, BP and Chevron carry the burden of proof in establishing a *prima facie* case.²⁹ The Commission is not required to hold a hearing when issues of material fact are not in dispute.³⁰ Disputed facts cannot be mere allegations, the complainant must make an adequate proffer of evidence to support the facts.³¹ The evidence presented in a complaint is not adequate unless it is actually linked to the activity alleged in the complaint. As stated by the Commission in another complaint case:

The Commission is aware that it may be difficult to present a *prima facie* case regarding improper communications between a pipeline and its affiliate. However, it is one thing to ask the Commission to view facts alleged in support of a complaint in a favorable light; it is another to ask the Commission to, in effect, create the support for a claim by drawing a chain of unsupported inferences.³²

²⁸ 18 C.F.R. § 385.213(a)(2) (2007).

²⁹ *Cascade Natural Gas Corporation v. Northwest Pipeline Corporation, et al.*, 45 FERC ¶ 61,287 at 61,905 (1988).

³⁰ *Kansas Power and Light Co. v. FERC*, 851 F.2d 1479, 1484 (D.C. Cir. 1988); *Ohio Power Co. v. FERC*, 744 F.2d 162, 170 (D.C. Cir. 1984).

³¹ *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990); *Cerro Wire & Cable v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982); *City of New Orleans v. SEC*, 969 F.2d 1163, 1167 at n. 6 (D.C. Cir. 1992); *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n. 20 (D.C. Cir. 1981).

³² *Sunrise Energy Company v. Transwestern Pipeline Company*, 62 FERC ¶ 61,087 at 61,625 (1993).

Finally, the Commission has broad discretion to decide which procedures to use in satisfying its statutory responsibilities, and it may conclude that a formal hearing is appropriate, that existing rules are adequate, or that some other procedural safeguard sufficiently protects the complainant.³³ In considering whether to set a matter for hearing, the Commission is permitted to examine the factual contentions that are made by the complainant in the light most favorable to the complainant.³⁴

36. Under the ICA, the Commission has the jurisdiction to “inquire into and report on the management of the business of persons controlling” SFPP and Calnev, as set forth in section 12(a)(1) of the ICA. The Commission also has the authority to “institute an inquiry ... concerning ... any question” arising under the relevant portions of the ICA, as set forth in section 13(2) of the ICA. For this reason, the Commission has authority to review the claims made by BP and Chevron in the complaint. With respect to financial reporting, the Commission may “inquire into and report on the management of the business of persons controlling” SFPP and Calnev. And the Commission has jurisdiction to review the compliance of SFPP and Calnev with respect to their compliance with its cash management regulations.

C. Compliance with Cash Management Regulations

1. SFPP’s and Calnev’s Obligation to Comply with Commission Regulations on Cash Management Plans

37. The Commission finds that the cash management agreements filed by SFPP and Calnev were submitted nearly four years late.³⁵ Specifically, the effective dates on the cash management agreements is June 30, 2003, but the agreements were signed and submitted to the Commission on May 25, 2007.

38. As regulated utilities, SFPP and Calnev are obligated to comply with the Commission’s cash management regulations. These regulations protect the customers of regulated entities by providing greater transparency of cash management programs and

³³ *Kansas Power and Light Co.*, 851 F.2d at 1484; *City of Albany v. FERC*, 7 F.3d 671, 673 (1993).

³⁴ *Cascade Natural Gas*, 45 FERC at 61,905 (1988); *Boston Edison Company v. Town of Concord, Massachusetts*, 49 FERC ¶ 61,213 at 61,776 (1989); *Cities and Villages of Albany and Hanover, et al. v. Interstate Power Co.*, 61 FERC ¶ 61,362 at 62,451 (1992).

³⁵ BP and Chevron Answer at 4.

ready-access to consistent data for FERC audit staff.³⁶ As we have stated, “it is vital to the Commission's statutory mission that it has on hand the necessary information to understand how regulated entities are accounting for their assets.”³⁷

39. By applying an effective date of June 30, 2003 to their cash management plans, SFPP and Calnev are expected to have acted in compliance with their cash management plans as of that effective date. This means that SFPP and Calnev are requested here to review all of their cash management transactions since that 2003 date, and confirm that each such transaction is in compliance with the Commission’s regulations. SFPP and Calnev acknowledge their obligation to maintain a variety of supporting documents related to their cash management activity.³⁸ SFPP and Calnev must ensure that they have the documents required under the Commission’s regulations and their cash management plans.

40. The efforts of SFPP and Calnev to ensure compliance with the Commission’s regulations should extend to the public release of information concerning SFPP, Calnev, and the Kinder Affiliates. We believe that any information release should be amended, if necessary, to the extent required by the effective date of the cash management agreements.

41. The Commission notes that in adopting cash management regulations, we recognize that a highly leveraged company, with the accompanying fixed interest expense and future obligation to repay the principal, may be in a weakened financial position if there is an unfavorable change in the business climate.³⁹ This leverage could result in an inadequate flow of cash, adversely impacting the solvency of a FERC-regulated entity.

42. In addition, we require proper classification of the balances in the FERC accounts that record cash management. Debit balances must be reported in the appropriate accounts receivable account, and credit balances must be reported in the appropriate accounts payable account. The reporting of negative balances in certain receivables accounts rather than in payable accounts is inappropriate and potentially misleading.⁴⁰ Therefore, these accounts must be corrected if they do not conform to our regulations.

³⁶ *Regulation of Cash Management Practices*, Order No. 634, *FERC Stats. & Regs.* ¶31,145 at P 6 (2003); *Regulation of Cash Management Practices*, Order No. 634-A, *FERC Stats. & Regs.* ¶31,152 at P 19 (2003).

³⁷ Order No. 634-A at P 29.

³⁸ Answer of SFPP and Calnev at 7, n. 18 (Pipeline Answer).

³⁹ Order No. 634-A at P 29.

⁴⁰ Order No. 634 at P 39-40.

2. Allegations of Improper Cash Management Compliance

43. The complainants seek more than compliance with the cash management regulations of the Commission. BP and Chevron contend that the Kinder Affiliates intend to strip SFPP and Calnev of value so that cash can flow to its controlling affiliates, ultimately leading to utilities that cannot pay their costs without an increase in rates. BP and Chevron argue that the business strategy of Knight Holdco is to “strip, flip, and skip” the assets of SFPP and Calnev. According to BP and Chevron, this strategy means that cash will be stripped away from SFPP and Calnev, then the assets of SFPP and Calnev will be sold (flipped), and after all of the assets are sold, the owners of Knight Holdco will have their cash free and clear (skip). Based on the lack of evidence regarding improper cash management, we believe that a hearing is not warranted at this time, and dismiss this part of the complaint.

44. While a strategy of removing cash from a pipeline would raise concerns at the Commission, the complainants have presented us with nothing more than their belief and conjecture that the Kinder Affiliates are engaging in such a strategy. Against that belief and conjecture, the pipelines and Kinder Affiliates deny that they are engaging in such a program. The Commission cannot act on belief and conjecture. It needs evidence before it can proceed with the costly and demanding requirements of opening this proceeding to a public hearing.

45. BP and Chevron point to the business arrangements entered by Richard Kinder, as evidence that the Kinder Affiliates are engaging in a strip, flip, and skip strategy. According to complainants, these business arrangements encourage Richard Kinder to use his management skills to generate dramatically greater amounts of cash flow for SFPP and Calnev. In particular, the arrangements entered by Richard Kinder apparently allow his removal as manager if cash flow is not dramatically improved. Yet complainants have not presented us with evidence that Richard Kinder has violated any law or regulation in his efforts to achieve the cash flow numbers. Moreover, we have no evidence that managers should not be permitted to base their financial incentives on their ability to bring value to the entity they manage. Thus, in the light most favorable to complainants, perhaps Richard Kinder could have entered different arrangements if his objective were to retain control, but that inference cannot be the basis for the Commission asserting that the Kinder Affiliates are engaged in a strategy of strip, flip, and skip.

46. The complainants also point to the MLP business structure as inherently possessing qualities that encourage a policy of strip, flip, and skip. However, even if that were the case, the Commission has no jurisdiction to change the law which permits the MLP structure. Only the Congress can decide that the MLP business model should be prohibited.

47. BP and Chevron point to pipeline safety matters before the USDOT as evidence that the pipelines owned by SFPP and Calnev are not being adequately maintained. Except for claiming 44 separate safety incidents, BP and Chevron provide no context to the nature of the incidents, nor do they provide evidence that the number and type of incidents is unusual for pipelines of the size and scope of SFPP and Calnev.

48. Nevertheless, BP and Chevron claim that the alleged lack of maintenance is evidence that the Kinder Affiliates and the pipelines are failing to follow proper cash management practices. While the Commission is certainly concerned about inadequate pipeline maintenance, the complainants are not asking this Commission to make a finding on maintenance, as that would be under the jurisdiction of the USDOT. The complainants are rather alleging that poor maintenance is evidence that cash management regulations are not being followed. However, this point does not go to the cash management plan as such, which simply addresses how cash flows back and forth between the pipelines and the Kinder Affiliates and determines what cash is owed the different parties to the cash management agreement, and under what terms.

49. Moreover, the complainants fail to explain how cash flows within the cash management plan compromise the ability of the pipelines to meet their maintenance obligations. The managers of the pipelines determine the budget for maintenance, under the direction and control of various individuals in the various Kinder Affiliates. This determination is vetted by the directors and officers of the various affiliates responsible for the decision. The assertion that there have been some safety issues is thus inadequate to establish that the cash flow distributed by the pipelines is excessive given the current needs of the system, or that the pipelines are imprudently distributing cash that is required to meet their public utility obligations.

D. FERC Form No. 6 Annual Reports

50. BP and Chevron complain that SFPP's balance sheet cannot be taken at "face value" because certain footnotes and entries raise questions about SFPP's finances, and that the balance sheet suggests that SFPP may actually be insolvent. The Commission has also examined the Form No. 6, and after careful inquiry, concludes that the complainants have presented us with nothing more than their belief and conjecture that something sinister could be behind the Form No. 6 reporting. Against that belief and conjecture, the pipelines and Kinder Affiliates deny that their footnotes and entries are inaccurate. The Commission cannot act on belief and conjecture. It needs more evidence than presented here before it can proceed with the costly and demanding requirements of opening this proceeding to a public hearing.

51. The Form No. 6 reports were prepared under the direction of individuals and officers of the pipelines and the Kinder Affiliates. The answers to the allegations in the complaint were prepared by attorneys working under the direction of individuals and officers of the pipelines and the Kinder Affiliates. Thus, these allegations of misleading

or inaccurate financial reporting necessarily mean that at least one of the officials of the Kinder Affiliates and the pipelines is engaging in improper activity. Given the serious nature of these allegations, BP and Chevron would be expected to provide the Commission with more than mere citations to the financial reports. We cannot conclude that the officers of the pipelines and the Kinder affiliates, and the attorneys representing them, are unaware of their ethical and legal obligations with respect to reporting public information, especially in light of the consequences if the information in Form No. 6 is inaccurate or misleading.

52. Regarding the particular claims of BP and Chevron, they question footnotes which assert that negative cash balances were reclassified to current liabilities. They also ask where SFPP has recorded its liability for some \$77 million in reparations in Form No. 6. BP and Chevron further assert that Form No. 6 shows that SFPP may not be able to borrow funds in order to pay its debts. These are nothing more than questions about the accuracy of Form No. 6 – not evidence that Form No. 6 is misleading or inaccurate. The Commission needs more evidence than Form No. 6 to conclude that Form No. 6 is not accurate. In other words, it cannot rely on the accuracy of statements in Form No. 6 for the conclusion that the statements in Form No. 6 are not accurate.

53. BP and Chevron further claim that Knight Holdco would rather place SFPP into voluntary bankruptcy than pay reparations. Yet they do not provide any explanation as to how and why that would be done. For a complaint alleging that a bankruptcy filing is a reasonable business strategy for the individuals who own and control a company, the Commission expects, at minimum, an explanation of how much these individuals would lose from forcing their investment into bankruptcy against the benefits that these individuals would receive from the bankruptcy filing. The Commission cannot simply speculate that the owners of SFPP and Calnev will benefit from a bankruptcy filing absent such an analysis.

54. Further, a hearing on the likely recovery of the pipeline shippers in bankruptcy would be a costly and time-intensive process. The Commission is not required to explore the possibilities of cost recovery in bankruptcy, as it is not a bankruptcy court and it is not required to hold a hearing to explore speculative events.⁴¹

55. BP and Chevron also question a \$375 million liability of SFPP to its affiliates, raising the ability of Knight Holdco to “call in” that liability to force SFPP into voluntary bankruptcy. The answer of SFPP and Calnev states that nearly three-quarters of SFPP’s current liabilities are owed to a related party, and further states that the related party does not expect or require payment within the next twelve months.⁴² The Kinder Affiliates do

⁴¹ See *Kansas Power and Light Co.*, 851 F.2d at 1484; *Columbia Gas Trans. Corp. and Tennessee Gas Pipeline Co.*, 68 FERC ¶ 61,375 at 62,496 (1994).

⁴² Pipeline Answer at 13.

not challenge this statement. The answers of the pipelines and the Kinder Affiliates further explain why the Commission should not be concerned that the Kinder Affiliates will force either SFPP or Calnev into voluntary bankruptcy. BP and Chevron offer no evidence that these answers contain inaccurate representations or information. In fact, in the last three years KMEP has begun to invest hundreds of millions of dollars in its Calnev and SFPP affiliates, something it would be unlikely to do if there was a realistic possibility that either pipeline was insolvent.⁴³ Moreover, KMEP has been able to maintain an investment grade credit rating and raise the necessary capital for these expansions. Thus, as part of its inquiry into these matters, the Commission concludes that SFPP, Calnev, and the Kinder Affiliates, have established that it would be unreasonable for them to use inter-company liabilities in order to force either SFPP or Calnev into voluntary bankruptcy.

56. In addition, the testimony of the General Counsel of Knight Holdco, relied upon by SFPP and Calnev in this proceeding, without objection from any of the Kinder Affiliates, effectively binds KMEP to an obligation to pay any reparations owed by either SFPP or Calnev. As stated in the answer of SFPP and Calnev, KMEP has an investment grade credit rating, and testimony of the General Counsel of Knight Holdco states that regulatory commissions could look to KMEP for payment of reparations, irrespective of questions of KMEP's technical liability for SFPP's debt obligation.⁴⁴ As part of its inquiry into these matters, the Commission concludes that SFPP, Calnev, and the Kinder Affiliates have established that entities can rely on the effective obligation of KMEP to pay reparations of SFPP and Calnev, given the argument of SFPP and Calnev that such reliance is appropriate, and the lack of any objection from KMEP to that argument.

57. We believe that a hearing is not warranted at this time on the financial reporting issue, and dismiss this part of the complaint based on (1) lack of evidence that the financial reporting is not accurate, (2) the explanation from SFPP, Calnev and the Kinder Affiliates that inter-company affiliate transactions will not be used to force SFPP or Calnev into bankruptcy, and (3) the obligation of KMEP to pay the reparations of SFPP and Calnev.

⁴³ See *SFPP, L.P.*, Docket No. IS05-230-000, filing dated April 27, 2005, tariff filing to recover \$95 million for the expansion of its North Line; *SFPP, L.P.*, Docket No. IS06-283-000, filing dated May 1, 2006, to recovery costs for the Phase I expansion of its East Line of approximately \$202 million; *SFPP, L.P.*, Docket No. IS08-28-000, filing dated October 30, 2007, to recover approximately \$148 million in costs for the Phase II expansion of its East Line; *Calnev Pipe Line Company, LLC*, filing in Docket No. OR07-10-000 dated May 14, 2007, addressing a proposed \$400 million expansion of Calnev's line to Las Vegas, Nevada.

⁴⁴ *Id.* at 17.

E. Renewed Motion to Compel

58. BP and Chevron renew the motion to compel SFPP, KMGPI, and/or KMI to pay interim reparations or place funds in escrow that they submitted in another Commission proceeding. This motion was filed on November 21, 2006 in Commission Docket Nos. OR92-8 and OR96-2, *et al.* Because the original motion was submitted in another Commission proceeding, and since BP and Chevron have provided us with no reason to believe that we will fail to reach the merits of the motion in that docket, we will not rule on the substance of the motion here. Rather, we intend to rule on the original motion in the original proceeding before the Commission. Thus, to the extent a ruling on that motion is required in this proceeding, the Commission denies the motion on procedural grounds, without reaching the merits of the motion.

The Commission orders:

(A) BP and Chevron's complaint is dismissed, as discussed in the body of this order, based on a lack of evidence that their allegations merit a hearing.

(B) BP and Chevron's renewed motion to compel is denied on procedural grounds in this proceeding, but will be considered on the merits in the proceeding where it was originally filed, Docket Nos. OR92-8 and OR96-2, *et al.*

(C) SFPP and Calnev shall review their compliance with the Commission's regulations concerning their cash management plans, and take any actions to assure compliance with their cash management agreements, beginning as of June 30, 2003. To the extent that such compliance would require a revision to any public release of information concerning SFPP, Calnev, and the Kinder Affiliates, SFPP and Calnev will promptly amend that information, and file that amendment with the Commission.

By the Commission. Commissioners Spitzer and Moeller concurring with separate statements attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BP West Coast Products LLC and
Chevron Products Company,

Docket No. OR07-14-000

v.

SFPP, L.P.
Calnev Pipe Line LLC
Operating Limited Partnership D
Kinder Morgan Energy Partners, L.P.
Kinder Morgan Management LLC
Kinder Morgan General Partner, Inc.
Kinder Morgan, Inc.
Knight Holdco, LLC

(December 7, 2007)

SPITZER, Commissioner, concurring:

This Order dismisses the Complaints filed by BP West Coast Products LLC (“BP”) and Chevron Products Company (“Chevron”) (collectively “Complainants”) challenging SFPP L.P.’s (“SFPP”) cash management plans and SFPP’s and Calnev Pipe Line LLC’s (“Calnev”) financial reporting in FERC Form No. 6. Although I concur in this result, I write separately to express my distress over the content and tenor of Complainants’ pleadings.

Proceedings initiated with this Commission under the Interstate Commerce Act require a basis in law or fact. 18 C.F.R. § 386.206(b) (2007). Such claims must be brought in good faith. The Order resolves the substantive issues raised in the complaints. However, what I view as extraneous allegations in the pleadings demonstrate a lack of respect for the Commission.

Interspersed within otherwise legitimate (if ultimately unavailing) assertions is language that the master limited partnership structure (“MLP”) is *per se* an unprincipled, if not illegal, form of business organization. Complainants then baldly assert SFPP and Calnev are running a “Ponzi scheme.” The term Ponzi scheme is derived from a fraud perpetrated by Charles Ponzi in 1920. Mr. Ponzi sold “promissory notes” “guaranteed” to return 40% in ninety days. He paid on these “investments” with funds from subsequent investors until the cash ran out, and his pyramid scheme toppled, leading to civil fraud judgments and criminal convictions.

Complainants also assert that the business strategy of Knight Holdco, a Delaware limited liability company that indirectly owns and controls SFPP and Calnev, is to “strip, flip, and skip” the assets of SFPP and Calnev. According to BP and Chevron, this strategy means that cash will be stripped away from SFPP and Calnev, then the assets of SFPP and Calnev will be sold (flipped), and after all of the assets are sold, the owners of Knight Holdco will have their cash free and clear (skip).¹ This strategy, Complainants reason, imperils the physical integrity of the pipelines as well as the shippers’ assurance of performance by the pipelines. Finally, Complainants personally attack Richard Kinder’s² motives and honesty. They suggest that his intentions are nefarious and impair the integrity of the pipelines.

The order recites, analyzes and rejects each of Complainants’ assertions in this case, including the arguments that the MLP structure is *per se* improper. The Order rejects the Ponzi scheme contention and concludes there is no basis in the record for the “strip, flip and skip” assertion. The Order also finds no basis to legitimize the allegations of improper or illegal conduct by Mr. Kinder.

What is the harm, one may ask, of Complainants’ reckless allegations? First, the parties are compelled to respond to frivolous assertions and barstool philosophy. More significantly, valuable Staff time is exhausted chronicling and then refuting each groundless assertion for inclusion in the proposed Commission Order.

There is, I believe, a consequence flowing from Complainants’ irresponsible accusations more disturbing than wasted time and wasted money. One undisciplined schoolyard bully disrupts the entire school. So is the case where a tribunal permits outrageous, unfounded assertions with no negative consequence. Complainants have every right to litigate their issues and they should zealously represent their interests before this Commission. However, the verbiage noted above disrespects not only the parties to this case, but the entire Commission and those who appear and practice before it. Consequently, I would hope that such conduct will not be repeated.

For the foregoing reasons I respectfully concur.

Marc Spitzer
Commissioner

¹ BP and Chevron Motion at 5-6 in Docket Nos. OR92-8 and OR96-2 (filed Nov. 21, 2006).

² Richard Kinder is the chairman and CEO of Kinder Morgan, Inc. and President of SFPP, Calnev, Kinder Morgan Management LLC, and Kinder Morgan General Partner, Inc.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BP West Coast Products LLC and
Chevron Products Company,

Docket No. OR07-14-000

v.

SFPP, L.P.
Calnev Pipe Line LLC
Operating Limited Partnership D
Kinder Morgan Energy Partners, L.P.
Kinder Morgan Management LLC
Kinder Morgan General Partner, Inc.
Kinder Morgan, Inc.
Knight Holdco, LLC

(December 7, 2007)

MOELLER, Commissioner *concurring*:

This Commission has limited resources, and those resources are wasted when litigants engage in personal attacks and litigation games that serve no legitimate purpose. We are spending excessive time and effort in this case and in other cases that involve these litigants on issues that lack any merit, and the Commission should not hesitate in the imposition of sanctions if these litigants cross the line and fail to follow proper ethical standards.

For this reason, I concur with today's order.

Philip D. Moeller
Commissioner