

129 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP West Coast Products LLC
v.
Calnev Pipe Line L.L.C

Docket No. OR09-11-000

BP West Coast Products LLC
v.
SFPP, L.P.

Docket No. OR09-12-000

Tesoro Refining and Marketing Company
v.
Calnev Pipe Line L.L.C.

Docket No. OR09-14-000

Tesoro Refining and Marketing Company
v.
SFPP, L.P.

Docket No. OR09-16-000

ORDER ON AUDIT COMPLAINTS

(Issued November 5, 2009)

1. This order addresses four complaints requesting audits of two oil pipelines' FERC Form No. 6. In Docket Nos. OR09-11-000 and OR09-12-000, BP West Coast Products LLC (BP West Coast) requests an audit of Calnev Pipe Line, L.L.C.'s, (Calnev) and SFPP, L.P.'s (SFPP) FERC Form No. 6 for the years 2007 and 2008.¹ In Docket Nos. OR09-14-000 and OR09-16-000, Tesoro Refining and Marketing Company (Tesoro) also requests an audit of Calnev's and SFPP's

¹ Both complaints were filed on June 15, 2009.

FERC Form No. 6 for the years 2007 and 2008.² SFPP and Calnev filed answers. None of these complaints meets the standard required to set a proceeding for hearing, as established by the Commission's December 2007 order in *BP West Coast Products v. SFPP, L.P.*³ The Commission thus dismisses the complaints.

The Pleadings

2. BP West Coast filed virtually identical complaints against Calnev and SFPP requesting a staff audit of those pipelines' FERC Form No. 6 for the years 2007 and 2008. Both complaints state that a shipper must file four separate actions each year if a shipper wishes to challenge an annual index rate increases and the actual rate increases. According to BP West Coast, the four actions involve: (1) a protest to the filing; (2) a specific complaint against the increases, which BP West Coast asserts must be considered on the merits, but which may be appealed if dismissed; (3) a complaint requesting an audit to look behind the numbers contained on page 700 of the FERC Form No. 6; and (4) a general complaint against all of the current rates, which would include all of the increments of rates up until the time of the complaint. Here BP West Coast addresses the third point, and BP West Coast requests the Commission to order an audit by the Commission Staff in two stages available to the public, which will reveal details about the Page 700 of the 2007 and 2008 FERC Form No. 6 of the two pipelines.

3. BP West Coast states that the first stage would involve disclosure by the pipelines of the work papers underlying the pipelines' 2007 and 2008 FERC Form No. 6, which BP West Coast asserts the pipelines are required to maintain to support an index-based rate increase. BP West Coast asserts that because a pipeline is not required to make the underlying work papers available, the only method by which a shipper can obtain those work papers is to file a complaint seeking an audit of the pipeline's accounting records and costs for a particular year. BP West Coast further asserts that the second stage would be for the Commission Staff to investigate the claimed costs in the two pipeline's cost of service as that is reported in the FERC Forms No. 6 for 2007 and 2008 to determine if there is data that would support an allegation that there are reasonable

² Both complaints were filed on June 30, 2009.

³ *BP West Coast Products v. SFPP, L.P.*, 121 FERC ¶ 61,243 (2007) (*BP West Coast v. SFPP I*), *reh'g denied*, *BP West Coast Products v. SFPP, L.P.*, 123 FERC ¶ 61,121 (2008) (*BP West Coast v. SFPP II*), *appeal sub nom, ExxonMobil Oil Corporation and BP West Coast Products LLC v. FERC*, Nos. 07-1163, *et al.* (consolidated) (D.C. Cir).

grounds to assert that the rates resulting from an index-based increase are substantially in excess of the actual cost increases that the rate is unjust and unreasonable, the standard that shippers must meet under 18 C.F.R. 342.2(c)(1)⁴ when filing a complaint against an index-based increase.

4. BP West Coast then turns to the matters a complaint is required to address under 18 C.F.R. § 385.206.⁵ BP West Coast states that it is filing the instant complaint because it is one of the four complaints that *BP West Coast v. SFPP I* requires to be filed against an index-based rate increase under the Commission's regulations.⁶ BP West Coast then asserts that it has reasonable grounds to believe the Calnev's and SFPP's index-based rate increases in 2009 were so substantially in excess of the actual (or claimed) cost increases, so as to render the rates unjust and unreasonable. BP West Coast further alleges it has reasonable grounds to believe that both pipelines are ineligible for index-based increase, in whole or in part, and that therefore the pipelines must now prove that their current rates are just and reasonable, including the 2009 index-based rate increase embedded in them. BP West Coast concludes that it is arbitrary not to provide shippers the information needed to address this issue. BP West Coast requests that the current rates of the two respondent pipelines be subject to the results of the audit.

5. Tesoro also filed a complaint against SFPP and Calnev requesting an audit of their respective 2007 and 2008 FERC Form Nos. 6. Both Tesoro complaints provide a brief summary of other proceedings in which Tesoro states that the Commission or the courts have found that SFPP and Calnev's rates are unjust and unreasonable. The complaints then assert that both pipelines are over-recovering their costs and that their existing rates are unjust and unreasonable. Tesoro's complaints also assert that both SFPP and Calnev have inflated rates of return, but the amount cannot be determined with precision without underlying documentation, including the treatment of purchase accounting adjustments, debt costs, and computation of return on equity. The complaints also assert that both pipelines' operating expenses are overstated given the allocation of overhead costs to those pipelines by their affiliated management company, Kinder Morgan Management LLC.

⁴ 18 C.F.R. § 343.2(c)(1) (2009).

⁵ 18 C.F.R. § 385.206 (2009).

⁶ *Cf. BP West Coast v. SFPP I*, 121 FERC ¶ 61,243 at P 8-10.

6. Tesoro then asserts that the deficiencies identified by Peter K. Ashton, a witness in its complaint against Calnev in another docket and reproduced as Exhibit D to its instant complaint,⁷ are also present in SFPP's 2007 and 2008 FERC Form No. 6. Tesoro then requests that the Commission find that the cost-of-service methodology used by the two pipelines improperly characterizes their respective costs of service, thereby violating sections 1(4) and 1(5) of the Interstate Commerce Act⁸ and section 343.2(c)(1) of the Commission's regulations.⁹ The complaints request that the Commission reject the pipelines' FERC Forms No. 6 for 2007 and 2008 as filed with the Commission and that the Commission direct both pipelines to file revised Forms No. 6 that reflect their actual cost of service and to establish just and reasonable rates for both pipelines.

7. SFPP and Calnev filed answers to the complaints asserting that all four complaints fail to meet the standards set forth in *BP West Coast v. SFPP I* for two reasons. The first is failure to establish reasonable grounds to believe a significant problem exists in either pipeline's application of its existing cost-of-service methodology in its 2007 or 2008 FERC Form No. 6, or in the underlying cost accounting or calculations of either pipeline.¹⁰ The second is failure to meet the requirements of 18 C.F.R. § 385.206 (2009),¹¹ which requires clarity in framing a complaint. On the first point, SFPP quotes the cited paragraph in *BP West Coast v. SFPP I*:

The second type of proceeding is a complaint that provides reasonable grounds to conclude that the pipeline did not properly apply its existing cost-of-service methodology to develop the underlying cost inputs used to develop the Page 700 in its annual FERC Form No. 6, or the inputs were improperly entered into its

⁷ See Tesoro complaint against Calnev at 6, incorporating Declaration of Peter K. Ashton in Support of Tesoro Refining and Marketing Company's Complaint Against Calnev Pipe Line, L.L.C., at P 13 (January 25, 2007). Tesoro does not identify the docket number, but it appears to be Docket No. OR07-7-000.

⁸ 18 U.S.C. App. §§ 1(4) and 1(5) (1988).

⁹ 18 C.F.R. § 343.2(c)(1) (2009), which establishes the protocol for adjusting rates pursuant to the indexing methodology.

¹⁰ Citing *BP West Coast v. SFPP I*, 121 FERC ¶ 61,243 at P 9.

¹¹ 18 C.F.R. § 385.206 (2009).

accounts or the calculation. These are mechanical costing and accounting matters that are normally handled as part of the Commission's ongoing audit procedures unless a complainant shows credible grounds to believe that a significant problem is involved. The Commission notes that pipelines submit their FERC Form No. 6 under oath and exposes the pipeline and its employees to civil and criminal sanctions if there are purposeful errors in either regard.¹²

8. SFPP and Calnev both state that this language establishes that the scope of any indexing audit is limited to evaluating whether the carrier has accurately applied its *existing* cost-of-service methodology to develop the underlying cost inputs of Page 700 and whether the carrier has accurately reflected the cost "inputs" in its accounting or Page 700 calculations. SFPP and Calnev state that the Commission specified that these mechanical and accounting matters are normally handled by an audit unless there are credible grounds to believe that a significant problem is involved. SFPP and Calnev conclude that the complaints do not meet this standard. SFPP and Calnev also argue that the complaints instead reflect ongoing disagreements with the Commission's oil pipeline cost-of-service methodology, and thus seek to challenge SFPP's and Calnev's existing cost-of-service methodologies. They argue that such concerns are not the basis for an audit complaint, and as such the complaints should be dismissed.

9. Within this general framework, SFPP and Calnev also allege there are specific failings to each complaint. Thus, with regard to BP West Coast's complaint against SFPP, SFPP asserts that the complaint is vague and that, while it incorporates allegations contained in BP West Coast's protest filed in Docket No. IS09-375-000, the complaint fails to specify the allegations relied on. SFPP also asserts that BP West Coast failed to establish credible grounds to believe that there are any significant problems with SFPP's accounts. SFPP argues that BP West Coast's challenges to the increase to SFPP's rate base and equity are unreasonable and that BP West Coast's argument that SFPP should make a rate filing justifying that increase is essentially a claim that SFPP should make no changes to its rate base in its FERC Form No. 6 or Page 700 on an annual basis. SFPP asserts that it properly used the average of the beginning and ending rate base in its report and that BP West Coast criticism of this established practice is unfounded.

10. SFPP further notes that the Commission has already rejected BP West Coast's criticism of the use of one inflation rate for 2008 in the context of the historical data used for indexing purposes and a different forward looking rate for

¹² *Id.* (original footnote citations omitted).

its pending West Line general rate case proceeding.¹³ It also states that it properly calculated its income tax allowance, and that contrary to BP West Coast's assertions, BP West Coast has had access to SFPP's 2006 and 2007 work papers in other proceedings. It further asserts that Trial Staff has examined SFPP's accounts for the years 2006 through 2008 and that any accounting exceptions were minimal.

11. In its answer, Calnev states that it disagrees with BP West Coast's arguments that Calnev's 2008 Page 700 is inaccurate. Calnev asserts that BP West Coast's assertion that there were no grounds for an increase of \$5.1 million to Calnev's rate base is incorrect. Calnev states that the \$5.1 million dollar increase was actually the increase in Calnev's return on rate base and reflects an increase in its rate base of \$13.5 million. Calnev further argues that the increase in the dollar return was appropriate because this reflects the increase in its rate of return from 7.22 percent to 10.68 percent and is combined with the increase in the rate base. Finally, Calnev asserts that there is no basis for BP West Coast's statement that Calnev did not explain changes in its application of the Commission's Opinion No. 154-B methodology.¹⁴ Calnev states that it did not change its methodology and that any change in the income tax allowance reflects the change in return in the same year.

12. SFPP's more specific answer to Tesoro asserts that Tesoro does not address either of the relevant standards in its complaint or attempt to show how it has met either standard. SFPP states that it did not inflate its rate of return, as Tesoro claims, to 10.2 percent and that in fact the rate of return reflected on its Page 700 is 7.13 percent, which is below the 8 percent that Tesoro claims is the proper return. In response to Tesoro's claims Tesoro has had no access to SFPP's work papers, SFPP states that Tesoro received on October 1, 2008 in another proceeding the work papers for the years 2006 and 2007, and includes in its answer copies of the relevant discovery documents. SFPP further argues that Tesoro's claims that Tesoro has not checked the pipeline's calculation must be rejected because if this statement were accepted, then a complainant would have no obligation to analyze the Page 700 and the FERC Form No. 6 before filing an audit complaint.

13. Finally, SFPP rejects Tesoro's assertion that SFPP's operating expenses are likely overstated, noting that Tesoro relies on a verified statement addressing Calnev's 2004 and 2005 cost of service, not the 2007 and 2008 cost of service at

¹³ *Citing SFPP, L.P.*, 127 FERC ¶ 61,312, at P 22 (2009).

¹⁴ *Williams Pipe Line Company*, 31 FERC ¶ 61,377 (1985) (Opinion No. 154-B).

issue here. SFPP claims that there is no basis for the claim in the affidavit in Exhibit D to Tesoro's complaint that a disproportionate share of overhead costs may have been allocated to SFPP. SFPP further asserts that if SFPP's equity cost of capital is the issue, Tesoro could have included in its complaint a discounted cash flow analysis, but that failed to do so. Calnev's response to Tesoro's complaint against Calnev is substantially identical to that of SFPP.

Discussion

14. The standard governing the review of these four complaints is stated in the language SFPP and Calnev cite from *BP West Coast v. SFPP I*, namely that a complaint "provides reasonable grounds to conclude that the pipeline did not properly apply its existing cost-of-service methodology to develop the underlying cost inputs used to develop the Page 700 in its annual FERC Form No. 6, or the inputs were improperly entered into its accounts or the calculation."¹⁵

15. Turning to BP West Coast's complaints against SFPP and Calnev, the stated purpose of the complaints is "to reveal crucial details about the Page 700, FERC Form No. 6 of the two pipelines and to obtain data that would help meet the shipper's pleading burden under 18 C.F.R. 342.2(c)(1)."¹⁶ To this end BP West Coast (1) refers to its past allegations that there are reasonable grounds to believe that the index-based rate increases were substantially in excess of the actual cost increases, (2) states its belief that the pipelines must now prove that the resulting rates are just and reasonable, and (3) then asserts that the complainants are seeking data to confirm that the rates are unjust and unreasonable, as they believe has been established on the face of Page 700.¹⁷ The Commission finds that BP West Coast's complaints do not address whether (let alone provide a reasonable ground to conclude that) the respondent pipelines properly applied their existing cost-of-service methodology to develop the underlying cost inputs used to develop the Page 700 in its annual FERC Form No. 6, or the inputs were improperly entered into their accounts or the calculation. BP West Coast's complaints accordingly

¹⁵ *BP West Coast v. SFPP I*, 121 FERC ¶ 61,243 at P 9. *See also id.* (complainant must show "credible grounds to believe that a significant problem is involved").

¹⁶ *See* Original Complaint of BP West Coast Products LLC Requesting Staff Audit of SFPP, L.P.'s FERC Form 6 Annual Reports Form 2007 and 2008 at 7-8 (BP Complaint).

¹⁷ *Supra*, n.15.

fail to satisfy the standard set forth above and instead appear to be a discovery attempt that is beyond the purpose of an audit complaint as stated in *BP West Coast v. SFPP I*.

16. Moreover, while BP West Coast questions the validity of the rate base, return, and income tax allowance numbers contained in each of the pipelines' 2009 Page 700, it provides no reasonable grounds for concluding that the accounting and similar mechanical cost calculations underlying those numbers were incorrect. The Commission concludes that BP West Coast has provided no facts or analysis that would provide reasonable grounds to conclude that either or the respondent pipelines did not properly apply the Commission's cost of service methodology in preparing their Page 700 and FERC Form No. 6 reports for 2007 and 2008. The complaints only contain allegations that the numbers contained in the FERC Form No. 6 of the respondent pipelines are unjustified and appear to be wrong.

17. Tesoro's complaints are also unconvincing. Like BP West Coast, it provides no details or analysis of why the Page 700 or FERC Form No. 6 of the respondent pipelines are incorrect, what calculations may not have been properly performed, or whether the underlying accounting information was not properly captured. At bottom, Tesoro's complaint asserts that both of the respondent pipelines did not properly design some of their cost components, such as the rate base, which Tesoro states include the treatment of purchase accounting adjustments, and debt costs, and computation of return on equity. Tesoro likewise states the overhead costs allocated to the two pipelines were overstated. These assertions all address whether the respondent pipelines had a correct cost of service methodology embedded in their rates, not whether they properly applied their existing methodologies to a year of pipeline operations and reported the results correctly. As the Commission clarified in *BP West Coast v. SFPP I*, a challenge to a pipeline's rate design must be made in a complaint against the base rates using that rate design, the cumulative increase of the index-based rate increases, or both of these.¹⁸ Tesoro's complaints are misplaced whether construed as a request for an audit of the respondents' accounts, or as an attack on their respective rate designs.

18. When initiating a complaint, BP West Coast and Tesoro have the burden of proof to establish they meet the threshold standard for filing the complaint.¹⁹ The

¹⁸ *Id.* P 10.

¹⁹ *Cascade Natural Gas Corporation v. Northwest Pipeline Corporation, et al.*, 45 FERC ¶ 61,287, at 61,905 (1988).

Commission is not required to hold a hearing when issues of material fact are not in dispute.²⁰ However, disputed facts cannot be mere allegations and the complainant must make an adequate proffer of evidence to support the facts.²¹ The evidence presented in a complaint is not adequate unless it is actually linked to the activity, error or omission addressed by the complaint.²² Here the complaints fail in two ways. First, they do not address the type of error or omission that is the proper subject matter of an audit complaint under *BP West Coast v. SFPP I*. Second, even if it is assumed that the complaints were properly framed as a request for an audit of the respondent pipelines' 2007 and 2008 FERC Form No. 6, the complaints are too general in their allegations and fail to provide any reasonable grounds for concluding that the threshold standard has been met. For the reasons stated the Commission dismisses all four of the captioned complaints.

The Commission orders:

The complaints filed in the captioned dockets are dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁰ *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).

²¹ *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).

²² *Sunrise Energy Company v. Transwestern Pipeline Company*, 62 FERC ¶ 61,087, at 61,625 (1993).