

136 FERC ¶ 61,083
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tesoro Refining and Marketing Company
v.
Calnev Pipe Line LLC

Docket No. OR07-7-002
(consolidated)

America West Airlines, Inc. and
US Airways, Inc.
Chevron Products Company
Continental Airlines, Inc.
Northwest Airlines, Inc.
Southwest Airlines Co. and
Valero Marketing and Supply Company

Docket No. OR07-18-002
(consolidated)

v.
Calnev Pipe Line LLC

ConocoPhillips Co.

Docket No. OR07-19-002
(consolidated)

v.
Calnev Pipe Line LLC

BP West Coast Products, LLC

Docket No. OR07-22-002
(consolidated)

v.
Calnev Pipe Line LLC

Tesoro Refining and Marketing Company

Docket No. OR09-15-001
(consolidated)

v.
Calnev Pipe Line LLC

BP West Coast Products, LLC

Docket No. OR09-20-001
(consolidated)

v.
Calnev Pipe Line LLC

ORDER ON REQUEST FOR CLARIFICATION OR REHEARING

(Issued August 4, 2011)

1. This order addresses Calnev Pipe Line LLC's (Calnev) request for clarification, or in the alternative rehearing, of the paragraphs 78 and 79 of the Commission's March 17, 2011 order in the captioned dockets.¹ As discussed in detail below, the Commission denies the requested clarification and rehearing.

I. Background

2. In its March 2011 Order, the Commission consolidated six complaints against Calnev and set them for hearing. Four of the complaints were filed in 2007.² These 2007 complaints challenge all of Calnev's interstate rates, including both the grandfathered portion as well as the portion in excess of the grandfathered rate.³ The other two complaints, filed in 2009 by BP West Coast and Tesoro, challenge Calnev's existing base rates as unjust and unreasonable.⁴

3. At issue on rehearing are paragraphs 78 and 79 of the March 2011 Order, in which the Commission explained why it set the 2009 complaints for hearing and consolidated them with the 2007 complaints. Specifically, the Commission stated:

Although the 2009 Calnev Complaints have survived summary dismissal, several of Calnev's arguments warrant a fuller discussion; accordingly they are addressed below. Calnev correctly notes that

¹ *Tesoro Refining and Marketing Co., et al. v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214 (2011) (March 2011 Order).

² The 2007 complainant shippers are: Tesoro Refining and Marketing Company (Tesoro); ConocoPhillips Co. (ConocoPhillips); BP West Coast Products, LLC (BP West Coast); and, jointly, America West Airlines, Inc., US Airways, Inc., Chevron Products Company, Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co. and Valero Marketing and Supply Company (ACV Shippers) (collectively the "Shippers" or "Shipper Complainants").

³ Thus, the 2007 complaints raise issues of both substantially changed circumstances and rate reasonableness.

⁴ The 2009 complaints do not challenge the grandfathered portion of Calnev's base rates.

there are currently pending complaints that address Calnev's base rates and its cost-of-service for the years 2006 and 2007. As such, Calnev reasonably asserts that if its rates are reduced in those years, this will likely eliminate any possible reparations under the 2009 Calnev Complaints. Calnev's argument has merit as evidenced below. If Calnev's rates are reduced, reparations may be paid to Tesoro and BP West Coast for the difference between: (1) the rates they paid in 2009, and (2) the new base rates for 2007 as indexed through 2009. This results in new effective rates for Tesoro and BP West Coast in 2009. As noted, Calnev's cost increases since calendar year 2007 have consistently exceeded the maximum allowed under the indexing methodology based. As the oil pipeline indexing methodology is premised on the use of a current Opinion No. 154-B cost-of-service, if a new just and reasonable rate is established for 2007 and is indexed through 2009, it is unlikely that rate levels through 2009 will be unjust and unreasonable since the resulting rates will be less than the cumulative increase in Calnev's cost-of-service. The Commission recognizes that this cannot be established with certainty until a cost-of-service determination has been made on the 2007 Calnev Complaints.

However, the Commission also concludes that resolution of all the outstanding complaints against Calnev's base rates will be advanced if the 2009 Calnev Complaints are set for hearing and consolidated with the 2007 Calnev Complaints. For example, the parties may find it in their interests to negotiate a package settlement for both the 2007 and 2009 Calnev Complaints. Moreover, if at hearing on the 2007 Calnev Complaints the presiding administrative law judge determines there are substantially changed circumstances to Calnev's 2007 base rates and the matter proceeds to a hearing on the issue of rate reasonableness, this would require establishing an appropriate cost-of-service for 2007. It should then be relatively easy to update that cost-of-service in a summary form and to determine whether Calnev's revised revenues, as indexed, exceed the cost-of-service increases in the subsequent years under the Commission's indexing methodology. For these reasons the 2009 Complaint [sic] are set for hearing and are consolidated with the 2007 Calnev Complaints.⁵

⁵ March 2011 Order, 134 FERC ¶ 61,214 at P 78 and 79 (internal footnotes omitted).

II. The Pleadings

4. On April 18, 2011, Calnev filed a request for clarification, or in the alternative rehearing, regarding paragraphs 78 and 79 of the Commission's March 2011 Order. Specifically, Calnev requests clarification that paragraphs 78 and 79 do not preclude Calnev from developing a record at hearing to establish its actual cost-of-service and volume data "for the years at issue," presumably 2008 and 2009, for purposes of analyzing and accurately measuring the appropriate level of reparations that may be owed to the complainants. Calnev asserts that allowing it to fully develop the record concerning its actual costs and volumes would ensure that Calnev is not precluded from establishing that a higher 2008 or 2009 rate would be just and reasonable and that any reparations to be paid in that year should be limited accordingly.⁶ Calnev states it is not seeking at this time to determine what reparations methodology might be reasonable, but only to develop a record that could address that issue.⁷

⁶ Calnev provides the following example:

If the Commission were to determine that, as of 2007, Calnev's pipeline rate level is no longer grandfathered, then . . . a new cost-based rate would . . . be determined as of that year. Based on Calnev's preliminary application of the Commission's discounted cash flow ("DCF") methodology, the real rate of return on equity for calendar year 2007 would be approximately 7.0 percent, and any cost-based rate calculated based on the 2007 data would utilize that 7.0 percent real equity rate of return. Paragraph 78 also indicates that this new 2007 rate would be indexed forward into the years 2008, 2009, and presumably onward, to determine any reparations owed by Calnev for those years. However, Calnev's preliminary DCF calculations, using actual data, yield a real rate of return on equity for 2008 of over 14.0 percent and approximately 8.8 percent for 2009. The wide variation in these preliminary equity rate of return calculations demonstrate that the application of a 2007 base rate to determine the 2008 or 2009 reparation amounts would likely result in significant overstatements of potential reparations for those years.

Calnev Request at 5.

⁷ Calnev further argues that granting its requested clarification would not place an undue burden on the shipper complainants or cause undue delay.

5. In the alternative to the requested clarification, Calnev seeks rehearing of paragraphs 78 and 79. Calnev asserts that denial of its requested clarification would constitute a denial of due process by precluding Calnev from presenting information on its cost-of-service.

All of the Shipper Complainants oppose Calnev's request for clarification and/or rehearing.⁸ The Shippers note that the March 2011 Order ruled that the appropriate level of reparations would be determined by establishing a just and reasonable rate for 2007, then "indexing forward" the new 2007 rate to determine the just and reasonable rate for subsequent years. Shippers state that this method of calculating reparations was established by the Commission in its Opinion No. 435 decisions⁹ and approved by the U.S. Court of Appeals for the D.C. Circuit.¹⁰ Shippers state that in contrast to this established method, Calnev seeks to introduce cost evidence for the purpose of justifying higher rates (and lower reparations) in the years following 2007 than would be derived by "indexing forward" the new 2007 just and reasonable rate that may be established in these proceedings. The Shippers argue Calnev's proposal is inconsistent with the Commission's indexing methodology¹¹ and violates the filed rate doctrine's rule against retroactive rate making. They further assert that Calnev's requested clarification would expand the scope of this proceeding by introducing a full evidentiary proceeding for the calendar years 2008 and 2009 (creating essentially a multitude of successive rate cases), which would be unduly burdensome to the parties and the proceeding. They also state that any increase in Calnev's cost of capital in 2008 or 2009 is built into the Commission's indexing methodology and therefore could be recovered through Calnev's indexing of the rates in those years. Finally, the shipper parties assert that the due process argument has no merit and wastes the Commission's resources.

⁸ Specifically, on May 3, 2011, ConocoPhillips Company (Conoco), individually, and BP West Coast Products LLC, Tesoro Refining and Marketing Co., Valero Marketing and Supply Co., America West Airlines, Inc., Continental Airlines, Inc., Northwest Airlines Inc., Southwest Airlines Co., US Airways, Inc., and Chevron Products Co., jointly, filed answers to Calnev's request for clarification/rehearing. Ordinarily answers to rehearing petitions do not lie, but as the Calnev pleading is alternatively styled as a request for clarification, the answers are allowable and have assisted the Commission.

⁹ Joint Shippers Answer at 3; Chevron Answer at 5-6 (*citing SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,113 (1999) (Opinion No. 435) and *SFPP, L.P.*, 91 FERC ¶ 61,135, at 61,516-519 (2000) (Opinion No. 435-A)).

¹⁰ Joint Shippers Answer at 3; Chevron Answer at 5-6 (*citing BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1306 (D.C. Cir. 2004)).

¹¹ 18 C.F.R. § 342.3 (2011).

6. In addition, ConocoPhillips argues that Calnev's request raises an issue which was not previously raised in these proceedings. ConocoPhillips notes that the Commission does not permit new arguments to be raised on rehearing as it is disruptive to the administrative process because it has the effect of a moving target for parties seeking a final administrative decision.¹²

III. Discussion

7. Calnev's clarification/rehearing request does not actually speak to the issues raised in paragraphs 78 and 79 of the March 2011 Order. In the March 2011 Order, the Commission states that if as a result of the 2007 complaint proceedings Calnev's rates are reduced, "reparations may be paid to [shippers] . . . for the difference between: (1) the rates they paid in 2009 and (2) the new base rates for 2007 as indexed through 2009."¹³ Those paragraphs recognized that an order reducing the indexed rates in effect in 2009 would likely result in rates that were less than Calnev's actual cost-of-service in 2008 or 2009.¹⁴ And, if this occurred, there would be no practical purpose in proceeding with the 2009 complaints.

8. However, Calnev is not seeking clarification regarding the impact of the resolution of the 2007 complaints on the 2009 complaints. Rather, Calnev seeks advance permission from the Commission to submit evidence of actual cost-of-service and volume data for the years subsequent to 2007 for the purposes of determining reparations that may arise from resolution of the 2007 complaint proceedings. At bottom what Calnev appears to seek is the ability to establish actual cost-of-service rates, not indexed rates, for the calendar years 2008 and 2009 to determine the level of reparations that would be due in either or both of those years. While Calnev's proposal is contrary to the Commission's established method for determining reparations,¹⁵ of concern at this stage in the proceedings is that Calnev is raising a new issue on rehearing – the scope of evidence it may submit in the hearing on the 2007 complaints regarding the appropriate method for calculating reparations. The Commission will not entertain new issues on

¹² ConocoPhillips Answer at 4 (*citing County of Butte, California v. California Department of Water Resources*, 129 FERC ¶ 61,133, at P 30 (2009)).

¹³ March 2011 Order, 134 FERC ¶ 61,214 at P 78.

¹⁴ The March 2011 Order thus concluded that this particular issue could likely be determined based on a summary review of Calnev's costs in that year. *See* March 2011 Order, 134 FERC ¶ 61,214 at P 78-79.

¹⁵ *See* Opinion No. 435-A, 91 FERC ¶ 61,135 at 61,516-519; *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1306-07.

rehearing.¹⁶ Accordingly, the Commission denies Calnev's requested clarification/rehearing as outside the scope of March 2011 Order.

The Commission orders:

Calnev's request for clarification and rehearing are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ *See, e.g., PJM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 & n.10 (2009) (A request for rehearing of a new issue is outside the proper scope of the rehearing); *Calpine Oneta Power v. American Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at P 7 (2006); *Midwest Indep. Transmission Sys. Op., Inc.*, 112 FERC ¶ 61,211, at P 34 (2005) (citing *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) and *Baltimore Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000)).