142 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Mobil Pipe Line Company — Docket Nos. OR07-21-002, OR07-21-000, IS12-553-001

ORDER DENYING REHEARING AND MOTION TO REOPEN RECORD

(Issued March 5, 2013)

1. This order addresses three pleadings filed by a group of shippers related to various Commission decisions in light of the opinion by the United States Court of Appeals for District of Columbia Circuit (D.C Circuit) in *Mobil Pipe Line Co. v. FERC*[1] in which the court vacated and remanded a Commission order denying Mobil's application for market-based rate authority for its Pegasus pipeline. For the reasons discussed below, the various requests contained in the pleadings are denied.

Background

2. On August 24, 2007, in Docket No. OR07-21-000, Mobil filed an application for a market power determination seeking authority to charge market-based rates on its existing Pegasus pipeline system for the transportation of crude oil from Pegasus' origin at Patoka, Illinois, to its destination at Nederland, Texas. The filing was protested and the Commission set the issues for hearing.[2] On August 5, 2009, the Presiding Administrative Law Judge (ALJ) issued an initial decision finding that Mobil had not established that it lacked significant market power and recommending that the application for market-based rates be denied.[3] On December 1, 2010, the Commission issued an

[1] 676 F.3d 1098 (D.C. Cir. 2012) (*Mobil v. FERC*).

[2] *Mobil Pipe Line Co.*, 121 FERC ¶ 61,268 (2007).

[3] *Mobil Pipe Line Co.*, 128 FERC ¶ 63,008 (2009).

order affirming the initial decision.[4] On January 28, 2011, Mobil filed a petition for review of the Commission's order with the D.C. Circuit.

3. On April 17, 2012, the D.C. Circuit issued an opinion in *Mobil v. FERC*.[5] The court granted Mobil's petition for review, vacated the Commission's order, and remanded to the Commission for further proceedings consistent with the opinion. On June 1, 2012, the Canadian Association of Petroleum Producers (CAPP), and Canadian Natural Resources Limited (CNRL) and Suncor Energy Marketing Inc. (Suncor), who were parties to the Commission proceeding and interveners in the appeal, filed petitions for rehearing *en banc* of the court's opinion. The petitions were denied by the court in a *per curiam* decision issued June 11, 2012.

4. In the *Mobil v. FERC* opinion, the court "conclude[d] that the Commission's decision was unreasonable in light of the record evidence. The record shows that producers and shippers of Western Canadian crude oil have numerous competitive alternatives to Pegasus for transporting and selling their crude oil. *Pegasus does not possess market power*."[6] Given these findings of the court, on remand the Commission granted Mobil's application for market-based rates for its Pegasus pipeline system.[7]

5. On August 28, 2012, in Docket No. IS12-553-000, Mobil filed FERC Tariff No. A-1210.3.0, to be effective October 1, 2012. The tariff provides for the transportation of crude petroleum from Patoka, Illinois into Mobil Pipe Line Company's 20-inch pipeline for delivery into Nederland, Texas. Mobil stated the tariff rate was market-based pursuant to the Commission Order on Remand in Docket No. OR07-21-001, issued August 3, 2012. The tariff increased the rate from $1.571 per barrel to $5.0791 per barrel for crude oil transportation from the origin at Patoka Station, Marion County, Illinois to the destination at Sunoco's Marine Terminal, Jefferson County, Texas. Mobil's tariff filing was protested. On September 27, 2012, the Commission issued an order accepting Mobil's tariff because Mobil was simply implementing market-based rates consistent with the Commission's order on remand.[8]

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[4] *Mobil Pipe Line Co.*, 133 FERC ¶ 61,192 (2010).

[5] 676 F.3d 1098 (2012).

[6] *Mobil v. FERC*, 676 F.3d at 1099 (Emphasis added).

[7] *Mobil Pipe Line Co.*, 140 FERC ¶ 61,104 (2012).

[8] *Mobil Pipe Line Co.*, 140 FERC ¶ 61,249 (2012).

Pleadings

6. The three pleadings before the Commission are: (1) a joint motion to reopen the record filed in Docket No. OR07-21-000 by the CAPP, CNRL and Suncor; (2) a request for rehearing of the Commission's order on remand by CAPP, CNRL, and Suncor; and (3) a request for rehearing of the Commission's order accepting Mobil's market-based rate tariff by Suncor, CNRL, Husky Marketing and Supply Company, and Valero Marketing and Supply Company. For purposes of this order these parties in their various configurations will be referred to as Joint Shippers.

7. In the joint motion to reopen the record, the Joint Shippers state in vacating the Commission's order in this case the court of appeals reviewed evidence on the issue of market power which is now seriously stale and out of date. Joint Shippers submit on the issue of price and netback differential, the evidence on the record covered the period April 2006 through January 2009. Thus, Joint Shippers contend that evidence in the court record is out of date by an amount of time ranging from more than three years to more than six years. Joint Shippers assert evidence of market conditions in 2006-2009 is no longer appropriate for assessing whether or not Pegasus pipeline has market power in mid-2012.

8. Joint Shippers assert the motion to reopen the record should be granted and this proceeding should be referred to a presiding ALJ with instructions to receive updated evidence on the issue of market power and, in particular: (a) to determine whether the price differentials identified by the court of appeals in its decision are "temporary" or "short term" price variations; (b) to determine a competitive rate for the service on Pegasus pipeline to be applied in lieu of the regulated rate which was rejected by the court as a proxy for the competitive rate; and (c) whether the current pricing differentials and market data reflect that Pegasus currently possesses market power.

9. In the request for rehearing of the remand order the Joint Shippers assert the remand order failed to protect against unjust and unreasonable rates by failing to consider whether the current crude oil price and netback differentials between Pegasus' origin and destination markets are short term, temporary price variations or persistent, on-going price differentials. The Joint Shippers argue the remand order failed to protect against unjust and unreasonable rates by failing to determine an appropriate proxy for the competitive transportation rate to be compared with potential increases in Pegasus' rates. The Joint Shipper contends these errors are contrary to the Commission's responsibility under the ICA to assure that oil pipeline rates are just and reasonable and contrary to Commission's statutory duty to assure that rates based on non-cost factors fall within the "zone of reasonableness."

10. The Joint Shippers assert nothing in the *Mobil* decision by the D.C. Circuit suggests that Pegasus should be allowed to implement rates which violate the "just and reasonable" standard of the ICA. Joint Shippers submit neither does the *Mobil* decision

or market-based rate authority relieve the Commission from its statutory responsibility under the ICA to protect Pegasus shippers from unjust and unreasonable rates. The Joint Shippers contend it is critical that the Commission reassess whether Mobil currently exhibits market power with regard to the: (i) current saturation of crude in the traditional Upper Midwest markets; (ii) significant shortage or lack of infrastructure to non-traditional markets in the West Coast where world pricing is available; and (iii) current differentials in existence which are anticipated to be sustained, lengthy and growing for an indefinite period of time. Additionally, Joint Shippers assert rehearing is also necessary to consider other potential abuses of market-based power, including the potential for affiliate abuse. The Joint shippers argue if Mobil is granted market-based rate authority, it could increase rates to the point that it is no longer economically feasible for third-party shippers to ship crude on Pegasus. The Joint Shippers assert Mobil's marketing affiliate could take advantage of this available space and pay the excessive rates, as any value could be retained within the corporate family.

11. In the request for rehearing of the Commission's order accepting Mobil's market-based rate tariff, the Joint Shippers argue the Commission erred by failing to assure that the market-based rate proposed by Mobil is within the zone of reasonableness and is just and reasonable under the ICA. The Joint Shippers contend both judicial authority and Commission precedent require the Commission to monitor the level of market-based rates to assure that they remain within the lawful zone of reasonableness. The Joint shippers submit undisputed over-recoveries of 137 percent and 176 percent have no relationship to the cost of providing service on Pegasus pipeline and are unjust and unreasonable on their face. Similarly, the Joint Shippers argue undisputed achieved returns on equity of 44.7 percent and 54.7 percent are outside any plausible zone of reasonableness and vastly exceed the returns which a pipeline would expect to achieve in a competitive transportation market.

12. The Joint Shippers assert the Commission should grant rehearing of the tariff order. Joint Shippers argue on rehearing, the Commission should (a) reverse the tariff order, (b) suspend the proposed rate increase for the full statutory seven-month period, (c) make the proposed rate increase subject to refund to the extent it is not suspended, and (d) order an investigation and hearing to establish a just and reasonable rate for Pegasus and to determine whether Mobil currently possesses market power.

Discussion

13. In three related pleadings the Joint Shippers request the Commission not to allow Mobil to implement market-based rates for its Pegasus pipeline and to further investigate whether the Pegasus pipeline qualifies for market-based rates based on current conditions. The Joint Shippers are offering to show that the price differential between the Gulf Coast and Patoka, Illinois origin point still exists and is not temporary. The Joint Shippers also assert they have an expert that can calculate a "competitive rate" to use as a benchmark.

14. The Joint Shippers' arguments appear to be a collateral attack on the court's opinion as reflected in the Commission's order on remand and order accepting market-based tariff, and an attempt to re-litigate issues that have been settled by the court. In fact, arguments concerning the justness and reasonableness of the market-based rates, the need to further consider price differentials, and the alleged lack of competitive alternatives raised in the pleadings were also raised in petitions for rehearing of the court's opinion and such petitions were denied by the court.

15. The new factual showings that the Joint Shippers are offering do not undermine the specific record findings of the *Mobil* court on appeal with respect to Pegasus and the Western Canadian crude market.[9] The court vacated the Commission's order on initial decision and determined that "[t]he record shows that producers and shippers of Western Canadian crude oil have numerous competitive alternatives to Pegasus for transporting and selling their crude oil. *Pegasus does not possess market power*."[10] The evidence that Joint Shippers seek to introduce does not undermine the Court's conclusion that: (1) Pegasus lacks market power based on its three percent share of the transportation market for Western Canadian crude - with 97 percent of transportation accomplished by alternatives to Pegasus;[11] and (2) a market that was competitive without Pegasus could not become uncompetitive by the entrance of such a small competitor.[12] The court was unconcerned with the price differential between Patoka and the Gulf Coast, finding that if Pegasus raised its rates above competitive levels, shippers would choose other alternatives.[13] As for the benchmark rate, the court specifically rejected using the regulated rate as the benchmark,[14] but the underlying conclusion of the court is that Pegasus is so small with so many competitors that it would be unable to charge anything but a competitive rate, thus negating any need to calculate a competitive rate to replace the regulated rate used by the Commission as the benchmark.

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[9] The Commission notes that for the first time on rehearing the Joint Shippers make an argument concerning the possibility of Mobil increasing the rates to a point that drives away all third party shippers and leaves Mobil's affiliate with all of the capacity. Such an argument is speculative at best. If Joint Shippers believe that Mobil is discriminating in favor of an affiliate on the Pegasus system, they should file a complaint with the Commission.

[10] *Mobil v. FERC*, 676 F.3d at 1099 (Emphasis added).

[11] *Mobil v. FERC*, 676 F.3d at 1103.

[12] *Id.*

[13] *Mobil v. FERC*, 676 F.3d at 1104.

[14] *Mobil v. FERC*, 676 F.3d at 1103-1104.

16. Given the findings of the court and the lack of any direction by the court to re-open the proceeding in order to re-examine Mobil's market-based rate application under other legal principles or standards, no further proceedings are necessary. Accordingly, the Joint Shippers' motion to reopen the record, request for rehearing of the remand order, and request for rehearing of the order accepting market-based tariff are denied.

<u>The Commission orders</u>:

The requests of the Joint Shippers are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.