

143 FERC ¶ 61,213
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.

SFPP, L.P.

Docket No. IS11-444-001

OPINION NO. 527

ORDER AFFIRMING INITIAL DECISION AND ORDERING REFUNDS

(Issued June 6, 2013)

1. This matter is before the Commission on exceptions to the Initial Decision¹ issued on March 16, 2012, by the Presiding Administrative Law Judge (ALJ) granting the Shippers'² February 3, 2012 Motion for Summary Disposition. The case concerns the May 27, 2011 proposal by SFPP, L.P. (SFPP) to implement a 6.8819 percent index-based transportation rate increase for all its lines for the period July 1, 2011, to June 30, 2012. Numerous SFPP shippers protested the filing.³ The Commission, by order issued June 30, 2011, accepted and suspended the tariff records, to become effective July 1, 2011, subject to refund, hearing and settlement judge procedures.⁴ On

¹ *SFPP, L.P.*, 138 FERC ¶ 63,017 (2012) (I.D.).

² “Shippers” or “Protestors” are comprised of the following parties: BP West Coast Products LLC; Chevron Products Company; ConocoPhillips Company; Continental Airlines, Inc.; Navajo Refining Company LLC; Northwest Airlines, Inc.; Southwest Airlines Co.; Tesoro Refining and Marketing Company; US Airways, Inc.; Valero Marketing and Supply Company; and Western Refining Company LP.

³ In addition to the Shippers listed above, other SFPP shippers, including Exxon/Mobil Oil Corporation, Holly Frontier Refining & Marketing LLC and Western Refining Company LP, did not participate in the Motion for Summary Disposition and are not part of “Shippers.”

⁴ *SFPP, L.P.*, 135 FERC ¶ 61,274 (2011) (Hearing Order).

September 30, 2011, SFPP filed a notice withdrawing all suspended tariffs except for its West Line.

2. The I.D. held that there were no disputed issues of fact, and accepting SFPP's factual assertions and supplemental data, SFPP was not entitled to apply any index rate increase for the July 1, 2011 to June 30, 2012 period on SFPP's West Line and therefore SFPP's proposed index-based rate increase for the West Line had been shown to be unjust and unreasonable. On April 16, 2012, SFPP submitted its Brief on Exceptions which included a Motion to Reopen the Record or in the Alternative, Remand for Further Proceedings. Commission Trial Staff (Staff) filed Brief on Exceptions requesting the Commission to direct SFPP to make refunds, which the I.D. had not done. Staff and Shippers filed Briefs Opposing SFPP's Exceptions. SFPP filed a Brief Opposing Staff's exceptions and Shippers filed in support of Staff's exceptions. The Commission denied SFPP's motion to reopen the record by order issued July 11, 2012.⁵ This order affirms the I.D.'s ruling denying SFPP's index rate increase, grants Staff's exceptions, and directs SFPP to make refunds.

Background

3. SFPP is a common carrier oil pipeline that transports refined petroleum in interstate commerce in six Western and Southwestern states. On May 27, 2011, SFPP submitted a tariff filing proposing to implement a system-wide 6.8819 percent index-based transportation rate increase, pursuant to 18 C.F.R. § 342.3 (2012), for the July 1, 2011 to June 30, 2012 period on SFPP's four lines. Later SFPP limited the request to only the West Line. Numerous shippers protested SFPP's filing. The Commission's June 30, 2011 Hearing Order accepted and suspended the tariff records, to become effective July 1, 2011, subject to refund, hearing and settlement judge procedures.

4. As explained in the Hearing Order, to maintain the relative simplicity of the indexing process for oil pipeline rates, the Commission evaluates a protest to an index-based tariff filing using the data reported in the carrier's Federal Energy Regulatory Commission (FERC) Form No. 6, page 700 in a "Percentage Comparison Test." This test compares the page 700 cost data contained in the company's annual FERC Form 6 to the data in the index filing for a given year with the data for the prior year. Using this test, the Commission found that SFPP's revised FERC Form No. 6 showed a total cost-of-service decrease between 2009 and 2010 of approximately 4.0 percent. The Commission found that a 4.0 percent decrease in costs combined with the proposed index-based rate increase of 6.9 percent would provide SFPP an approximately 10.9 percent revenue increase under its transportation rates. Given this difference between SFPP's change in costs and the proposed index-based rate increase, the

⁵*SFPP, L.P.*, 140 FERC ¶ 61,016 (2012).

Commission set the matter for hearing because SFPP's proposed index-based rate increases appeared substantially in excess of its change in actual costs such that the proposed rates might be unjust and unreasonable.⁶

5. On September 21, 2011, SFPP filed a Motion for Abeyance asserting that the West Line rates had been established in Docket No. IS08-390-000 by Opinion No. 511 (issued February 17, 2011)⁷ and collected by SFPP subject to refund and further Commission order on protests and rehearing requests. That docket involved SFPP's June 30, 2008 cost-of-service rate tariff filing to increase its West Line rates, effective August 1, 2008, pursuant to 18 C.F.R. § 342.4 (2012). Unlike the simplified index-based rate increase involved here, such a rate increase involves a full cost-of-service review.

6. On November 23, 2011, the ALJ issued an Order Denying Motion for Abeyance and Addressing Pending Procedural Issues. The order held that it was not appropriate to hold the proceeding in abeyance. Furthermore, the order stated that the issue to be adjudicated in this proceeding was whether SFPP's proposed index-based rate increase for the West Line was just and reasonable. The order further stated that the scope of the evidence considered in this proceeding was not limited to a preliminary review of SFPP's FERC Form No. 6 data but the evidence must be relevant to the issue to be adjudicated.

7. On December 13, 2011, SFPP filed direct testimony to support its proposed rate increase for the West Line. In that testimony SFPP claimed it calculated its cost-of-service consistent with Opinion No. 511. SFPP stated it also excluded from the 2009 and 2010 West Line interstate cost-of-service all West Line costs recovered through a surcharge mechanism including its regulatory litigation costs from Docket No. IS08-390-000, and costs associated with the transmission of Ultra Low Sulfur Diesel (ULSD).⁸ SFPP then filed Supplemental Testimony on January 9, 2012. According to SFPP's revised calculations, which excluded Docket No. IS08-390 litigation costs, its West Line costs did not decrease from 2009 to 2010, as its Form No. 6 filings would indicate, but rather increased by 4.0421 percent. Based on this purported 4.0421 percent increase, SFPP claimed it was entitled to the entire index increase of 6.8819 percent.

8. On February 3, 2012, Shippers filed a Motion for Summary Disposition, and on February 21, 2012, Trial Staff filed in support of Shippers' motion. In the Motion for Summary Disposition, Shippers stated they were accepting all of SFPP's factual assertions, including the allocation of costs to the West Line. Based upon SFPP's

⁶ *Id.* P 12.

⁷ *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 (2011), *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220 (2011).

⁸ This proceeding does not involve the ULSD charges and surcharges.

Exhibits SWI-65S and SWI-66S, Shippers included the following table which depicted SFPP's costs incurred in 2009 and 2010:⁹

| Table 1 | | | |
|--|--|----------|----------|
| SFPP Testimony of Cost Changes Between 2009 and 2010 | | | |
| West Line Cost of Service | | | |
| Ln No | (000) | 2009 | 2010 |
| 1 | Operating Expense | \$25,654 | \$22,822 |
| 2 | Operating Expense less Litigation Costs | \$20,385 | \$22,430 |
| * * * | | | |
| 8 | Total with Litigation Costs | \$45,564 | \$42,316 |
| 9 | Percentage Change | | -7.1276% |
| 10 | Total excluding Litigation Costs | \$40,295 | \$41,924 |
| 11 | Percentage Change | | +4.0421% |

9. Shippers asserted this showed that SFPP's cost decreased by even more than the four percent decrease mentioned in the Hearing Order. On February 21, 2012, SFPP filed an Answer in Opposition to the Motion for Summary Disposition, and a Motion for Leave to File Supplemental Direct Testimony. On March 5, 2012, SFPP filed an Errata to its February 21, 2012 filing. The supplemental data, corrected on March 5, reflected the effect of Opinion No. 511-A. The data (in thousands), excluding litigation expenses, showed cost of service of \$41,924 and adjusted revenue of \$40,260, with a revenue deficit of \$1,664.

10. In its answer, SFPP urged the Commission to deny Shippers' motion for summary disposition. SFPP also requested leave to file a second round of supplemental direct testimony, which it attached to the response. SFPP stated this testimony raised the issue of whether SFPP was under-recovering its cost-of-service in 2010.

11. Shippers and Trial Staff objected to SFPP's request to file supplemental direct testimony. They argued such material did not raise any factual disputes and SFPP's supplemental testimony was irrelevant to an index calculation. They contended that while summary disposition may be rare it was warranted in this proceeding to avoid a waste of hearing resources, because they had accepted SFPP's factual assertions, and thus there were no factual issues in dispute and only one legal issue to decide.

⁹ Shippers' Motion at pp 6-7.

12. On March 6, 2012, the ALJ held oral argument on Shippers' Motion for Summary Disposition. The ALJ granted SFPP's request to file supplemental data and accepted the March 5, 2012 Errata. At the conclusion of the oral argument the ALJ granted Shippers' Motion for Summary Disposition, and subsequently issued the I.D. on March 16, 2012.

The I.D.

13. The ALJ first addressed Rule 217(b) of the Commission's Regulations which permits the granting of summary disposition when "there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding."¹⁰ The I.D. cited *KN Interstate Gas Transmission Co.*, where there the Commission elaborated that for summary disposition to be granted, the following two conditions must be met: (1) the proponent must have been afforded a reasonable opportunity to present arguments and factual support (written and oral) and that evidence must be viewed in its most favorable light, and (2) the Commission must find that a hearing is unnecessary and would not affect the ultimate disposition of an issue because there are no material facts in dispute or because the facts presented by the proponent have been accepted in reaching the decision.¹¹ The ALJ concluded that both conditions had been met here as SFPP filed direct and supplemental testimony to support its proposed rate increase, and for purposes of the Motion for Summary Disposition, Shippers and Staff accepted the accuracy of each of SFPP's factual assertions, including SFPP's allocations of costs to the West Line, and its revisions, updates, and corrections to its cost data.

14. The ALJ stated that under these circumstances Shippers' motion raised two issues: The first was "[i]s SFPP entitled, as a matter of law, to remove its litigation expenses from its 2009 and 2010 costs of service for purposes of calculating the year-to-year percentage change in costs?"¹²

15. The second issue was "[i]f SFPP is permitted to remove its 2009 and 2010 litigation expenses for purposes of calculating its year-to-year percentage change in costs, is SFPP entitled to a rate increase of approximately 4 percent to compensate for its actual increase in costs, or is it entitled to the full index increase of 6.9 percent?" However, since the ALJ held that SFPP was not entitled to remove the litigation costs, the I.D. did not address the second issue.

¹⁰ 18 C.F.R. § 385.217(b) (2012).

¹¹ *KN Interstate Gas Transmission Co.*, 86 FERC ¶ 61,229, at 61,824 (1999); *see also Coastal States Marketing Inc. and Coastal States Trading, Inc. v. Texas-New Mexico Pipeline Co.*, 25 FERC ¶ 61,164, at 61,452 (1983).

¹² I.D., 138 FERC ¶ 63,017 at P 9.

16. The ALJ stated that SFPP's submission, accepted by Indicated Shippers and Commission Trial Staff, indicated that the revised calculations of 2010 revenues and costs "with the 'corrected' litigation surcharge costs and recovery included reflect an over-recovery of revenues by 1.16 percent but that with the 'corrected' litigation surcharge costs and recovery excluded from the analysis, SFPP would be under-recovering its revenues by 3.97%."¹³

17. The ALJ ruled at the hearing, which was reflected in the I.D., "that the litigation surcharges must be included in the analysis."¹⁴ The ALJ stated the ruling that litigation surcharges must be included is based on the fact that "the index methodology is meant to be a summary proceeding, not a full litigation of actual costs, not a full rate case, not a full evidentiary gladiator-type proceeding with respect to revenues."¹⁵

18. The ALJ stated that while the issue of whether a company should include litigation costs when comparing its cost-of-service data in an index methodology case may be an issue of first impression "when the Commission determines whether a pipeline's indexed rate increase is so substantially in excess of actual cost increases that the resulting rate would be unjust and unreasonable, the Commission compares the pipeline's Form 6 cost-of-service for the prior year with its current Form 6 data and ... this has always included litigation costs."¹⁶ The fact that these litigation costs are recovered via a surcharge made them no less a cost of providing service.¹⁷

19. At the end of the oral argument and as set forth in the I.D., the ALJ held:

For purposes of adjudication of the Motion for Summary Disposition, with litigation surcharge costs *included*, the undisputed facts as established by SFPP's March 5, 2012 Errata indicate that the revised 2009 and 2010 calculations result in an *over-recovery* of 1.16 percent. Therefore, as a matter of law, because SFPP is not entitled to apply any index rate increase for the July 1, 2011 to June 30, 2012 period on the West Line, SFPP's

¹³ *Id.* P 35.

¹⁴ Transcript, March 6, 2012 oral argument at 167-68.

¹⁵ *Id.* at 168.

¹⁶ I.D., 138 FERC ¶ 63,017 at P 38.

¹⁷ *Id.* P 35.

proposed index-based rate increase for its West Line has been shown to be unjust and unreasonable.¹⁸ (Italics in original).

20. The ALJ stated that since there were no disputed issues of fact a hearing was not necessary, and granted Shippers' Motion for Summary Disposition by order issued March 16, 2012. On April 16, 2012, SFPP filed a Brief on Exceptions and Motion to reopen the record or, in the alternative, remand for further proceedings. Staff filed exceptions limited to the issue of whether the Commission should order refunds which the I.D. did not address. Indicated Shippers filed in support of Staff. Staff and Indicated Shippers filed briefs opposing SFPP's exceptions and motion to reopen, and SFPP filed a Brief Opposing Staff's Exceptions.

21. On July 11, 2012, the Commission denied SFPP's motion to reopen the record to introduce SFPP's 2011 revenue data to show it would under-recover costs absent the proposed index-based rate increase because those data are not relevant when a shipper challenges an index-based rate change.¹⁹

22. This order will first address SFPP's exceptions and then address Staff's exceptions, which focus on the Commission affirming the I.D.'s grant of summary disposition denying SFPP the index-rate increase for 2011.

SFPP's Brief on Exceptions

Policy Considerations

23. In its Brief on Exceptions, SFPP asserts that policy considerations warrant full Commission review because this is a "case of first impression."²⁰ SFPP contends that "[n]ever before has the Commission, or any administrative law judge, ruled at the hearing stage of a proceeding as to whether a pipeline's indexing adjustment is appropriate."²¹ Moreover, it argues, the I.D. was issued on summary disposition, without the benefit of answering and reply testimony or a hearing.

24. In its Brief Opposing Exceptions, Staff asserts that SFPP's Brief on Exceptions establishes no policy basis for the Commission to overturn the I.D. Rather, the policy objective that underlies the Commission's index-based ratemaking approach is "to simplify and expedite the Commission's regulation of oil pipeline rates." Thus, Staff

¹⁸ *Id.* P 39.

¹⁹ *SFPP*, 140 FERC ¶ 61,016 at P 33.

²⁰ Brief on Exceptions at 1.

²¹ *Id.*

contends, this policy applies to any Commission review of the I.D. We agree that the described issues do not raise novel policy issues but simply apply the Commission's existing policy and precedent.

SFPP's Exceptions

25. Before setting forth SFPP's exceptions it should be noted that the I.D. stated that the issue presented by Shippers' motion is whether SFPP is "entitled, as a matter of law, to remove its litigation expenses from its 2009 and 2010 cost-of-service for purposes of calculating the year-to-year percentage charge in cost?"²²

26. SFPP urges the following exceptions:

1. The I.D. erred in granting the Motion for Summary Disposition because this precluded SFPP from introducing evidence that is dispositive to the outcome of this proceeding—a cost-of-service and revenue analysis that shows that SFPP under-recovered its West Line cost-of-service by over \$9,000,000 in 2011, despite the application of the 2011 Index to its rates. (I.D., 138 FERC ¶ 63,017 at P 39).
2. The I.D. erred in concluding that, as a matter of law, a pipeline is precluded from applying the index to its rates if the pipeline is over-recovering its cost-of-service at the time it seeks to apply the index. (I.D., 138 FERC ¶ 63,017 at P 39).
3. The I.D. erred in concluding that SFPP over-recovered its 2010 West Line cost-of-service by 1.16 percent. (I.D., 138 FERC ¶ 63,017 at P 39).
4. The I.D. erred in concluding that SFPP should not remove Surcharged Costs, including the IS08-390 Litigation Costs, from the cost-of-service analyses for purposes of performing the Percentage Change Calculation.
5. The I.D. erred in relying on the treatment of "litigation costs" on Page 700 of Form No. 6. (I.D., 138 FERC ¶ 63,017 at P 38).

27. The thrust of SFPP's exceptions are first that the ALJ did not consider evidence of SFPP's 2011 cost-of-service and revenue for the West Line, which SFPP claims shows that even after application of the 2011 index to the West Line rates, SFPP under-recovered the West Line cost-of-service by in excess of \$9 million. SFPP argues that the protesting shippers "acknowledg[ed] that this data would be determinative in this proceeding,"²³ and thus it was error for the ALJ to prevent the introduction of this

²² I.D., 138 FERC ¶ 63,017 at P 9.

²³ Brief on Exception at 11.

evidence. However, SFPP continues, even if the Commission does not so find, it was also error for the ALJ to conclude that SFPP over-recovered its 2010 West Line cost-of-service and thus SFPP was not entitled to apply the 2011 index rate increase to its rates.

28. SFPP contends the I.D. erred in concluding that SFPP should not have removed the litigation surcharged costs in performing the percentage charge calculations. SFPP asserts that its approach is consistent with Commission precedent and argues “[s]urcharged costs reflect actual amounts the pipeline has incurred and thus are not subject to inflationary changes.”²⁴

29. SFPP asserts that Protesters have acknowledged that the 2011 West Line Cost and Revenue Data are dispositive evidence in this proceeding because the Commission has consistently permitted a pipeline to apply the full index to its rates, regardless of whether the pipeline experienced a cost decrease in the index year at issue if the pipeline can show that it would still likely under-recover its cost-of-service after application of the index to its rates. In support of its contention SFPP cites to *Rocky Mountain Pipeline System*, 115 FERC ¶ 61,390 (2006) (*Rocky Mountain*); *BP West Coast Products LLC. V. SFPP, L.P.*, 119 FERC ¶ 61,241 (2007); *Shell Pipe Line Co.*, 102 FERC ¶ 61,350 (2003).

30. SFPP argues that the 2011 West Line Cost and Revenue Data go to the heart of this proceeding because this information alone provides sufficient justification for SFPP to apply the 2011 Index to its West Line rates, and the data was not available at the time the I.D. was issued. SFPP asserts that the I.D. not only incorrectly relied on a flawed calculation purportedly showing that SFPP over-recovered its West Line cost-of-service in 2010, but erred, at P 39, in concluding that a proposed index-based rate increase is automatically unjust and unreasonable if at the time it seeks to apply the index the pipeline is over-recovering its cost-of-service, even by a marginal amount. Although the ALJ asserted that this position is true as a “matter of law,” SFPP states the ALJ failed to cite any support, legal or otherwise for this statement.

31. SFPP contends that the alleged standard the I.D. applied is also erroneous from a policy perspective since it would render the Commission’s standard for evaluating complaints against index-based rate filings meaningless.

32. SFPP asserts that the Commission stated that in order to pursue a complaint against an index-based rate increase, a complainant must demonstrate that application of the index would “substantially exacerbate” the pipeline’s already existing over-recovery. To meet the “substantial exacerbation” standard, the Commission has ruled that a complainant must show “(1) that the pipeline is substantially over-recovering its cost-of-service and (2) that the indexed-based rate increase so exceeds the actual increase in the pipeline’s operating cost that the resulting rate increase would substantially exacerbate

²⁴ Brief on Exceptions at 11.

that over-recovery, citing *Tesoro Refining and Marketing Co. v. Calnev Pipe Line, LLC*, 121 FERC ¶ 61,142 at P 6 (2007).

33. SFPP argues that the I.D. erred in concluding that SFPP over-recovered its cost-of-service because the ALJ failed to recognize that Docket No. IS08-390 Surcharge Revenues are a normalized amount while ignoring that the 2010 Docket No. IS08-390 litigation costs are an actual amount incurred by SFPP. SFPP then proposes various methods to correct for this difference, all of which result in SFPP's under-recovering its cost-of-service.

34. SFPP asserts that the Commission has held that “if a pipeline is not recovering its cost of service, the Commission permits the carrier to apply the full increase allowed under the index methodology even if its costs declined....” citing cases *supra* P 30. While the Commission typically makes this type of determination by comparing the Page 700 cost data contained in the company’s annual FERC Form No. 6 to the data that is reflected in the index filing for a given year with the data for [the] prior year, SFPP contends here there is no need to make such a comparison because SFPP has presented its actual cost and revenue data for 2010 as part of its direct case.

35. SFPP then explains why the arguments urged by Protesters in opposition to SFPP's cost recovery approach in the prior pleadings have no merit. SFPP argues that it correctly excluded the Docket No. IS08-390 litigation costs which are recovered through a surcharge mechanism from the cost-of-service used for the percentage change calculation, and applying the Commission standard, SFPP was entitled to the index-based rate increase. SFPP states that applying this test, if the percentage change in the pipeline’s costs is reasonable given the percentage change in the index, the Commission permits the pipeline to apply the full index to its rates, regardless of whether the pipeline is over-recovering its cost-of-service.

36. SFPP asserts that the Commission has never accepted a protest of an index filing in a case when the deviation was less than 10 percentage points and has set for hearing those cases where the deviation was greater than positive 10 percentage points. Under this standard, and based on the evidence presented here by SFPP, SFPP argues it should be permitted to apply the 2011 Index to its West Line rates. Moreover, SFPP contends that it correctly removed the litigation expense from the percentage charge calculation. SFPP adds that it only removed the “surcharged” Docket No. IS08-390 litigation expense, and did not remove all litigation expenses, so included in its calculation are all the non-surcharged West Line litigation expenses.

37. SFPP asserts that in Opinion No. 511, the Commission ordered SFPP to recover its Docket No. IS08-390 Litigation Costs through a three-year Litigation Surcharge, which surcharges would be calculated separately from the West Line’s base transportation rates.

38. SFPP cites to the Commission's treatment of the Ultra Low Sulfur Diesel (ULSD) surcharged costs which are excluded from the cost data considered by the Commission in the five-year review process. SFPP contends the I.D. should have treated the Docket No. IS08-390 surcharged litigation expenses in the same manner. SFPP contends that there is no rational basis to first develop in the ULSD context a conceptual separation with a differential treatment of costs and revenues recovered through surcharges to those recovered through base transportation rates and not apply that conceptual separation and differential treatment with respect to SFPP's Docket No. IS08-390 surcharged Litigation Costs and associated revenues.

39. In fact, SFPP points out, in Opinion No. 511-A, at P 50,²⁵ the Commission agreed with the contention that, like the ULSD amounts, SFPP must provide separate reporting of its Docket No. IS08-390 Litigation Costs and revenues in its FERC Form No. 6. Moreover, because Surcharged Costs are not "indexed costs," SFPP argues it would be inappropriate and illogical to use Surcharged Costs in the percentage change calculation as the basis for determining whether the pipeline can apply the index to its rates that recover its "indexed costs."

40. SFPP states that Protestors claimed that since the Commission included "litigation costs" in the cost data it considered in its most recent five-year review of the oil pipeline index (Index Adjustment Factor), which was used in determining the annual index adjustment to be used for the 5-year period, from July 1, 2011 to June 30, 2016, an "apples to apples" comparison can only be made by including SFPP's IS08-390 Litigation Costs in the costs-of-service used for SFPP's percentage change calculation. SFPP argues that this contention, which was the foundation underlying the Motion for Summary Disposition, is flawed and based on a misstatement of what SFPP actually did in its testimony. Contrary to Shippers' claim, that suggests that SFPP sought to remove all regulatory litigation costs from the costs of service it presented for use in the percentage change calculation, SFPP did not exclude all litigation costs, as previously explained.²⁶

41. Moreover, SFPP contends, implicit in the Shippers' argument are two key claims which also not accurate: (1) regulatory litigation costs recovered through a surcharge mechanism were in fact included in the cost data used to calculate the Index Adjustment Factor, and (2) if included in the cost data used by the Commission, regulatory litigation costs recovered through a surcharge caused the Index Adjustment Factor to be higher than it otherwise would have been.

²⁵ 137 FERC ¶ 61,220.

²⁶ *Supra*, P 37.

42. SFPP states that SFPP's regulatory litigation costs recovered through a surcharge totaled approximately \$7.5 million compared to the \$5.49 billion of 2009 operating expenses, *inter alia*, used by the Commission to arrive at the Index Adjustment Factor. This preliminary analysis indicated that regulatory litigation costs recovered through a surcharge likely had no impact on the Index Adjustment Factor adopted by the Commission. Thus, contrary to Protestors' claim, treatment of surcharged regulatory litigation costs in the five-year review are irrelevant for purposes of this proceeding, and will be irrelevant for any other future index proceedings throughout the time that the current Index Adjustment Factor is in place for this same reason.

43. SFPP asserts that the I.D. incorrectly claimed at P 38 that the Commission's analysis of FERC Form No. 6 data at the initial stage of the proceeding "has always included litigation costs," and that "litigation costs" must therefore be included in the analysis here.

44. SFPP states it is not claiming that all litigation costs should be excluded from the Percentage Change Calculation, and in fact it did not exclude all litigation costs from its West Line interstate costs-of-service. By focusing on litigation costs, rather than costs recovered through surcharges, the I.D. missed the core theory of SFPP's case. Second, SFPP argues that when the issue is framed in the proper context, a review of the Commission's prior indexing orders shows that the Commission excludes other surcharged costs, namely ULSD costs, from its indexing analysis because these costs are recovered through a surcharge rather than through the pipeline's indexed rates.

45. Further, SFPP argues that when a case reaches the hearing stage, as here, the evidence should not be limited to the data on the face of its Page 700. In fact, Staff itself stated here that "[t]he scope of this proceeding includes all issues necessary for the Commission to determine the justness and reasonableness of SFPP's index-based rate increase [T]his proceeding will consist of a reasonableness review of SFPP's proposed rate increase, and all issues that such a reasonableness review involves."²⁷ Since SFPP claims it has shown that permitting SFPP to apply the 2011 Index to its West Line rates is reasonable, as Trial Staff has acknowledged, the data on Page 700 should not be used to preclude SFPP from increasing its West Line rates pursuant to the indexing methodology when application of that methodology has been shown to be reasonable.

46. Finally, SFPP asserts there is no support for Protestors' argument that if SFPP is entitled to apply the index to its rates, it should only be entitled to apply a portion of the index, not the full index. SFPP asserts that the Commission has made it clear that it allows a pipeline to apply "the *full* increase allowed under the index methodology" in the event the pipeline is under-recovering its costs at the time it seeks to apply the index to its

²⁷ Citing Trial Staff's Brief Concerning the Scope of the Proceeding and Holding the Proceeding at Abeyance at 2-3, Docket No. IS11-444-001 (Oct. 19, 2011).

rates.²⁸ SFPP states that is precisely the situation that exists here. Further, the Commission was clear in Order Nos. 561 and 561-A that the indexing increase need not precisely match the increase in actual costs and that a reasonable level of deviation is not only tolerated but expected. The rate changes under the indexing methodology are not intended by the Commission to be so precise, but are instead designed to set rates within a zone of reasonableness that encourages efficiencies.²⁹

Shippers' Brief Opposing Exceptions

47. Shippers oppose each of the five exceptions enumerated by SFPP. Shippers assert that SFPP has not identified any disputed issues of material fact, and none of its enumerated exceptions alleges that there are such factual disputes. Shippers state that while this case may present an issue of first impression in that the Commission has never ruled on the summary disposition of an index proceeding that has been set for hearing, the I.D.'s ruling is entirely consistent with the Commission's policy and precedent.

48. To put the matter in proper prospective Shippers highlight certain matters that preceded the I.D. Shippers refer to the Hearing Order where the Commission applied its index rate percentage change calculation to SFPP's proposal to increase its rates by the 2011 index rate increase of approximately 6.9 percent. The Commission cited the data in SFPP's Form No. 6 filings for 2009 and 2010 which indicated that on a system-wide basis SFPP experienced a cost decrease of approximately 4 percent, while seeking to increase its rates by approximately 6.9 percent. The Commission found that "this magnitude of a divergence between the pipeline's change in costs, as expressed in percentage terms, and the proposed rate increase raises an issue of reasonableness that the Commission will investigate."³⁰

49. Shippers continue that after the matter was set for hearing, limited to SFPP's West Line, SFPP filed direct and supplemental testimony. SFPP filed direct testimony, for the express purpose of reflecting the Commission's rulings in Opinion No. 511-A, which testimony excluded Docket No. IS08-390 litigation costs, and with that exclusion purported to show that the West Line costs did not decrease from 2009 to 2010, as its Form No. 6 filings would indicate, but rather increased by 4.04 percent. Based on this purported 4.04 percent increase, SFPP claimed it was entitled to the entire index increase of 6.88 percent. For purposes of summary disposition, the Shippers accepted SFPP's

²⁸ See *BP West Coast Products LLC v SFPP*, 119 FERC ¶ 61,241 at P 10.

²⁹ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. and Regs. ¶ 30,985, at 31,103 (1993), *order on reh'g*, Order No. 561-A, FERC Stats. and Regs. ¶ 31,000 (1994).

³⁰ Hearing Order, 135 FERC ¶ 61,274 at P 11.

factual assertions and dispute only its entitlement, as a matter of law, to remove Docket No. IS08-390 litigation costs from its 2009 and 2010 cost-of-service.

50. Shippers state that SFPP's answer to the Motion for Summary Disposition included still more testimony, this time for the purpose of showing that SFPP purportedly under-recovered its cost-of-service in 2010, after taking account of the Commission's rulings in Opinion No. 511-A.

51. Shippers state that this testimony was corrected before oral argument, and as corrected, SFPP calculated that with Docket No. IS08-390 litigation costs and surcharge revenues excluded from the analysis, SFPP would have under-recovered its cost-of-service by 3.97 percent. However, if those costs and revenues are included in the calculation, SFPP would have over-recovered its 2010 cost-of-service by 1.16 percent. Shippers add that while SFPP removed from its revenues the amount of refunds that SFPP currently anticipates paying as a result of the Commission's decisions in Docket No. IS08-390 SFPP has not paid those refunds, and that if those amounts were not deducted from SFPP's revenues, its over-recovery would be even larger.

52. Shippers argue that although SFPP had asserted that summary disposition was not appropriate because there were genuine issues of fact, SFPP's list of exceptions does not include any genuine issues of fact, and each of the listed exceptions pertains to a legal issue. Thus, Shippers assert, the only issues to be resolved are legal in nature, and the I.D. resolved the legal issues correctly.

53. Shippers then refer to SFPP's exceptions. Shippers state that exception 1 contends the I.D. erred by granting summary disposition without permitting SFPP to introduce evidence of its 2011 revenues. This exception Shippers contend pertains to the relevancy of evidence. Moreover, Shippers assert that any evidence relating to 2011 revenues is entirely irrelevant and could not be considered in SFPP's request for 2011 index rate increase. Shippers state that the three cases cited by SFPP are not on point, and do not support SFPP's position. Shippers state that SFPP has cited no precedent for the proposition that its later-developed 2011 cost and revenue data is relevant to the issues to be decided in this case, which is focused on a comparison of SFPP's West Line costs for 2009 and 2010.

54. Shippers state that while SFPP's 2011 revenue is not relevant here, if SFPP believes that it is under-recovering its cost of service, it has recourse to file a new cost-of-service case. In like manner, Shippers note, the Commission has repeatedly told shippers that if they believe the pipeline is over-recovering and the index does not exacerbate the over-recovery, they can file a complaint to seek relief. In short, Shippers state, an indexing proceeding is not the proper forum in which to assess a pipeline's changing circumstances over time.

55. With respect to the remaining exceptions, Shippers state that exception 2 argues that the ALJ applied an incorrect legal standard in deciding the case. Exception 3 argues that the ALJ erred by ruling that SFPP must include its Docket No. IS08-390 litigation costs and revenues when calculating whether it over-recovered or under-recovered its cost of service. Exceptions 4 and 5 argue that the ALJ erred by ruling that SFPP must include those costs when comparing its 2009 and 2010 costs. Shippers maintain that all these exceptions are legal issues.

56. Shippers state that basically SFPP claims that it should be permitted to remove its Docket No. IS08-390 litigation costs because they were collected through a surcharge that is not subject to an annual indexing adjustment. Shippers' response is that the I.D. correctly ruled that SFPP must include all costs including all litigation costs even if those costs are collected by a surcharge, in its calculation of the percentage change in costs from 2009 to 2010.

57. Shippers assert that the fact that the surcharge is not subject to indexing does not transform this proceeding from a streamlined indexing case to a cost-of-service rate case. Shippers state that the Commission has always included all litigation costs in its calculation of a pipeline's year-to-year cost changes, even where those litigation costs were collected through a surcharge. In fact, Shippers point out, all litigation costs are included in a pipeline's annual costs as reported in Form 6 No. data, which the Commission uses to evaluate challenges to pipelines' proposed index rate increase filings. Shippers maintain SFPP collected its litigation costs from prior rate cases through a surcharge, citing *SFPP, L.P.*, 113 FERC ¶ 61,277, at PP 94-95 (2005); *SFPP, L.P.*, 121 FERC ¶ 61,240, at PP 105-10 (2007). Shippers add that the Commission's generally applicable index percentage captures the changes in industry-wide pipeline costs, and makes no exception for changes in litigation costs.

58. Shippers state that the applicable index percentage rate of 6.9 percent for 2011 reflects, in part, changes in industry-wide litigation costs. Shippers contend that SFPP's change in costs must reflect changes in the same costs in order to make an apples-to-apples comparison to the index. Moreover, as the I.D. held, litigation costs are no different from any other costs, and affect shippers the same as any other costs. Accordingly, Shippers argue litigation costs should not be treated any differently, regardless of the method in which the pipeline recovers those costs.

59. SFPP argued in its exceptions that litigation costs recovered through a surcharge should be disregarded for purposes of determining the year-to-year changes in SFPP's cost-of-service since in its recent cost-of-service case it was required to track those costs and recover them dollar-for-dollar, and was prohibited from applying the annual indexing percentage adjustment to those costs. Shippers' answer that the holding in a particular cost-of-service case does not dictate the result in an index proceeding. Shippers assert that how litigation costs are recovered is not relevant, and SFPP has not identified a single index case in which the Commission took account of the manner in which a

pipeline recovers a certain cost item. The reason, Shippers state, is that in an index rate proceeding, the Commission simply measures the change in all of the pipeline's interstate costs from one year to the next without considering the particular circumstances surrounding any given cost. Shippers state the fact that this matter was set for hearing does not make it a full-blown cost-of-service rate case, and the standards applicable to indexing cases applies here as well.

60. Contrary to SFPP's exception, Shippers assert that the I.D. was correct in comparing changes in all of SFPP's costs including litigation costs to changes in all industry-wide costs, which similarly included litigation costs. Thus, consistent with its past practices in the most recent five-year oil pipeline index review, the Commission examined industry-wide cost changes for the period 2004 to 2009 in formulating the index to be applied for the 2010 to 2015 time period.

61. Among other things, the Commission analyzed operating expenses, as reflected on pages 300-303 of Form No. 6, which included litigation costs, set forth in Account 520. Shippers contend that the purpose of the index proceeding is to compare SFPP's cost changes against industry-wide cost changes, and accordingly since the industry-wide cost changes include litigation expenses, all of SFPP's costs, including SFPP's litigation expenses, now must be used for the comparison.

62. Shippers add that in Opinion No. 511-A the Commission declined to require that litigation expenses collected through a surcharge should be treated separately on Form No. 6 stating that it would "not address in this proceeding the treatment of the litigation surcharge in the calculation of the Commission's oil pipeline index. The question is more appropriately addressed at the time of the next five-year index review."³¹ Thus, at present, litigation costs, even those recovered through a surcharge, must be included in the costs used to calculate the index percentage.

63. Shippers assert that there is no merit to SFPP's claims that the litigation costs it collected through a surcharge should be treated in the same manner as ULSD costs collected through a surcharge. Shippers state that the Commission has elected to treat ULSD costs differently because ULSD expenses are incurred only by certain pipelines and certain shippers, and are collected by a separate rate not subject to index rate increase. Thus, the ULSD costs were excluded from the calculation of the generally applicable indexing adjustment.³²

³¹ Opinion No. 511-A, 137 FERC ¶ 61,220 at P 50.

³² See *Five-Year Review of Oil Pricing Index*, 135 FERC ¶ 61,172, at PP 17-18 (2011).

64. Finally, Shippers assert that SFPP has mischaracterized the I.D.'s core ruling in its claim that the I.D. erred in holding that, as a matter of law, SFPP is not entitled to the index increase because, if permitted, that increase would cause SFPP to over-recover its cost of service. Shippers argue that this was not the central reasoning of the I.D. Rather, the ALJ ruled in the I.D. that "[a]fter careful consideration of the relevant pleadings and oral arguments, it is my determination that SFPP must include its litigation costs when comparing its 2009 and 2010 costs of service for purposes of the consideration of the application of the Commission's index methodology."³³ This responds directly to the issue to be determined which was:

Is SFPP entitled, as a matter, as a matter of law, to remove its litigation expenses from its 2009 and 2010 costs of service for purposes of calculating the year-to-year percentage change in costs?³⁴

65. Shippers add that the I.D.'s discussion of revenues was in response to SFPP's contention that the index increase must be granted because without it SFPP's revenue would be insufficient to recover its cost of service. In that context, the I.D. held that SFPP was wrong and that it would, in fact, over-recover its cost of service. But again, Shippers point out, that revenue evidence is not relevant in this proceeding, which is an index rate increase proceeding, not a cost-of-service rate proceeding.

Staff's Brief Opposing Exceptions

66. Staff disputes each of SFPP's exceptions. Staff reiterates that the index-based and cost-of-service-based ratemaking methods are exclusive alternatives; they do not co-exist.

67. Staff states that in this proceeding, Protestors, including Staff, are not disputing the costs, revenues, or rate designs that SFPP claims in its testimony. Thus, Staff states there were no material issues in dispute and any remaining issues were legal issues, and the I.D. properly granted summary disposition under Commission Rule 217.

68. Staff asserts that the index-based rate increases are an independent, formula-based method for rate changes and thus a pipeline is prohibited from making a "cost-of-service showing to justify a rate higher than the applicable ceiling unless it can demonstrate that it is affected by uncontrollable circumstances that preclude it from recovering all its prudently incurred costs under the indexing system."³⁵

³³ I.D., 138 FERC ¶ 63,017 at P 38.

³⁴ I.D., 138 FERC ¶ 63,017 at P 9.

³⁵ Order No. 561, FERC Stats. & Regs ¶ 30,985 at 30,949.

69. Staff states there is no merit to SFPP's claim that it has under-recovered its cost of service from a cost-of-service-based perspective and therefore the Commission should take this into consideration in determining whether SFPP can receive the index-based rate increase. Staff contends that this type of evidence is not permitted to support an index-based rate proposal where the simplified rate review does not consider the pipeline's proof about its underlying base rates or its cost of service. Staff asserts that if SFPP is concerned about under-recovery of its costs, SFPP has the option of filing a cost-of-service-based investigation. The indexing method was specifically designed to avoid the procedure used in a general rate proceeding, namely an exhaustive examination of company-specific costs,

70. Staff asserts that similarly there is no merit to SFPP's exception that the I.D. erred in not permitting SFPP to introduce evidence consisting of a cost of service and revenue analysis that would show that even with the application of the 2011 Index rate increase to its rates SFPP would under-recover its West Line cost of service by over \$9,000,000 in 2011, because that type of data is irrelevant in an index-rate proceeding.

71. Moreover, Staff states, SFPP was allowed to file testimony that refined its cost-of-service analyses for the years 2009 and 2010 in its initial case-in-chief when the ALJ permitted supplemental testimony in light of Opinion No. 511, and then permitted SFPP to file a second round of supplemental testimony.

72. Staff asserts that the proffered evidence failed to show that SFPP qualified for the index-based increase. In support of its position, Staff cites to the evidence introduced at the hearing, namely that SFPP's cost change from 2009 to 2010 was negative 7.7 percent.

73. Staff states that using the same analysis that the Commission used in the Hearing Order, a 7.7 percent cost decrease combined with the proposed index-based rate increase of 6.9 percent would provide SFPP a 14.57 percent revenue increase under its transportation rates. This Staff maintains, clearly would be an unjust and unreasonable increase, so the index rate adjustment should not be permitted.

74. Staff states that there is no merit to the SFPP's exception that the I.D. erred in granting summary disposition based on the finding that SFPP over-recovered its 2010 cost-of-service when SFPP alleges it actually under-recovered its costs in 2010. Staff contends SFPP's argument is irrelevant to challenging a finding that an index-based rate increase unjust and unreasonable. Comparing costs to revenues is irrelevant to an index-based rate increase proposal because this constitutes a cost-of-service-based analysis and is not permissible in index-based rate cases.

75. Staff contends that SFPP has misinterpreted the way the Commission has permitted a pipeline to receive an index-based rate increase even though the pipeline was showing an over-recovery on the face of its FERC Form No. 6 at the time it sought to apply the index. In those cases, Staff maintains, the Commission based its findings that

there was no over-recovery on a comparison between the percentage increase in the pipelines' actual cost of service from one year to the next, based upon the pipelines' FERC Form No. 6, page 700, to the index percentage increase.

76. Specifically, in those cases, the Commission found that application of the index-based increase the pipeline would recover less than the pipeline's increase in costs. Thus, Staff states, in *Belle Fourche Pipeline Co., et al.*, 127 FERC ¶ 61,311, at P 13 (2009) the pipeline's year-to-year cost of service increase was 14 percent compared to the 7.6 percent increase for the index level. In *Calnev Pipe Line, L.L.C.*, 127 FERC ¶ 61,304, at P 4 (2009) (*Calnev*), the pipeline's year-to-year cost of service increase was 19.2 percent compared to the 7.6 percent increase for the index level, and in *SFPP, L.P.*, 123 FERC ¶ 61,317, at P 6 (2008), SFPP's cost increase from 2006 to 2007 on its FERC Form No. 6, SFPP's was \$19.6 million whereas the proposed 5.2 percent index-based increase would produce only an increase of \$7.4 million.

77. In its Brief on Exceptions SFPP had argued that the I.D. did not rely on the proper cost and revenue figures, because the ALJ failed to make certain adjustments, such as using normalized amounts. Staff responds that such cost-of-service-based considerations are irrelevant to an index-based rate adjustment.

78. Staff asserts that the case SFPP cites, *BP West Coast Products LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241 at P 10, does not establish that a pipeline that is under-recovering its cost of service at a time it seeks to apply the index to its rates is automatically entitled to apply the full index to its rates. Staff states that case cannot be cited as precedent because it involved a complaint that application of the index-based rate increase resulted in rate increases so substantially in excess of the pipeline's actual cost increases that the rates were unjust and unreasonable.

79. Staff argues that here SFPP wants the benefits of a finding of under-recovery without any of the risks otherwise imposed by a full cost-of-service hearing where issues such as whether it actually incurred any of its alleged costs. This is not permitted in an index rate increase proceeding. Staff states that pipelines may choose either index-based rate increases or cost-of-service based rates, but not some results-oriented combination of the pipeline's own making.

80. Staff states that the thrust of SFPP's other exceptions is that the I.D. erred in reaching its conclusion because it removed litigation costs from the calculation. Staff asserts that SFPP's reliance on Opinion No. 511 for the proposition that the litigation costs can be ignored is misplaced. Contrary to SFPP's allegations, Opinion No. 511 in no way changed or addressed what costs are to be included on page 700 of SFPP's FERC Form No. 6 for purposes of comparing 2009 costs to the 2010 costs. Rather Opinion No. 511 stated "while SFPP may not permanently embed a litigation recovery surcharge in its *rates*, it may include a limited three-year surcharge to recover reasonable legal costs

of the proceeding in Docket No. IS08-390-000, *et al.* that have been incurred by SFPP.”³⁶ What is important for indexing purposes, Staff contends, is the comparison with the costs on SFPP's FERC Form No. 6 costs.

81. Finally, Staff asserts that SFPP misinterpreted *Magellan Pipeline Company, L.P.*, 115 FERC ¶ 61,276 (2006), as supporting its position that its costs should not include litigation costs. Staff argues this case is inapposite because it addresses recovery of the ULSD charges that only a limited subset of pipelines incur, namely those transporting particular diesel products. Moreover, the holding in *Magellan* addresses whether ULSD costs, which are not industry-wide, should be used in determining the oil pipeline price index. Because pipelines generally incur litigation costs, the ULSD charges at issue in *Magellan* are not comparable. Staff states that SFPP had wide latitude—three rounds of testimony and pleadings—to show the relevance of information other than that found on SFPP's 2009 and 2010 FERC Form No. 6, page 700. But the only adjustments SFPP introduced in any way relevant to this index-based increase were adjustments to update the information that reflect the West Line costs that were at issue in this case. Thus, Staff contends, the I.D. appropriately included litigation costs in comparing SFPP's 2009 and 2010 FERC Form No. 6, page 700.

Discussion

82. Having reviewed the I.D., the Brief on Exceptions and Briefs Opposing Exceptions, the Commission finds that the ALJ properly granted the Motion to Dismiss, and that SFPP is not entitled to apply index-rate increases for the July 1, 2011 to June 30, 2012 period on the West Line. Moreover, we find merit in Staff's Brief on Exceptions and will direct SFPP to refund amounts collected under the index-based rate increases from July 1, 2011 until that index-based increase ends, file a refund report, and cancel its currently effective West Line tariffs that include the 2011 index-rate increase.

SFPP's Exceptions

83. Before addressing SFPP's exceptions we confirm that in this proceeding the requirement for summary disposition under Rule 217(b) was satisfied. Protestors accepted SFPP's factual assertions and there were no material facts in dispute. What is in dispute was the relevancy of certain materials SFPP sought to introduce, and whether the ALJ correctly ruled on the legal issues affecting their admission or exclusion.

84. SFPP's exceptions basically consist of two arguments. The first argument is that the ALJ should have considered evidence of SFPP's 2011 cost-of-service and revenues for the West Line. That evidence, SFPP argues, would show that even after application of the 2011 index-rate increase to the West Line rate, SFPP would have under-recovered

³⁶ *SFPP, L.P.*, 134 FERC ¶ 61,121 at P 37 (2011).

the West Line cost of service by in excess of \$9,000,000. The second argument is that the ALJ improperly included the 2009 and 2010 Docket No. IS08-390-000 litigation costs in applying the cost comparison test. Excluding these costs from the 2009 and 2010 cost figures, SFPP argues, would result in SFPP being entitled to apply the 2011 index-rate increase to the West Line rates.

85. The first argument is not dissimilar from SFPP's Motion to Reopen the Record, in which SFPP sought to have the Commission require the admission of the 2011 West Line cost and revenue data into the record. The Commission denied the motion by order issued July 11, 2012, holding that the evidence SFPP sought to introduce was not relevant to the subject index adjustment proceeding.³⁷ SFPP did not seek rehearing of the July Order, which confirms the comparison methodology to be used to assess index adjustments, and fully supports affirmance of the evidentiary rulings in the I.D.

86. As stated above, in the Hearing Order the Commission found that SFPP's FERC Form No. 6 for the year 2009 and 2010 showed the cost-of-service decreased approximately 4 percent and thus a proposed index-based 6.9 percent increase indicated a divergence of such magnitude that required investigation. This was based on SFPP's revised system-wide FERC Form No. 6. Subsequently, SFPP limited the proposed index-rate increase to the West Line.

87. The July Order stated that indexing cases are streamlined proceedings and are not to delve into cost-of-service issues as a general rate case would. The only relevant evidence in indexing cases is the change in the pipeline's cost-of-service in the two years *preceding* the proposed index rate increase. Thus, any later-developed data is not relevant.

88. In this proceeding, the ALJ applied the usual standard for an indexing proceeding, which is to compare the pipeline's change in costs in the two years prior to the rate index increase year. With the Docket No. IS08-380 litigation costs included, SFPP's revised data, which Protestors accepted, show that SFPP's cost decreased by approximately 7.1 percent from 2009 to 2010. The ALJ found that the disparity between the two was so substantial as to make the proposed index-based rate increase unjust and unreasonable. In its motion to reopen the record and in its Brief on Exceptions, SFPP argues that SFPP's 2011 revenue data would show SFPP would under-recover its West Line costs absent the proposed index-based percentage rate increase so SFPP would be entitled to

³⁷SFPP, 140 FERC ¶ 61,016, P 35 (2012) (July Order) (holding that "ALJ applied the proper standard for an indexing proceeding, which is to compare the pipeline's change in costs in the two years prior to the index increase. . . SFPP now seeks to reopen the record to introduce SFPP's 2011 revenue data to show it would under-recover its costs absent the proposed index-based rate increase. However, those data are not relevant when a shipper challenges an index-based rate change.").

the index-rate increases. In its Brief on Exceptions SFPP argues the ALJ erred that by granting Shippers' motion because that precluded SFPP from introducing the 2011 evidence.

89. In opposition, Shippers and Staff both contend that the proffered evidence for the year 2011 is not relevant to this proceeding and thus there was no error in rejecting the 2011 data. We agree, and in fact the arguments on both sides mirror much of the discussion in the July Order. The July Order explained that the key issue here was what SFPP should include in the cost comparison test, and this turned on whether to include or remove the Docket No. IS08-390 litigation expenses. The ALJ determined that such litigation costs are a component of the pipeline's cost-of-service and must be treated the same as other costs, and could not be removed. Based upon this finding, the ALJ granted the Shippers' motion for summary disposition because SFPP's own calculation showed that with litigation costs included there was an over-recovery of 1.169 percent and therefore "SFPP is not entitled to apply an index rate increase for the July 1, 2011 to June 30, 2012 period."³⁸

90. Here, as in the Motion to Reopen the Record, SFPP argues that the Commission has consistently permitted a pipeline to apply the full index to its rates, regardless of whether the pipeline experienced a cost decrease in the index year at issue if the pipeline can show that it would still likely under-recover its cost-of-service after application of the index to its rates. In support of its contention SFPP cites *Shell Pipe Line Co.*, 102 FERC ¶ 61,350, *Rocky Mountain*, 115 FERC ¶ 61,390; and *BP West Coast Products LLC. V. SFPP, L.P.*, 119 FERC ¶ 61,241.

91. SFPP mischaracterizes these cases. These cases do *not* establish that if a pipeline can show that it is under-recovering its costs at any point, even after the index increase went into effect, it is permitted to automatically apply the index increase to its rates. In fact, the July Order rejected SFPP's interpretation of these cases.³⁹ Rather, as the July Order explained, these cases should be understood as reflecting the Commission's policy that index rate proceedings are to be conducted on a streamlined basis, without regard to the pipeline's subsequent financial data in related cost-of-service cases. A relevant portion of the analysis in the July Order is restated below.

92. In *Shell* a party protested a pipeline's proposed index rate increase on the ground that the index increase was substantially in excess of the pipeline's actual cost increase and therefore should be rejected because the increase would result in unjust and unreasonable rates for that pipeline. The Commission rejected the protest because the protestor was not a shipper on the pipeline, and did not have standing to challenge the

³⁸ I.D., 138 FERC ¶ 63,017 at P 39.

³⁹ July Order, 140 FERC ¶ 61,016 at PP 37-40.

rate index filing. However, the Commission added that even if it were to consider the protest, the pipeline had shown a persisting *under*-recovery of its costs in the three years preceding the proposed increase totaling in excess of \$160 million, and thus the Commission could not conclude that the pipeline's proposed rates with the index rate increase was unjust and unreasonable. That case is inapposite to SFPP's desire to offer evidence of future costs and revenues to justify an index rate increase commencing in 2011, where the record showed over-recovery for the prior 2009-2010 period.

93. In *Rocky Mountain*, the pipeline filed an index rate increase and on the same day, filed a cost-of-service rate increase. The Commission approved the index increase because the pipeline had properly calculated the index-rate increase, and the Commission established a hearing for the cost-of-service filing.⁴⁰ Here, it was the proposed index rate increase was set for hearing. Thus, the existence of a subject-to-refund *Rocky Mountain* cost of service proceeding in conjunction with an approved Rocky Mountain index rate adjustment does not support SFPP's request to introduce in its index proceeding evidence of full calendar year 2011 costs and revenue to justify the 2011 index rate increase. The Commission's streamlined index methodology assesses that proposed rate increase based on 2009-2010 cost comparisons from SFPP's Form No. 6, page 700.

94. Finally, *BP West Coast* is also not comparable to the instant case because it involved intertwined multiple index rate increases with a cost-of-service filing. There, in April 2005, SFPP filed a cost-of-service case in which it designed rates that would become effective on June 1, 2005, with rates that would not recover SFPP's full cost-of-service. SFPP then applied the 2005 index increase to those new rates, effective July 1, 2005, and subsequently applied the 2006 index adjustments as well, effective July 1, 2006. The Commission approved the 2006 index increase simply by comparing SFPP's change in costs as reflected in its prior two years' FERC Form 6 filings, 6.6 percent to the index increase of 6.1485 percent. On rehearing, the Commission affirmed its decision, holding that SFPP would not over-recover its cost of service as set forth in its cost-of-service rate filing, even after applying both the index rate increase and the cost-of-service increase.⁴¹

95. With respect to SFPP's claim of possible revenue shortfalls, Staff responded that using the same analysis that the Commission used in the Hearing Order, SFPP's 7.7 percent cost decrease from 2009 to 2010, combined with the proposed index-based rate increase of 6.9 percent, would provide SFPP a 14.6 percent revenue increase under its transportation rates. We find that this percentage increase would result in unjust and

⁴⁰ *Rocky Mountain*, 115 FERC ¶ 61,390 at PP 16-17.

⁴¹ *BP West Coast Products, et al. v. SFPP, L.P.*, 121 FERC ¶ 61,195, at P 7 (2007).

unreasonable rates, and therefore the subject index rate increase should not be permitted to apply to SFPP's rates effective July 1, 2011.

96. We also find that there is no merit to SFPP's exception that the ALJ erred in basing the grant of summary disposition on use of the Commission's index assessment methodology to find that SFPP over-recovered its 2010 cost-of-service, where SFPP asserts it actually under-recovered its costs in 2010. Comparing costs to revenues in a single year is irrelevant to assessing the reasonableness of an index-based rate increase by a simple comparison of the prior two years' Form No. 6 data. To allow the singling out of particular years insinuates the complexity of a cost-of-service-based analysis into the process, and would allow cherry-picking of particular years both by shippers challenging, and pipelines supporting a particular index adjustment. In sum, it is antithetical to the Commission's simplified method for assessing index adjustments, where the snapshot uses the prior two years Form No. 6 page 700 data.

97. SFPP has also mischaracterized cases where the Commission permitted a pipeline to receive an index-based rate increase even though the pipeline was showing an over-recovery on the face of its FERC Form No. 6 at the time it sought to apply the index rate increase, citing *Belle Fourche Pipeline Co., et al.*, 127 FERC ¶ 61,311 (2009) (*Belle Fourche*), *Calnev Pipe Line, L.L.C.*, 127 FERC ¶ 61,304, and *SFPP, L.P.*, 123 FERC ¶ 61,317. In those cases the Commission consistently based its findings that there was no over-recovery on a comparison between the percentage increase in the pipeline's cost of service from one year to the next, reported on the pipelines' FERC Form No. 6, page 700, to the percent increase for index level. Thus, in *Belle Fourche*, the pipeline's year-to-year cost of service increase was 14 percent compared to the 7.6 percent increase for the index level, *Belle Fourche*, 127 FERC ¶ 61,311 at P 13. In *Calnev*, the pipeline's year-to-year cost of service increase was 19.2 percent compared to the 7.6 percent increase for the index level, *Calnev*, 127 FERC ¶ 61,305 at P 4, and in *SFPP, L.P.*, SFPP's cost increase from 2006 to 2007 was \$19.6 million whereas the proposed 5.2 percent index-based increase would produce an increase of only \$7.4 million, *SFPP, L.P.*, 123 FERC ¶ 61,317 at P 6.

98. This simplified method for assessing filings to implement adjustments is reasonable because, if SFPP or any other pipeline believes that it is under-recovering its cost of service under its existing rates, it has the option to file a full cost-of-service rate increase at any time. Similarly, if shippers believe the pipeline is over-recovering, they can file a complaint to seek relief. The Commission's assessment policy for index adjustment filings is consistent with a simplified rate-setting methodology, and is reasonable given the right to file rate cases. SFPP's other exceptions take issue with the ALJ's ruling that "the IS08-390 litigation costs must be included in SFPP's 2009 and 2010 costs of service for purposes of calculating the year-to-year percentage change in

costs.”⁴² SFPP contends it correctly removed the litigation expense from the percentage change calculations for the years 2009 and 2010 because these were surcharged costs. SFPP adds that it only removed the “surcharged” Docket No. IS08-390 litigation expenses, and it did not remove all litigation expenses, so included in its calculation are all the non-surcharged West Line litigation expenses. The Commission finds there is no distinction between so-called “surcharged” and “non-surcharged” litigation expenses for purposes of the percentage comparison test of the prior two years’ Form No. 6 data.

99. SFPP misreads Opinion No. 511, where SFPP states the Commission ordered SFPP to recover its Docket No. IS08-390 litigation costs through a three-year litigation surcharge calculated separately from SFPP's West Line’s base transportation rates. This, SFPP contends, indicates that the Commission intended that these costs be treated differently from other litigation costs for purposes of assessing its index adjustment filings. SFPP equates the “surcharged treatment” of its Docket No. IS08-390 litigation costs as akin to the Commission’s treatment of ULSD surcharged costs, which are not treated as costs subject to indexing.

100. There is no merit to SFPP's position with respect to the “surcharge” aspect of the Docket No. IS08-390 litigation costs. The fact that the surcharge is not subject to indexing does not transform this proceeding from a streamlined indexing case to a cost of service rate case. The Commission has always included all litigation costs in the calculation of a pipeline’s year-to-year cost changes, even where those litigation costs were collected through a surcharge. ULSD costs were a special case, and did not affect all pipelines and all shippers. Litigation costs, however, are the usual type of costs that all pipelines incur from time to time. All litigation costs are included in a pipeline’s annual costs as reported in Form 6 No. data, which the Commission uses to evaluate challenges to pipelines’ proposed index rate increase filings. The collection of litigation costs through a surcharge is not unusual, and in fact, SFPP collected its litigation costs from prior rate cases through a surcharge.⁴³ The Commission’s generally applicable index percentage captures the changes in industry-wide pipeline costs, and makes no exception for pipeline’s litigation costs.

101. SFPP’s reliance on *Magellan Pipeline Company, L.P.*, 115 FERC ¶ 61,276, as supporting its position that the so-called surcharged litigation costs should not be included is based on a misplaced analogy to ULSD costs. The ULSD product regulations concerned extraordinary and non-industry-wide pipeline costs, whereas litigation costs are incurred by all pipelines from time to time, and affect all shippers. Moreover, the holding in *Magellan* speaks only to whether ULSD costs, which are not industry-wide,

⁴² I.D., 138 FERC ¶ 63,017 at P 38.

⁴³ *SFPP, L.P.*, 113 FERC ¶ 61,277 at PP 94-95; and *SFPP, L.P.*, 121 FERC ¶ 61,240 at PP 105-110.

should be used in determining the oil pipeline index. Because pipelines generally incur litigation costs allocable to their shippers, the ULSD charges at issue in *Magellan* are not comparable. Thus, the I.D. properly included the surcharged Docket No. IS08-390 litigation costs.

102. Nor does the holding in a particular cost-of-service case (e.g., to allow recovery of litigation costs in a surcharge) dictate the process for assessing the reasonableness of an index adjustment. How litigation costs are recovered, whether by surcharge or in rates, is not relevant in an index case. In an index rate proceeding the Commission simply measures the change in all of the pipeline's interstate costs using the Form No. 6 data percentage comparison test, without considering the particular circumstances surrounding any given cost. The fact that the instant index adjustment was set for hearing does not conflate it into a full-blown cost-of-service rate case; the simplified methodology applicable to indexing cases applies here as well.

103. Contrary to SFPP's allegations, Opinion No. 511 in no way addressed what costs are to be included on page 700 of SFPP's FERC Form No. 6 for purposes of comparing 2009 costs to the 2010 costs. Rather, Opinion No. 511 stated "while SFPP may not permanently embed a litigation recovery surcharge in its rates, it may include a limited three-year surcharge to recover reasonable legal costs of the proceeding in Docket No. IS08-390-000, *et al.* that have been incurred by SFPP."⁴⁴

104. We find that the I.D. correctly compared changes in all of SFPP's costs on FERC Form No. 6 including, litigation costs, to changes in all industry-wide costs reflected in the index percentage rate increase, which similarly included litigation costs. In the most recent five-year oil pipeline index review, the Commission examined industry-wide cost changes for the period 2004 to 2009 in formulating the index to be applied for the 2010 to 2015 time period. In the review, the Commission analyzed operating expenses, as reflected on pages 300-303 on FERC Form No. 6, which included litigation costs, set forth in Account 520. The applicable index percentage rate of 6.9 percent for 2011 reflects, in part, changes in industry-wide litigation costs.

105. The purpose of the index rate proceeding is to compare SFPP's cost changes against industry-wide cost changes. SFPP's change in costs must reflect changes in the same costs in order to make a comparison to the index. Accordingly, since the industry-wide cost changes include litigation expenses, all of SFPP's costs, including SFPP's litigation expenses must be used for the comparison. Litigation costs are no different than any other costs, and affect shippers the same as any other costs, regardless of the method by which the pipeline recovers those costs.

⁴⁴ *SFPP, L.P.*, 134 FERC ¶ 61,121 at P 37.

106. SFPP's assertion that in Opinion No. 511-A the Commission intended that litigation expenses collected through a surcharge should be treated separately on FERC Form No. 6 is without merit. Rather, the Commission stated that it would "not address in this proceeding the treatment of the litigation surcharge in the calculation of the Commission's oil pipeline index. The question is more appropriately addressed at the time of the next five-year index review."⁴⁵ Thus, existing policy requires all litigation costs, however recovered, must be included in the costs used in the Form No. 6 "percentage comparison" test for assessing an index adjustment.

107. Accordingly, we affirm the I.D. in granting summary disposition, and confirm that SFPP was not entitled to apply the index percentage increase to its rates commencing July 1, 2011.

Staff's Recommendations

108. Staff urges the Commission to implement the I.D. by requiring SFPP to take certain steps. Staff asks the Commission to order SFPP to:

1. Refund, within 30 days, all of the amounts collected, from July 1, 2011 until the index-based increase ends, under the index-based rate increase the I.D. rejected,
2. File a refund report, and
3. Cancel its currently effective West Line tariffs and reduce the following rates effective July 1, 2011:
 - a. the Watson, CA to Phoenix, AZ and East Hynes, CA to Phoenix, AZ rates by 7.82 cents per barrel,
 - b. the Colton Transmix Facility rates by 6.76 cents per barrel, and
 - c. the Watson, CA to Calnev Pipe Line L.L.C. Colton, CA and East Hynes, CA to Calnev Pipe Line L.L.C. Colton CA rates by 1.78 cents per barrel.

109. The Commission's June 2011 Hearing Order accepted SFPP's index-based rate increase subject to refund, and further Commission order. SFPP did not request rehearing of the refund condition.

⁴⁵ Opinion No. 511-A, 137 FERC ¶ 61,220 at P 50.

110. Staff states that in ruling on Shippers' Motion for Summary Disposition the ALJ held that the sole issue to be adjudicated in this proceeding was whether SFPP's proposed index-based rate increase for its West Line was just and reasonable. Shippers and Staff accepted the accuracy of SFPP's allocations of costs to the West Line, and based upon SFPP's undisputed allocations of its costs and revenues, but including the Docket No. IS09-380 litigation surcharge costs, the I.D. found that SFPP's 2009 and 2010 calculation results in an over-recovery by SFPP.⁴⁶ The I.D. concluded that, as a matter of law, SFPP was not entitled to apply the index-based rate increase it requested, and the proposed index-based rate increase for SFPP's West Line was unjust and unreasonable.⁴⁷

111. The I.D. however, did not address the subject of refund. Staff asserts that under section 1(5) of the Interstate Commerce Act (ICA), a rate that is unjust and unreasonable is prohibited and unlawful. Moreover, Staff asserts under ICA section 15(7) the Commission has authority to order refunds of any rates found not to be justified. Accordingly, Staff requests the Commission to order SFPP to (1) refund, within 30 days, all of the amounts collected via the index-based rate increase (plus interest calculated pursuant to 18 C.F.R. § 340.1(c)(2) (2012)); (2) file a refund report and (3) reduce the existing West Line rates and supersede the currently effective tariffs, pursuant to 18 C.F.R. § 341.5 (2012).⁴⁸

112. SFPP Brief Opposing Exceptions asserts that Staff is wrong to claim that the I.D. erred in not ordering SFPP to make refunds and file a refund report. SFPP contends that section 340.1(c) of the Commission's regulations relied upon by Staff in support of its argument, makes clear that SFPP is only required to pay refunds once the Commission issues a "final order" that finds the rate increase proposed by SFPP is not justified, and such a final order had not been issued when the I. D. was issued. SFPP requests that "the Commission should follow its recent practice of waiting until a final order is issued to require refunds."⁴⁹

113. For the same reason that the I.D. was not a final order, SFPP contends it would have been wrong for the I.D. to order SFPP to cancel retroactively its currently effective West Line tariffs, and to reduce retroactively its West Line interstate rates. Further, SFPP contends that while the Commission has the power under the ICA to order refunds

⁴⁶ I.D., 138 FERC ¶ 63,017 at P 32.

⁴⁷ I.D., 138 FERC ¶ 63,017 at P 39.

⁴⁸ On April 22, 2012, Shippers filed a Brief on Exceptions to Incorporate By Reference Staff's Brief on Exceptions.

⁴⁹ Exceptions at 3.

and reparations where appropriate, there is no provision of the ICA that authorizes the Commission to order a pipeline to file a tariff to become effective retroactively.

114. SFPP proposes that if the Commission decides that SFPP's West Line rates should be reduced, SFPP will file new tariffs that cancel its then-effective tariff, implement new, prospectively-effective rates in those tariffs that are calculated in accordance with the Commission's order, and pay refunds based on the difference.

Disposition

115. The June 2011 Hearing Order accepted SFPP's rate increase for the West Line subject to refund. SFPP acknowledges refunds could be required once there is a final order. This is that final order. Accordingly, we direct SFPP to implement the I.D. and make refunds consistent with the ordering paragraphs below.

The Commission orders:

(A) The Initial Decision is hereby affirmed;

(B) SFPP shall refund, within 30 days of the date of this order, all of the amounts collected, from July 1, 2011 until the index-based increase rejected by this order is eliminated from SFPP's tariff, and file a refund report with the Commission 30 days after refunding these amounts, with interest calculated consistent with the Commission's regulations;

(C) Within 30 days of the date of this order, SFPP shall file revised tariff records to remove the rejected index-based increase from its West Line rates, cancel its currently effective West Line tariffs, and reduce its rates effective July 1, 2011, as follows:

- a. the Watson, CA to Phoenix, AZ and East Hynes, CA to Phoenix, AZ rates by 7.82 cents per barrel,
- b. the Colton Transmix Facility rates by 6.76 cents per barrel, and
- c. the Watson, CA to Calnev Pipe Line L.L.C. Colton, CA and East Hynes, CA to Calnev Pipe Line L.L.C. Colton CA rates by 1.78 cents per barrel.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.