

152 FERC ¶ 61,102
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

BP Products North America Inc.

Docket No. OR15-25-000

v.

Sunoco Pipeline L.P.

ORDER ON COMPLAINT ESTABLISHING HEARING

(Issued July 31, 2015)

1. This order establishes a hearing to address a complaint filed by BP Products North America Inc. (BP) against Sunoco Pipeline L.P. (Sunoco) alleging that Sunoco entered into certain contracts and revised its prorationing policy in an unduly discriminatory manner in violation of the Interstate Commerce Act (ICA). Before addressing the merits of the complaint, the Administrative Law Judge (ALJ) must first resolve a dispute concerning the scope of a protective order requested in this proceeding. To the extent further information is exchanged as a result of the protective order issued by the ALJ, the ALJ should permit the parties to supplement their pleadings accordingly.

Background

2. On April 30, 2015, BP filed a complaint against Sunoco. The complaint seeks remedies from the Commission for Sunoco's actions of executing throughput and deficiency agreements with certain shippers and revising its prorationing policy for its pipeline between Marysville, Michigan and Toledo, Ohio, which together, created a new class of shippers for existing pipeline capacity. BP alleges that Sunoco's actions have resulted in a dramatic decrease in the pipeline capacity available to BP, an uncommitted shipper on Sunoco's pipeline. BP contends that Sunoco's actions are unjust, discriminatory, in direct conflict with long-standing Commission policies, and in violation of Sections 1(4), 1(6) and 3(1) of the ICA.

3. BP requests that the Commission: (1) terminate the agreements entered into between Sunoco and the committed shippers; (2) require Sunoco to employ a prorationing policy that does not unduly discriminate between committed and

uncommitted shippers; (3) require that Sunoco restore BP's historic shipment ratio on the Sunoco system to the level effective immediately prior to the execution of the agreements and tariff changes; and (4) require that Sunoco pay BP an award of \$62,268,671 for damages caused by Sunoco's actions in violation of the ICA.

4. BP requests that certain shipper information in its complaint be treated as confidential and included with its complaint a proposed protective order.

5. On June 2, 2015, Sunoco filed an answer to BP's complaint. Sunoco asserts its prorationing approach is reasonable and consistent with Commission precedent and requests that the complaint be dismissed. As pertinent here, pursuant to 18 C.F.R. § 388.112, Sunoco requests privileged treatment of certain information contained in its filing. Sunoco asserts that portions of the answer and attachments contain information that is sensitive and proprietary, not available to the public, and which, if revealed, could subject Sunoco and its shippers to the risk of competitive disadvantage or other business injury. Sunoco argues that the privileged information is highly confidential pursuant to the proposed protective order included with the answer.

6. Sunoco states its proposed protective order is based on the Commission's Model Protective Order and is the same as the protective order included with BP's complaint, with the addition of the following two paragraphs: (1) Paragraph 22, which is necessary to comply with section 15(13) of the ICA; and (2) Paragraph 23, which provides that certain information that is competitively sensitive among participants in the case may be designated as "Highly Confidential."

7. On June 4, 2015, BP filed a motion in opposition to Sunoco's request for a protective order and proposed certain modifications to Sunoco's proposed Paragraph 23. BP asserts that to determine whether Sunoco's actions were unduly discriminatory or preferential, BP must be able to review and analyze certain information protected under section 15(13) of the ICA relating to nominations, shipment volumes, and capacity allocation on Sunoco's pipeline. BP states that the information which is protected from disclosure under section 15(13) of the ICA would be deemed highly confidential under Sunoco's proposed protective order. BP states that under Sunoco's proposed protective order, only outside counsel and outside consultants would be eligible to review this information.

8. BP states that it has no objection to the information being designated highly confidential and subject to limited disclosure. However, BP asserts that under Sunoco's proposed protective order, outside counsel and outside consultants would be wholly inadequate to fully evaluate the impact of Sunoco's actions on BP without consulting BP's commercial representatives and in-house counsel. BP submits that an outside consultant's review of this material may prove more useful than that of outside counsel, but even so, without input from BP's commercial representatives and in-house counsel,

a consultant's review would lack the necessary context and years' worth of communications between the participants. BP contends that its outside counsel and outside consultants would be severely disadvantaged in litigating this case if they were unable to disclose and discuss those materials designated as highly confidential as those materials are the very essence of the case.

9. On June 8, 2015, Sunoco filed an answer to BP's answer on the protective order issues. While Sunoco has agreed to one of BP's proposed changes subject to a further modification, Sunoco opposes BP's proposed changes to allow certain in-house representatives to have access to the protected material. Sunoco asserts that competitively sensitive information should not be disclosed to in-house personnel of a party's competitors. Sunoco submits that even if it were appropriate to permit certain in-house personnel to review highly confidential material, BP's proposal is too broad. Sunoco asserts that its proposed protective order will not harm BP's ability to litigate its claims.

10. Marathon Petroleum Company (Marathon), and PBF Holding Company LLC and Toledo Refining Company (PBF) filed motions to intervene in the proceeding and answers in support of Sunoco's proposed protective order.

Discussion

11. Based upon the pleadings filed by the parties to this proceeding, it appears that they are at an impasse concerning the scope of the protective order in this proceeding. The merits of BP's complaint cannot be addressed until it is determined what, if any, further information needs to be exchanged by the parties. While the Commission does issue protective orders in proceedings, those protective orders are generally unopposed. The issues raised here are the type of discovery disputes that are generally addressed by an Administrative Law Judge (ALJ). The Commission finds that the most efficient and equitable approach for this complaint is to establish hearing procedures with an ALJ first addressing the threshold issue of the scope of the protective order. To the extent further information is exchanged pursuant to any protective order issued by the ALJ, the ALJ should provide an opportunity for parties to supplement their pleadings for purposes of conducting the hearing established by this order.

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning BP's complaint against Sunoco.

(B) A Presiding ALJ, to be designated by the Chief ALJ within 15 days of this order, shall first address the issue concerning the scope of the protective order requested

in this proceeding, and thereafter establish hearing procedures to address the merits of the complaint including the opportunity for the parties to supplement their pleadings as a result of any information exchanged pursuant to the protective order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.