

154 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enterprise TE Products Pipeline Company LLC

Docket No. OR11-6-001

ORDER DENYING REHEARING

(Issued February 2, 2016)

1. This order denies rehearing of the Commission's order in *Enterprise TE Products Pipeline Co., LLC*, Opinion No. 529, 146 FERC ¶ 61,157 (2014), which found that Enterprise TE Products Pipeline Company, LLC, ("Enterprise TE") failed to meet its burden of showing that it lacked market power.

Background

2. On March 1, 2011, Enterprise TE filed an application for authority to charge market-based rates for transportation of refined petroleum products to three delivery locations: North Little Rock, Arkansas; Jonesboro, Arkansas; and Arcadia, Louisiana (the "Application"). On October 7, 2011, the Commission issued an order setting the matter for hearing,¹ finding that there were significant material issues of fact regarding the composition of Enterprise TE's proposed destination markets and the proposed alternatives available to shippers on Enterprise TE's system.

3. On December 18, 2012, the Presiding Judge issued an Initial Decision.² In the Initial Decision, the Presiding Judge determined that Enterprise TE had failed to meet its burden of showing that it lacked market power in the Little Rock, Arcadia, and Jonesboro destination markets as required to support its application for market based rates.³

¹ *Enterprise TE Products Pipeline Co., LLC*, 137 FERC ¶ 61,027 (2011).

² *Enterprise TE Products Pipeline Co., LLC*, 141 FERC ¶ 63,020 (2012) (Initial Decision).

³ *Id.* P 388.

4. In support of this determination, the Presiding Judge ruled that Enterprise TE's proposed methodology for determining the relevant geographic market and competitive alternatives was flawed.⁴ The Presiding Judge ruled that Enterprise TE's so-called "1-2 percent test," which compared the delivered price of gasoline at the retail level, was "fundamentally flawed because it fails to consider the only price that a pipeline ultimately controls – its transportation rate."⁵

5. The Presiding Judge also ruled that Enterprise TE erred in using branded, instead of unbranded, gasoline in determining competitive alternatives.⁶ Unbranded prices, stated the Presiding Judge, represent prices that provide the maximum amount of substitutability, allowing purchasers to buy from other alternatives in search of a lower-priced product.⁷ Using branded price data, held the Presiding Judge, restricts substitutability because branded products are differentiated products at the wholesale level.⁸

6. On March 5, 2014, the Commission issued Opinion No. 529. The Commission affirmed the Initial Decision, finding that the Presiding Judge correctly determined that Enterprise TE's 1-2 percent test was flawed in that it failed to examine transportation rates.⁹ The Commission further affirmed the Initial Decision's determination that unbranded gasoline should be used to determine competitive alternatives.¹⁰ The Commission ruled that the high degree of substitutability with unbranded gasoline made it appropriate for use in Enterprise TE's market-power analysis.¹¹

⁴ Initial Decision, 141 FERC ¶ 63,020 at P 200.

⁵ *Id.*

⁶ *Id.* P 238.

⁷ *Id.*

⁸ *Id.*

⁹ Opinion No. 529, 146 FERC ¶ 61,157 at P 42.

¹⁰ *Id.* P 49.

¹¹ *Id.*

Rehearing

7. On April 4, 2014, Enterprise TE sought rehearing of two issues decided in Opinion No. 529.¹² The first issue was whether the Commission, in Opinion No. 529, overlooked evidence in the record that Enterprise TE conducted an acceptable transportation rate increase test.¹³ Enterprise TE argues that in his prepared rebuttal testimony, Enterprise TE witness Dr. Schink performed a test demonstrating that Enterprise TE could not profitably increase its proposed transportation rates by 15 percent in the relevant markets.¹⁴ Enterprise TE argues that the Commission, therefore, should grant rehearing and find that Dr. Schink's transportation rate increase test appropriately assesses Enterprise TE's inability to exercise market power in the relevant markets.¹⁵

8. The second issue raised by Enterprise TE on rehearing is whether the Commission was correct in finding that unbranded gasoline prices, as opposed to branded gasoline prices, should be used in the delivered price test.¹⁶ Enterprise TE argues that branded price data provide a more reliable and accurate estimate of the wholesale gasoline prices in this case.¹⁷ Enterprise TE further states that most gasoline sold in its markets is branded gasoline,¹⁸ and that the substitutability of branded gasoline is equal to that of unbranded gasoline.¹⁹

Discussion

9. In Opinion No. 529, the Commission found that no party provided an acceptable methodology for determining competitive alternatives.²⁰ The Commission found that

¹² Request for Rehearing of Enterprise TE, filed April 4, 2014 ("Request for Rehearing").

¹³ *Id.* at 2.

¹⁴ Request for Rehearing at 8, citing Ex. ENT-18 at 51-61.

¹⁵ *Id.* at 12.

¹⁶ *Id.*

¹⁷ Request for Rehearing at 13.

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ Opinion No. 529, 146 FERC ¶ 61,157 at P 41.

Enterprise TE's 1-2 percent test failed by focusing on the delivered price of gasoline and not the price of transportation.²¹ The Commission held that by failing to properly analyze the potential for anti-competitive increases in transportation rates, Enterprise TE failed to meet its burden of demonstrating good alternatives.²²

10. In its application, and throughout the proceeding, Enterprise TE utilized the 1-2 percent test in its attempt to demonstrate the absence of significant market power.²³ Further, Enterprise TE maintained that the 15 percent test was inherently flawed.²⁴ Enterprise TE's 15 percent price test was submitted solely to rebut allegations from Trial Staff and Chevron that Enterprise TE could significantly raise its rates.²⁵ The Commission concurs with the holding of the Initial Decision that Enterprise TE's 15 percent test should be considered as rebuttal evidence and relevant only to the specific allegations of Trial Staff and Chevron.²⁶ The Commission does not allow a company seeking market-based rate authority to fundamentally alter its case-in-chief at the rebuttal stage.²⁷ Ultimately, Opinion No. 529 correctly analyzed Enterprise TE's proposed 1-2 percent test in determining whether Enterprise TE had met its burden of demonstrating it lacked significant market power.²⁸ Enterprise TE's request for rehearing on this issue is denied.

11. In Opinion No. 529, the Commission found that it was appropriate to use unbranded gasoline in Enterprise TE's market-power analysis.²⁹ The Commission agreed with the Initial Decision that while branded gasoline is differentiated on the wholesale level, which lowers the substitutability between products, unbranded gasoline allows for

²¹ *Id.* P 42.

²² *Id.*

²³ Ex. ENT-18 at 24-29.

²⁴ Initial Decision, 141 FERC ¶ 63,020 at P 133.

²⁵ Ex. ENT-18 at 51.

²⁶ Initial Decision, 141 FERC ¶ 63,020 at P 327.

²⁷ *See ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052, at P 54 (2015).

²⁸ Opinion No. 529, 146 FERC ¶ 61,157 at P 42.

²⁹ *Id.* P 49.

purchasers to buy from various alternatives, thereby maximizing substitutability.³⁰ On rehearing, Enterprise TE has not persuaded the Commission to alter this ruling.

The Commission orders:

Enterprise TE's request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ Initial Decision, 141 FERC ¶ 63,020 at P 238, cited in Opinion No. 529, 146 FERC ¶ 61,157 at PP 48-49.