

157 FERC ¶ 61,185  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

BP Products North America Inc.

Docket No. OR15-25-000

v.

Sunoco Pipeline L.P.

ORDER ON INTERLOCUTORY APPEAL

(Issued December 8, 2016)

1. On November 18, 2016, PBF Holding Company LLC and Toledo Refining Company LLC (collectively PBF) filed an Interlocutory Appeal of a ruling by the Presiding Judge made on November 15, 2016 denying highly confidential status to certain PBF information in the exhibits of BP Products North America Inc. (BP) and Commission Trial Staff (Trial Staff), and denying permission to file interlocutory appeal. On November 23, 2016, the Chairman, as motions Commissioner, referred the matter to the full Commission.<sup>1</sup>

2. The Commission remands the matter to the Presiding Judge as discussed below.

**I. Background**

3. This proceeding involves a complaint filed by BP alleging discriminatory and preferential actions by Sunoco Pipeline L.P. (Sunoco) in favor of shippers PBF and Marathon Petroleum Company LP. On August 27, 2015, the then Presiding Judge<sup>2</sup> issued an Order Granting Motion for Adoption of Protective Order (“August 27 Protective Order”). The August 27 Protective Order stated that “[t]his Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant” and that such protection would “remain in effect unless or until specifically

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<sup>1</sup> Notice of Determination by the Chairman, Docket No. OR15-25-000 (November 23, 2016) (Notice of Determination).

<sup>2</sup> At the time, the Presiding Judge was the Honorable Michael J. Cianci, Jr.

modified or terminated.”<sup>3</sup> On March 16, 2016, the Presiding Judge issued a Modified Protective Order addressing the protection of material provided by third parties. The Modified Protective Order stated that a participant or third party “may designate as protected those materials which customarily are treated by the Participant or Third Party as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers or Third Parties to risk of competitive disadvantage or other business injury.”<sup>4</sup>

4. On September 19, 2016, the current Presiding Judge<sup>5</sup> issued her updated Rules for Hearings Conducted before Judge Hurt (“Hearing Rules”). Paragraph 23 of the Hearing Rules states:

[u]nder NO circumstances will an exhibit be moved into evidence that is marked ‘Privileged’ or ‘CEII’ (Critical Energy Infrastructure Information) without designating the exhibit as such on the record, and obtaining approval from the Judge. Any party wishing to proffer ‘protected,’ ‘privileged,’ ‘CEII,’ or any other restrictively-designated material has an EXTREMELY HEAVY BURDEN. Such burden extends not only to proving relevance and materiality, but showing an item is actually privileged. (*See, e.g.*, 18 C.F.R. § 388.112 and Commission Order No. 630.) Instead, I suggest preparing a redacted version that makes your point without including restricted matter.

5. On November 11, 2016, PBF filed a motion arguing that certain of its highly confidential materials should continue to be protected, pursuant to the existing Modified Protective Order.<sup>6</sup>

## **II. Rulings by the ALJ**

6. From November 14, 2016 to November 15, 2016, the Presiding Judge and the parties discussed the treatment of this asserted highly confidential material. After oral argument on the disputed materials, the Presiding Judge held that all of the disputed PBF

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<sup>3</sup> August 27 Protective Order at P 1.

<sup>4</sup> Modified Protective Order at P 2.

<sup>5</sup> The current Presiding Judge is the Honorable Patricia Hurt.

<sup>6</sup> PBF, *Motion of PBF Holding Company LLC and Toledo Refining Company LLC Demonstrating that Highly Confidential Materials Should Continue to be Protected*, Docket No. OR15-25-000 (Nov. 11, 2016).

information in BP's and Trial Staff's exhibits should be public. The Presiding Judge also indicated she was denying any motion for permission to file an interlocutory appeal.

7. On November 17, 2016, the Presiding Judge convened a hearing. PBF disputed proposals by Trial Staff to make certain highly confidential PBF information in Trial Staff's and Sunoco's exhibits part of the public record. After oral arguments from the parties on each of the additional disputed passages, the Presiding Judge held that all of the additional disputed PBF information in Trial Staff's and Sunoco's exhibits should be public. The Presiding Judge again denied PBF's request for permission to take interlocutory appeal.

### **III. Interlocutory Appeal**

8. On November 18, 2016, PBF filed the instant Interlocutory Appeal, seeking Commission review of the bench rulings removing privileged treatment of certain PBF information. Specifically, PBF argues that the Presiding Judge improperly required PBF to meet an "extremely high burden" to prove that each disputed passage would result in specific business or competitive harm.<sup>7</sup> PBF argues that the Commission has previously rejected such a high standard, holding instead that "the test is not whether the party has demonstrated that disclosure would result in actual harm but whether there is evidence supporting the existence of potential competitive injury or economic harm."<sup>8</sup>

9. PBF argues that under the Commission's test, the information at issue should remain privileged. PBF claims that information involving nominations, utilization, and allocations should remain protected.<sup>9</sup> PBF argues that this information may allow competitors "insight into PBF's corporate decision making."<sup>10</sup> PBF further argues that information contained in or referencing PBF's ongoing commercial Throughput and Deficiency (T&D) agreement with Sunoco should continue to be protected.<sup>11</sup> PBF states that such information consists of "particularly sensitive parts of an ongoing commercial PBF contract and may indicate to the market PBF's corporate behavior and analysis."<sup>12</sup>

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<sup>7</sup> Interlocutory Appeal at 8.

<sup>8</sup> *Id.* at 9 (quoting *BP Pipelines (Alaska) Inc., et al.*, Docket No. IS09-348-004, Order on Interlocutory Appeal, at P 24 (June 27, 2011)).

<sup>9</sup> *Id.* at 13-14.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 14-18.

<sup>12</sup> *Id.* at 15.

PBF argues that release of the disputed information will directly impact PBF's negotiating positions in ongoing discussions with other pipelines, to PBF's detriment.<sup>13</sup>

10. PBF acknowledges that the Commission prefers open administrative proceedings.<sup>14</sup> However, argues PBF, the Commission has recognized that in certain situations sensitive business records require confidential treatment throughout the course of Commission proceedings.<sup>15</sup> PBF argues that the public interest of conducting an open hearing does not outweigh the harm to PBF that disclosure would cause.<sup>16</sup> Further, PBF notes that because there is extensive data in this proceeding that remains confidential, publication of the disputed information will not eliminate the need for confidential sessions.<sup>17</sup> PBF maintains that because it has shown a substantial risk of competitive injury or economic harm with respect to the disclosure of the highly confidential material at issue, its legitimate confidentiality concerns outweigh any interest in disclosure.<sup>18</sup>

#### **IV. BP Answer**

11. On November 30, 2016, BP filed an Answer to the Interlocutory Appeal. BP claims that the Presiding Judge appropriately ruled that PBF failed to meet its threshold burden of demonstrating that public disclosure of the disputed information is likely to cause substantial harm to the competitive position of PBF.<sup>19</sup> Further, argues BP, the Presiding Judge's rulings comport with the express provisions of and founding principles associated with the Interstate Commerce Act (ICA).<sup>20</sup>

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<sup>13</sup> For example, claims PBF, its willingness to pay premium rates may result in other pipelines expecting similar premiums. *Id.* at 17.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> *Id.* (citing *Transcontinental Gas Pipe Line Corporation*, 40 FERC ¶ 61,023, at 61,066 (1987)).

<sup>16</sup> *Id.* at 18-20.

<sup>17</sup> *Id.* at 20.

<sup>18</sup> *Id.*

<sup>19</sup> BP Answer at 1.

<sup>20</sup> *Id.*

12. BP states that general and/or aggregated references to PBF's capacity utilization and nomination behavior are not appropriate items for protected or privileged treatment.<sup>21</sup> BP argues that PBF was "completely silent" on whether disclosure of such information was likely to cause substantial harm to its competitive position.<sup>22</sup> Concerning information from PBF's T&D Agreements, BP argues that simply because certain information is contained in an ongoing agreement or contract does not automatically result in such data/information deserving protected/privileged treatment.<sup>23</sup> BP further argues that such information should be public to assure that, consistent with the ICA, pricing discrimination and preferences are not taking place.<sup>24</sup>

#### V. **PBF Answer**

13. On December 5, 2016, PBF submitted an Answer to BP's Answer. PBF argues that the Commission should reject BP's Answer, as it does not add to the record or aid the Commission.<sup>25</sup> PBF argues that the disputed information is not an "aggregate" as claimed by BP but an average, the release of which would cause competitive harm.<sup>26</sup> PBF also disputes that the information in question must be published in the applicable tariff.<sup>27</sup> Finally, PBF states that as BP never claimed the disputed information is necessary for prosecuting the complaint, the only motivation BP has for seeking disclosure is to allow BP personnel access to confidential business information.<sup>28</sup>

#### VI. **Determination by Motions Commissioner**

14. On November 23, 2016, the Chairman, acting as Motions Commissioner pursuant to Rule 715 of the Commission's Rules of Practice and Procedure, determined "that the PBF Holding Company LLC and Toledo Refining Company LLC (PBF) have demonstrated extraordinary circumstances, in accordance with Rule 715(c) (5) of the

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> PBF Answer at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 2-4.

<sup>28</sup> *Id.* at 4-5.

Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715(c)(5) (2016), that make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."<sup>29</sup> Accordingly, the Chairman referred the Interlocutory Appeal to the full Commission.<sup>30</sup> Pursuant to Rule 715(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715(e) (2016), the Chairman stayed the ruling requiring the public release of certain PBF commercial information during pendency of the Interlocutory Appeal.

## VII. Discussion

15. At issue is whether a limited number of documents should continue to have confidential treatment as designated by PBF, or whether they should be made publicly available. While public disclosure is the preferred option, public policy limits disclosure under certain circumstances. The standard for determining whether public disclosure of information should be limited is whether "disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>31</sup>

16. In reaching her decisions on confidentiality, the Presiding Judge required PBF to meet an "extremely heavy burden" of demonstrating a document was actually privileged.<sup>32</sup> At the pre-hearing conference discussing confidentiality, the Presiding Judge stated that for a document to remain confidential, the party must make "not merely an assertion but a showing that it is, indeed, commercially sensitive and needs to be protected."<sup>33</sup> The Presiding Judge characterized the test being used as demonstrating "clearly defined injury that *would* result from the release."<sup>34</sup> At another point, the

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<sup>29</sup> Notice of Determination.

<sup>30</sup> Once the matter is referred to the Commission, under 18 C.F.R. § 715(d) (2016), the Commission must act within 15 days of the referral, or the ruling will be reviewed by the Commission in the ordinary course of the proceeding as if the appeal had not been made, and the Judge's ruling will effectively be upheld.

<sup>31</sup> *BP Pipelines (Alaska) Inc.*, Docket No. IS09-348-004, Order on Interlocutory Appeal, at P 23 (June 27, 2011) (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 282 (D.C. Cir. 1974), vacated on other grounds, 975 F.2d 871 (D.C. Cir. 1992)).

<sup>32</sup> Interlocutory Appeal at 5 (quoting The Rules for Hearing Before Judge Hurt).

<sup>33</sup> Tr. 163:20-22.

<sup>34</sup> Tr. 286:21 (emphasis added), *see also* Tr. 315:24.

Presiding Judge required PBF to identify the injury that was “likely to result from the release of this information.”<sup>35</sup>

17. Because the Presiding Judge may have applied too strict a standard (i.e., she may have required a showing of an actual injury), the Commission will remand the issue to the Presiding Judge to review the disputed information under the appropriate standard described above and determine whether public disclosure is appropriate.

The Commission Orders:

The matter is remanded to the Presiding Judge for disposition based on the standards set forth in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>35</sup> Tr. 287:4-5, *see also* Tr. 292:2-4, 15.