

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Dome Pipeline Corporation

Docket No. IS07-57-001

ORDER DENYING REHEARING

(Issued February 20, 2007)

1. On January 19, 2007, NOVA Chemicals Corporation (NOVA Chemicals) filed a request for rehearing of the Order Accepting Tariffs issued December 29, 2006, in this proceeding (December 29, 2006 Order).¹ In that order, the Commission accepted tariff sheets filed by Dome Petroleum Corporation (Dome) to cancel certain Incentive Volume Rates. NOVA Chemicals argues that the December 29, 2006 Order allows Dome to work a substantial injustice on shippers who relied to their detriment on the promise of favorable rates in the future in return for committing to off-peak movements of product. As discussed below, the Commission denies rehearing of the December 29, 2006 Order.

Background

2. On December 1, 2006, Dome filed tariff sheets² to cancel discount Incentive Volume Rates for transportation on the Eastern Leg of its system in order to finance hydrostatic testing as part of its pipeline integrity management program. Following cancellation of the Incentive Volume Rates, Dome's Regular Volume Rates became effective for movements of propane, ethane, and butane on the Eastern Leg of the

¹ *Dome Pipeline Corp.*, 117 FERC ¶ 61,364 (2006).

² FERC Tariff Nos. 222, 223, and 224. The tariffs provide for the movement of propane, ethane, and butane respectively.

pipeline system. The Regular Volume Rates range from 4.49 percent to 64.45 percent higher than the canceled discount volume rates on a dollar-per-barrel basis.

3. NOVA Chemicals protested the filing, stating that shipments made during April through August were eligible for incentive rates and earned the shippers the right to deliver equal volumes to the same destinations from September through March at the incentive rate. In other words, contended NOVA Chemicals, cancellation of the Incentive Volume Rates would deny the affected shippers of up to half of their bargain with Dome by preventing them from shipping Incentive Credit Volumes through March 2007.

4. In response to NOVA Chemicals, Dome cited its need to conduct hydrostatic testing to maintain the integrity of its system. While Dome stated that volumes and revenues on the Western Leg of Dome's system might be sufficient to provide the requisite financial support for the Western Leg testing, Dome emphasized that substantially lower volumes and revenues on the Eastern Leg would inhibit its testing if the Incentive Volume Rates remained in place.

5. In the December 29, 2006 Order, the Commission accepted the tariffs. The Commission emphasized that, following the cancellation, Dome's effective tariff rates would be within applicable indexed ceiling levels, and that Dome was entitled to take this action under section 342.3 of the Commission's regulations.³ The Commission cited *Shell Pipeline Company LP (Shell)*,⁴ pointing out that a pipeline can choose to offer a discount, but that it is under no obligation to continue the discount. The Commission agreed that, under Dome's tariff, shipping volumes during the April-August period entitled the shippers the right to deliver an equal volume to the same destinations from September through March, but the Commission disagreed that Dome's tariff guaranteed shippers the right to ship the September-March volumes at the discounted rate.

Request for Rehearing

6. On rehearing, NOVA Chemicals raises the following issues:
- a. Whether the Commission erred in determining that the *Shell* decision and section 342.3 of the regulations required the Commission to accept the cancellation of the incentive rates.

³ 18 C.F.R. § 342.3 (2006).

⁴ 100 FERC ¶ 61,139 (2002).

- b. Whether the Commission erred by interpreting Dome's tariff language as permitting it to cancel the Incentive Volume Rates unilaterally and without notice.
- c. Whether the Commission erred by placing on shippers the burden of protecting themselves from cancellation of the Incentive Volume Rates in the middle of the Incentive Credit Volumes period in light of the Commission's obligation to ensure that carriers establish and observe just and reasonable practices under Interstate Commerce Act (ICA) section 1(6).
- d. Whether the Commission erred by not accepting the tariffs subject to refund.

Discussion

7. The Commission denies rehearing. NOVA Chemicals has not demonstrated that the Commission's decision in the December 29, 2006 Order fails to represent reasoned decision-making.

A. Applicability of the Shell Decision

8. NOVA Chemicals contends that the Commission erred in relying on the *Shell* decision. According to NOVA Chemicals, *Shell* did not involve a situation in which shipments made at incentive rates conferred rights to future shipments at incentive rates. Rather, continues NOVA Chemicals, it involved the cancellation of movements of crude oil when the carrier was selling certain assets essential to the physical movements on the relevant section of the pipeline, and on that basis, the Commission permitted the cancellation of the discounted rate. NOVA Chemicals asserts that Dome was only seeking higher revenues during the middle of the incentive period.

9. Moreover, continues NOVA Chemicals, in the *Shell* decision, the Commission apparently relied heavily on its order in *Express Pipeline LLC (Express)*,⁵ where the Commission permitted cancellation of discount joint rates, leaving shippers the ability to ship only under local rates.⁶ Again, NOVA Chemicals maintains that the facts are not comparable to the facts in the instant case. NOVA Chemicals states that, in *Express*, the agreement between the carriers to establish the joint rates was set to terminate on the

⁵ 99 FERC ¶ 61,229 (2002).

⁶ *Id.* at P 8-12.

same date when the carrier proposed to cancel its joint rate tariff; therefore, all parties should have had adequate notice of the proposed cancellation of the rates. However, NOVA Chemicals maintains that Dome's shippers received no notice of Dome's plans to cancel its Incentive Volume Program before they scheduled and paid for shipments during the April through August 2006 period. NOVA Chemicals asserts that, in the absence of such notice, the shippers reasonably relied on Dome's continuation of the Incentive Volume Rates, at least through the conclusion of the Incentive Credit Volumes period. NOVA Chemicals argues that the Commission erred in suggesting that the shippers should have seen the cancellation coming.

10. The Commission concludes that this argument is without merit. The issue is not whether the specific underlying facts of the *Shell* and *Express* cases were precisely the same as those underlying the instant case. The crucial facts in the *Express* case were that the carriers voluntarily offered a joint rate that was a discount from the underlying local rates, and that the Commission concluded that the carriers were not obligated to continue to offer this discounted rate. The Commission recognized that, once the discount ended, the pipeline might charge more, but it could not charge more than the rates established in the individual carriers' tariffs on file with the Commission.⁷ In the instant case, shippers still are protected in that Dome cannot charge them more than its Regular Volume Rates that are on file with the Commission, but they do not have a right to the continuation of a discount that Dome was not obliged to offer in the first instance. Thus, the Commission's decision in this case is consistent with the decision in *Express*.

11. Similarly, the crux of the *Shell* decision is the same as the crux of the instant case. Shell had no obligation to offer a discount, and did not have an obligation to maintain its discounted rates for a particular period. The Commission emphasized in the *Shell* Order that service would continue to be offered under Shell's jurisdictional tariffs, despite the fact that shippers would be subject to a rate higher than the discounted rate.⁸

12. In this case, Dome's tariff provided for a discount, but the tariff nowhere specifies any obligation on Dome to maintain that discount for any specified period. Dome thus could revise its tariff at any time to remove the discount.

⁷ *Id.* at P 10.

⁸ *Shell Pipeline Company, LP*, 100 FERC ¶ 61,139, at P 2, 6 (2002).

B. Section 342.3 of the Regulations

13. NOVA Chemicals criticizes the Commission's reliance on this section of its Regulations, contending that it addresses pipeline proposals to change rates to levels not exceeding the ceiling levels established by section 342.3(d) of the regulations. In this case, states NOVA Chemicals, Dome has not proposed to change its rates, but instead proposed to cancel its incentive rates, but its Regular Volume Rates, which are subject to indexing, remain unchanged.

14. This argument likewise has no merit. Section 342.3 establishes the indexing methodology as one means for a pipeline to change its rates. Subsection (a) allows a carrier to change its rates at any time as long as the resulting rate does not exceed the applicable ceiling level.⁹ That is precisely what Dome has done in this case. Section 342.4 establishes other rate changing methodologies, but Dome has not acted under section 342.4, and it is not required to do so. Specifically, Dome is not attempting to cost-justify rates in excess of its applicable ceiling levels, and it is not seeking market-based rates or the implementation of settled rates in excess of the applicable ceiling levels.

C. Dome's Tariff Language

15. NOVA Chemicals claims that the Commission improperly interpreted the language of Dome's tariff with respect to Incentive Credit Volumes. NOVA Chemicals states that the Commission recognized that the tariff provides that volumes shipped during the April-August period are eligible for the incentive rates in effect, but determined that shipments during the September-March period were eligible for the Incentive Volume Rate only if such rate remained in effect. However, NOVA Chemicals contends that the Commission's conclusion does not follow from the language it quotes from the tariff because the "in effect" language cited by the Commission applied only to the rates applicable during the April-August period, not to the rates applicable to shipments during the September through March period.

16. NOVA Chemicals states that the Commission also erred in finding that the "contractual and tariff incentive arrangement . . . by its terms was terminable at any time." NOVA Chemicals argues that the tariff says nothing about when the incentive rate can be terminated, and it does not grant to Dome any express right "by its terms" to cancel its Incentive Volume Rates "at any time."

⁹ "A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level. . . ."

17. There is no merit to this argument. Paragraph 3 of the December 29, 2006 Order quotes the following language from Dome's tariff rules and regulations:

The total volume shipped during the months of April, May, June, July and August (the incentive volume) shall be eligible for the rate in effect as set forth in Column (B) in the Table of Rates where offered. In addition, delivery of the incentive volume shall earn the Shipper the right to deliver an equal volume to the same destination during the ensuing months of September through March (the incentive credit volume) at the rate set forth in Column (B) of the Table of Rates. Any volumes delivered to a given destination during the months of September through March in excess of the incentive credit volume shall be billed at the Regular Volume Rate contained in Column (A) in the Table of Rates. Notwithstanding the forgoing, any specific incentive volume or incentive credit volume delivered will be subject to the Incentive Volume Rate in effect in Column (B) on the date of said Shipper's Tender (Notice of Shipment), provided said Tender (Notice of Shipment) is made prior to the month of delivery. Where the Incentive Volume Rate is not offered to a particular delivery point then all volumes delivered to this delivery point shall be charged the Regular Volume Rate in all instances.¹⁰

18. The Commission thoroughly discussed this tariff language in Paragraph 16 of the December 29, 2006 Order and is not persuaded by the interpretation urged by NOVA Chemicals. The Commission cannot enforce a tariff provision that is inconsistent with the Commission's regulations. In this case, as discussed above, Dome was under no obligation to keep its Incentive Volume Rates in effect for any particular period of time. When Dome discontinued that rate, as it was entitled to do, NOVA Chemicals' interpretation would require Dome to provide transportation at rates that were no longer on file with the Commission. Dome filed its revised tariff sheets to cancel the Volume Incentive Rates on 30 days notice. Neither the ICA nor the Commission's regulations require a longer notice period.

D. Shippers' Responsibilities

19. NOVA Chemicals next contends that the Commission erred by placing on Dome's shippers the burden of protecting themselves from Dome's attempt to change contract terms unilaterally by canceling its Incentive Volume Rates in the middle of the Incentive

¹⁰ Item 24 of FERC No. 222, Item 20 of FERC No. 223, Item 23 of FERC No. 224.

Credit Volume period. NOVA Chemicals argues that this is fundamentally inconsistent with the Commission's obligation to ensure that carriers establish, observe, and enforce just and reasonable practices under ICA section 1(6). According to NOVA Chemicals, in suggesting that it is powerless to object to a pipeline's unilateral abrogation of a promise embodied in a tariff, the Commission fails to enforce the ICA's prohibition of unjust and unreasonable regulations and practices affecting rates or tariffs.

20. Finally, states NOVA Chemicals, given the substantial concerns raised about whether it was just and reasonable to cancel incentive rates in the middle of the incentive program, the Commission should have, at a minimum, accepted Dome's tariffs subject to refund, pending further consideration of the justness and reasonableness of Dome's proposal. NOVA Chemicals states that refund protection would enable the Commission to place Dome's shippers in the position they would have occupied had the pipeline not unreasonably cancelled its Incentive Volume Rates.

21. This argument also lacks merit. Contrary to NOVA Chemicals' claim, Dome's cancellation of the Incentive Volume Rates applicable to the Eastern Leg of its system does not constitute any sort of unjust, unreasonable, or unduly discriminatory act or practice, as would be the case if Dome cancelled the incentive rates for some shippers shipping under a particular tariff but retained the incentive rates for other shippers utilizing the same movement. NOVA Chemicals cites no precedent that compels the result it seeks. Because Dome's cancellation of the Incentive Volume Rates was consistent with section 342.3(a) of the Commission's regulations, as well as with Commission precedent, the Commission has no authority to suspend the effectiveness of Dome's filing and impose a refund obligation.

The Commission orders:

Rehearing of the December 29, 2006 Order is denied as discussed in the body of this order.

By the Commission. Commissioner Spitzer dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Dome Pipeline Corporation

Docket No. IS07-57-001

(Issued February 20, 2007)

SPITZER, Commissioner, *dissenting*:

The majority denies the request of NOVA Chemicals Corporation (NOVA Chemicals) for rehearing of the Commission's December 29, 2006 order that accepted tariff sheets filed by Dome Petroleum Corporation (Dome) to cancel certain Incentive Volume Rates.

For the reasons articulated in my earlier dissent,¹ I continue to be persuaded by NOVA Chemicals' argument that Dome changed the benefit of its bargain. Indeed, NOVA Chemicals is not arguing that Dome must retain the Incentive Rates indefinitely; rather, it is arguing that Dome must retain the Incentive Rates for the period bargained for (*i.e.*, January – March 2007). I also concur with NOVA Chemicals' argument that the December 29 order may send the “signal that incentive rate provisions are meaningless, because pipelines can offer shippers the right to ship future volumes at incentive rates and then cancel their incentive rates at any time, before shippers can take advantage of their earned incentive volume rate credits.” Rehearing at 13. In sum, I continue to believe that Dome's removal of the Incentive Volume Rates after shippers have acted in reliance upon them is an unjust and unreasonable practice and changes the bargain.

For these reasons, I respectfully dissent.

Marc Spitzer

¹ *Dome Pipeline Corp.*, 117 FERC ¶ 61,364 (2006).