

122 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Western Refining Pipeline Company

Docket Nos. IS08-131-000
IS08-131-001

ORDER ACCEPTING TARIFFS

(Issued March 7, 2008)

1. This order accepts Western Refining Pipeline Company's (Western) tariffs establishing initial rates, and rules and regulations governing the interstate movement of crude petroleum from points in New Mexico and Texas to certain points in New Mexico, to be effective March 10, 2008, as proposed.

Background

2. On February 8, 2008, Western filed FERC Tariff No. 1, the Rules and Regulations tariff governing the interstate movements of crude petroleum at Local and Proportional Rates provided in FERC Tariff No. 2. FERC Tariff No. 2 establishes common carrier service between the origin points of TEPPCO Midland, Texas (Midland), and Lynch, New Mexico; and the destination points of Star Lake and Bisti, New Mexico. Western states that, pursuant to section 342.2(b)¹ of the Commission's regulations, it filed an affidavit stating that a non-affiliated shipper has agreed to the initial rates in FERC Tariff No. 2. The proposed rates are as follows: (1) Midland to Star Lake \$6.9600 per barrel; (2) Midland to Bisti \$7.5744 per barrel; (3) Lynch to Star Lake \$6.0416 per barrel; and (4) Lynch to Bisti \$6.6561 per barrel. Western requests that the tariffs be made effective March 10, 2008.

3. On February 14, 2008, Western filed supplemental tariffs to correct a clerical error on the title page. Western states that the original tariff filings cited the wrong regulation relating to the tariff filing authority. Western states that both tariffs should have cited

¹ 18 C.F.R. § 342.2(b) (2007).

section 342.2(b) rather than section 342.2(a) as the correct tariff authority. Pursuant to section 341.14 of the Commission's regulations, Western requests that it be granted a waiver under section 6(3) of the Interstate Commerce Act (ICA) to file the supplemental tariffs on 24 days' notice in order for the supplements to become effective on March 10, 2008. Western requests short notice in order for the correction supplements to become effective March 10, 2008, concurrent with the effective date of FERC Tariff Nos. 1 and 2.

Protests

4. On February 25, 2008, motions to intervene and protests were filed by Resolute Natural Resources Company and Resolute Aneth, LLC (Resolute); and the Navajo Nation and the Navajo Nation Oil and Gas Company (Navajo Protestors). Resolute and the Navajo Protestors hold oil and gas leases on Navajo Trust Lands and on Bureau of Land Management (BLM) lands in Southeastern Utah. Resolute argues that Western is attempting to use the tariff it filed on February 8, 2008 to secure Commission validation of Western's exercise of market power by illegally preferring its affiliates and discriminating against third parties such as Resolute who seek access to competitive markets for their crude oil. Resolute alleges that the anticompetitive plan of Western and its affiliates consist of four parts: (1) controlling all of the refining capacity in the Four Corners region of the United States; (2) threatening to use its pipeline to supply all of the crude oil required by the refineries of its affiliates and thereby forcing Four Corners producers to accept prices drastically below competitive levels; (3) defining transportation service on the Western system so narrowly that access to any markets other than those controlled by affiliates of Western would not be possible; and (4) charging rates so egregiously high that even if a non-affiliated person had a Commission-established right to transportation on Western, it could not pay such high rates.

5. Resolute argues that the result of this anticompetitive conduct will be likely to reduce long-term production and reserves of crude oil in the Four Corners region. Resolute contends that, to remedy Western's behavior, the Commission should order Western to file cost, revenue, and throughput data necessary to establish cost-based just and reasonable rates. Resolute submits that the Commission should also require Western to provide non-discriminatory, non-preferential transportation services that will permit unaffiliated shippers access to markets other than the market controlled by Western's affiliate.

6. Navajo Protestors similarly argue that the proposed tariff filing by Western is an attempt by Western Refining, Inc., the parent of Western, to preserve its monopsony power over crude oil production and its monopoly power over crude oil refining in the Four Corners region through the unlawful exercise of market power by its subsidiary, Western, in the crude oil transportation business. Navajo Protestors request that the Commission find that Western's proposed tariff filing is deficient, suspend the proposed rates for the maximum period and require Western to justify its rates through a cost-of-

service showing. In addition, the Navajo protestors request that the Commission find that Western is proposing a discriminatory service under its tariff and require Western to offer an exchange or displacement service that would provide producers such as the Navajo Protestors reasonable access to a competitive market and to reduce the minimum shipment and delivery requirements to a reasonable level.

7. Resolute and the Navajo Protestors assert that they will suffer clear economic harm if the sales price they receive from Western Refining is below what could be obtained in a competitive market such as West Texas-Midland. Resolute and the Navajo Protestors contend that this will occur because the rates proposed by Western are prohibitively excessive and are not rates that a rational shipper would agree to in a competitive market. Resolute and the Navajo Protestors speculate that the non-affiliated shipper who agreed to the initial rates may be receiving offsetting compensation in some form. Resolute and the Navajo Protestors submit that in order to obtain a market for their oil they requested exchange service by means of displacement of barrels at Bisti, New Mexico to points on the southern end of Western's system. Resolute and the Navajo Protestors argue that while such service would not require a reversal of flow on Western's system, their request was denied. Navajo Protestors also argue that the requirement of tendering 25,000 barrels for injection at the origin point and a minimum delivery of 12,500 barrels at the destination point are excessive and discriminate against small to-mid-sized shippers and should be reduced. Resolute and the Navajo Protestors argue that in addition to having authority to fashion remedies under the ICA, the Mineral Leasing Act of 1920, 30 U.S.C. Chapter 3A, also gives the Commission authority to remedy the anticompetitive behavior of Western.²

² While the Mineral Leasing Act governs oil pipelines on federal lands and requires them to be operated as common carriers, the enforcement of the act is the responsibility of the Secretary of the Interior and not the Commission. Section 185(r)(5) of the act states:

Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

Western's Reply

8. On March 3, 2003, as permitted by section 343.3(b) of the Commission's regulations,³ Western filed replies to the protests of Resolute and the Navajo Protestors. Western asserts that the protests raises a variety of issues, most of which are irrelevant to whether Western's Tariff Nos. 1 and 2 should be allowed to become effective without suspension. Western states that Resolute and the Navajo Protestors are not shippers, have never been shippers, and do not intend to become shippers on Western. Western submits that none of the crude oil that Resolute and the Navajo Protestors produce moves on Western. Western argues that the protestors have no cognizable interest in Western's rates or its rules and regulations tariff.

9. Western asserts that the focus of the protest is not at all on the service that Western provides, but instead on service that the protestors wish Western would provide. The protestors ask the Commission to require Western to offer some type of "exchange" or buy/sell-type service by which crude oil inventories in New Mexico would be traded for those owned by others in Midland, Texas. Western states that even if Western had legal title to the inventories it transports (which it does not) and could enter into such buy/sell arrangements (which it cannot), the Commission has no authority to require Western to provide such a service. Western submits that the entire point of a real exchange is to avoid physical transportation. Western states that if the arrangement posited by the protestors were to occur, there would be no transportation on Western's pipeline in either direction. Western contends that nothing today prohibits the protestors from entering into exchange agreements with parties that have crude oil in Midland or other markets if they can reach satisfactory economic arrangements with those parties to trade barrels in one location for barrels in the other location.

Discussion

10. In this proceeding, Western has filed initial rates that have been agreed to by a non-affiliated shipper. Resolute and the Navajo Protestors argue that the initial rates are not just and reasonable and request that the Commission direct Western to support the rates through a cost-of-service showing. Resolute and the Navajo Protestors also request that the Commission direct Western to provide exchange or displacement services. Resolute and the Navajo Protestors challenge Western's proposed tariff on the grounds that it is part of a conspiracy to enable Western and its affiliates to exercise market power over crude oil refining in the Four Corners Area.

11. In order to fully understand the arguments of Resolute and the Navajo Protestors it is necessary to describe the various configurations of the Western pipeline system. Resolute and the Navajo Protestors never shipped oil to refineries in Texas but have

³ 18 C.F.R. § 343.3(b) (2007).

solely shipped crude on other pipelines to refineries in New Mexico. In the past, when the Western pipeline system was owned by TexNewMex Pipeline Company, oil flowed in a north-south direction, thus providing producing areas in New Mexico and Utah access to refineries to the south in New Mexico and Texas. The pipeline, however, had been idle for seven years prior to be acquired by Giant Pipeline Company (Giant) in 2005. During that time, Resolute and the Navajo Protestors had been able to command their price for crude oil to feed the New Mexico refineries.⁴ After purchasing the line, Giant refurbished it and, in 2007, placed it back into service moving crude in a south-north direction. Western acquired the pipeline system on May 31, 2007 and maintained the flow of oil on the pipeline in a south-north direction from producing areas in Texas to refineries in New Mexico.

12. Under this situation, Resolute and the Navajo Protestors will no longer be the exclusive suppliers of crude to the New Mexico refineries, which they currently supply via pipelines other than Western's pipeline. Thus, Resolute and the Navajo Protestors are faced with receiving a lower price from the refiners in New Mexico than is reflected in their existing contract with those refineries. However, the price of the oil commodity itself is beyond the Commission's jurisdiction, which relates to oil pipeline transportation.

13. The Commission finds that neither Resolute nor the Navajo Protestors have shown that they have a substantial economic interest in the transportation of crude oil over Western that would warrant them having standing to protest the filing. In sum, Resolute and the Navajo Protestors lack standing because they are not shippers on Western, they do not intend to ship on Western, and they have not made a valid transportation request to Western for shipments. Since Resolute and the Navajo Protestors do not have standing to protest, the Commission finds that Western is not required to file cost, revenue, and throughput data supporting the rate in accordance with section 342.2 of the Commission's regulations.

14. In addition, the Commission finds that the arguments of Resolute and the Navajo Protestors alleging an anticompetitive exercise of market power by Western are speculative and unsupported with respect to oil pipeline transportation services. The protestors' arguments concerning an alleged attempt by Western and its affiliates to

⁴ As Western asserts in its reply to the Navajo Protestors at 4, "[t]hose landlocked New Mexico refineries were otherwise captive to the declining crude oil reserves in the Four Corners region, and subject to the maximum prices charged by crude oil producers in the region, including the two producers that have filed protests in this docket."

control oil refining capacity is beyond the Commission's jurisdiction. The Commission also finds that Resolute and the Navajo Protestors' arguments that they have unlawfully been denied transportation service is without merit. It does not appear that either Resolute or the Navajo Protestors have made a valid request for transportation service on Western. Moreover, what Resolute and the Navajo Protestors characterize as an exchange service that the Commission must require Western to provide appears to be a private contractual arrangement that does not involve pipeline transportation.

15. By using an exchange, Resolute and the Navajo Protestors believe they can obtain a higher price for their oil in Midland while not actually shipping to Midland. The Navajo Protestors state, "shippers and producers . . . will suffer clear economic harm if the sales price they receive from Western Refining is below what could be obtained in a competitive interstate market such as West-Texas-Midland."⁵ Resolute provides this example of an exchange scenario, at footnote 7 of its pleading:

Assume Western has acquired 100 barrels of super sweet crude oil in Midland from TEPPCO and intends to ship them north to Bisti and on to the refineries. Resolute has 100 barrels of the same quality of crude oil available at Bisti. Resolute finds a party, for example Valero, who wants to purchase Resolute's 100 barrels and wants them delivered to Midland. Resolute tells Western that it wants to ship the 100 barrels from Bisti to Midland by exchange. Western simply exchanges, or treats the barrels that it purchased from TEPPCO as now owned by Resolute in Midland and allows Valero to receive those barrels in Midland. At the north end of the pipe, Western exchanges, or treats the Resolute barrels as now owned by Western and those barrels flow to the refineries. Resolute is treated on Western's books as having transported 100 barrels from Bisti to Midland. Western is treated as having transported 100 barrels from Midland to Bisti. No barrels have moved, no electrical energy is expended to pump oil, but Western receives a transportation fee for both phantom shipments. An exchange, of course, depends on their being barrels available at both ends of the pipe. That is not an issue here because if Western were not shipping crude oil up from Midland, there would be adequate demand for Resolute's barrels at the refineries and Resolute would receive a fair price and have no need to ship barrels to Midland.⁶

⁵ Navajo Protestors Protest at 20 (emphasis added).

⁶ It appears that the protestors muddle the distinction between Western, the pipeline, and its refining affiliate, Western Refining. As Western points out in its reply, Western, the pipeline, cannot enter into an exchange with the protestors because it does not purchase crude or take title to any of the crude oil that moves on its line.

16. Resolute provides this detailed example of how it perceives an exchange would work, but fails to acknowledge that since there is no actual movement of oil, there is no transportation involved. The exchange is essentially a private contractual arrangement between the parties exchanging barrels, and thus there is no need to involve the pipeline at all, for there is nothing for the pipeline to do to make an exchange happen. As Resolute itself recognizes, “[f]or Western it would neither need to physically transport the oil nor incur real transportation costs since the transaction is, for Western, an accounting and administrative exercise.”⁷ The Commission fails to see how the protestors can claim that the Commission’s jurisdiction over oil pipelines is involved if the protestors themselves recognize that no transportation would occur with such a transaction.

17. The Commission also rejects Resolute and Navajo Protestors’ claims that they made a valid request for transportation to Western. On February 22, 2008, Resolute and Navajo Protestors sent to Western what they characterize as a transportation service agreement request with Western. The letter is designated Attachment IV to Resolute’s protest. The letter does not even request service based on the terms and conditions, and rates that are being proposed by Western in its tariff filing. At best, its “request” is nebulous. For example, Western is proposing various rates in its tariff but the request states service would be at “[a] negotiated rate not to exceed the currently effective FERC approved tariff rates.” It also states a term of “May 1, 2008 through April 30, 2009, and year to year thereafter,” receipt points described as all “existing and future meter stations measuring receipts and deliveries into or off of Transporter,” and delivery points described as all “existing and future meter stations measuring deliveries off or into Transporter,” including “deliveries by ‘non delivery.’” The request for deliveries by “non delivery” in all likelihood is a reference to an exchange, but the request does not indicate at all how the exchange would be accomplished. Under Resolute and the Navajo Protestors’ own hypothetical example an exchange could be accomplished only if a counter-party in Midland were willing to exchange its barrels with Resolute and the Navajo Protestors’ barrels in Bisti. Resolute and the Navajo Protestors’ do not indicate that they have a counter-party in Midland who has barrels of oil available and is agreeable to an exchange, or even that they are actively pursuing such an arrangement. This is further evidence that Resolute and the Navajo Protestors’ position is no more than speculative and that they are without a substantial economic interest protesting Western’s proposed rates.

18. Accordingly, the Commission accepts Western’s tariffs, to be effective March 10, 2008, as proposed.

⁷ Resolute Protest at 15.

The Commission orders:

(A) Western's FERC Tariff Nos. 1 and 2 are accepted effective March 10, 2008.

(B) The Commission grants waiver of the 30-day filing requirement and accepts Western's Supplement 1 to FERC Tariff No. 1 and Supplement 1 to FERC Tariff No. 2 effective March 10, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.