

135 FERC ¶ 61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

SFPP, L.P.

Docket No. IS11-444-000

ORDER ACCEPTING AND SUSPENDING TARIFF FILING, SUBJECT TO
REFUND, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued June 30, 2011)

1. On May 27, 2011, SFPP, L.P. (SFPP) filed FERC Tariff Nos. 194.1.0, 195.1.0, 196.3.0, 197.1.0, 198.3.0, 199.1.0, and 200.1.0 to implement an index-based rate increase under section 342.3 of the Commission's regulations.¹ SFPP also filed FERC Tariff No. 201.1.0, which contains an Index of Tariffs. SFPP proposes the tariffs be effective July 1, 2011. In this order, we accept and suspend SFPP's tariffs to become effective July 1, 2011, subject to refund. We also establish hearing and settlement judge procedures.

I. The Pleadings

2. SFPP's proposed tariffs would increase its rates effective July 1, 2011 by 6.9 percent on the West, East, North and Oregon Lines as well as increase its Watson Volume Deficiency Charge by 5.6 percent. Motions to intervene and protests were filed by: ConocoPhillips Company (ConocoPhillips) and, jointly, Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., US Airways, Inc., BP West Coast Products LLC, Chevron Products Company, Holly Refining & Marketing Company LLC, Navajo Refining Company, L.L.C., Valero Marketing and Supply Company, Tesoro Refining and Marketing Company, and Western Refining Company, L.P. (collectively, the "Indicated Shippers"). ExxonMobil Oil Corporation (ExxonMobil) filed a motion to intervene and protest one day out-of-time. ExxonMobil's protest incorporates by reference the arguments set forth in the Indicated Shippers' joint protest. On June 20, 2011, SFPP filed a response to the protests.

¹ 18 C.F.R. § 342.3 (2011).

3. The protesting parties assert SFPP's proposed index rate increases are so substantially in excess of the actual cost increases incurred by SFPP that the proposed rates are unjust and unreasonable. In support of this allegation, the protesting parties state that SFPP's Form No. 6 does not show actual cost increases that would justify the proposed rate increases. They note that page 700 of SFPP's Form No. 6 demonstrates SFPP's total interstate cost of service actually decreased by \$6.8 million or 4.5 percent from 2009 to 2010. In comparison, SFPP proposes to increase its transportation rates by 6.9 percent and the Watson Volume Deficiency Charge by 5.6 percent. The protesting parties also assert the decrease in SFPP's cost of service was not offset by a decrease in revenue, noting that the 2010 Form No. 6 shows that SFPP's total interstate operating revenues increased by \$27.9 million or 18.8 percent from 2009 to 2010.

4. Based on reported 2010 interstate cost of service (totaling \$143.3 million) and 2010 interstate operating revenue (\$175.9 million), the protesting parties further allege SFPP is currently substantially over-recovering its cost of service by 22.7 percent. They thus conclude the proposed 6.9 percent rate increase would substantially exacerbate that over-recovery, and this fact requires the Commission to summarily reject SFPP's proposed index-based rate increase. In the alternative, the protesting parties urge the Commission to make the index rate increase subject to refund and set it for investigation and hearing to determine their reasonableness. The Indicated Shippers and ExxonMobil further argue that if the Commission accepts SFPP's tariff filing without further investigation, the Commission must make these index-based rate increases subject to refund because the underlying rates are currently subject to refund and/or review in other proceedings.²

5. In its response to the protests, SFPP argues its proposed index-based rate increase is not substantially in excess of its change in actual costs. In support of this argument, SFPP states it filed an amended 2010 FERC Form 6 which reflects a corrected 2009 total cost of service of \$149,344,961 (compared to the \$150,124,606 originally reported and used by the protesting parties). Thus, according to SFPP from 2009 to 2010, SFPP's cost of service only declined by 4 percent (not 4.5 percent alleged by the protesting parties).

6. SFPP also responded to the protesting parties' argument that allowing SFPP to take the index increase would exacerbate SFPP's alleged over-recovery of \$32.6 million in 2010. SFPP counters that this "over-recovery" argument ignores the reality that revenues in 2010 will be significantly lower once the West and East Line rate

² In support of this position, ExxonMobil and the Indicated Shippers provide citations to support only that the underlying rates on West and East Lines are currently subject to refund citing with respect to the West Line rates, *SFPP, L.P.*, 121 FERC ¶ 61,240 (2007) and *SFPP, L.P.*, 122 FERC ¶ 61,133 (2008) and with respect to the East Line, *SFPP, L.P.*, 128 FERC ¶ 61,214 (2009).

proceedings (Docket Nos. IS08-390-000 and IS09-437-000) are completed. SFPP adds that its grandfathered rates generate a significant portion of the revenue in question and therefore are deemed lawful. Last, SFPP notes that based on Commission precedent, should the Commission find that the proposed index-based rate increase may not be just and reasonable, the Commission should not reject its filing. Rather, the Commission should set the proceeding for investigation and hearing, and hold the hearing in abeyance to allow for settlement judge proceedings.³

II. Discussion

7. The Commission will grant ExxonMobil's late-filed motion to intervene and protest. Granting this late intervention and protest, which was only one day out-of-time, will not disrupt the proceeding or place additional burdens on existing parties.

8. Protests challenging an index-based rate increase are governed by section 343.2(c)(1) of the Commission's regulations, which provides in part:

A protest or complaint filed against a rate proposed or established pursuant to § 342.3 [indexing] of this chapter must allege reasonable grounds for asserting that . . . the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable⁴

9. To maintain the relative simplicity of the oil indexing process, the Commission evaluates a protest to an index-based tariff filing using the data reported in the carrier's FERC Form No. 6, page 700 data in a "percentage comparison test."⁵ The percentage comparison test is a very narrow test that "compare[s] the Page 700 cost data contained in the company's annual FERC Form No. 6 to the data that is reflected in the index filing

³ SFPP Response at 4 (citing *Calnev Pipe Line L.L.C.*, 115 FERC ¶ 61,387 (2006)).

⁴ 18 C.F.R. § 343.2(c)(1) (2011).

⁵ *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082, at P 10 (2010) and *SFPP, L.P., et al.*, 129 FERC ¶ 61,228, at P 7 (2009). The Commission will not consider protests that raise arguments beyond the scope of the percentage comparison test. The Commission will apply a wider range of factors beyond the percentage comparison test in reviewing a complaint against an index-based rate increase. See *id.* P 11 (citing *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 8-9 (2007)).

for a given year with the data for [the] prior year. . . .”⁶ This test is the “preliminary screening tool for pipeline [index-based] rate filings,”⁷ and is the sole means by which the Commission determines whether a protest meets the section 343.2(c)(1) standard.⁸

10. In this case, the protestors challenge SFPP’s index-based rate increases under both the percentage comparison test as well as arguing the rate increase would substantially exacerbate an over-recovery. As noted above, the Commission does not consider “substantially exacerbate” arguments when evaluating a protested index rate filing. Rather, the percentage comparison test is the sole screening tool the Commission applies to determine whether to investigate a protested annual index filing. Accordingly, the Commission rejects the portions of the protests and SFPP’s response that raise or address the “substantially exacerbate an over-recovery” arguments.

11. Turning to the percentage comparison test, SFPP’s revised FERC Form No. 6, as filed on June 17, 2011, shows a total cost of service decrease between 2009 and 2010 of approximately 4.0 percent.⁹ A 4 percent decrease in costs combined with the proposed index-based rate increase of 6.9 percent for all the transportation rates would still provide

⁶ *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082 at P 10; *BP West Coast Products, LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261, at P 8 (2007). The percentage comparison test compares proposed changes in rates against the change in the level of a pipeline’s cost of service.

⁷ *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, 59 Fed. Reg. 59,137 (November 16, 1994), FERC Stats. & Regs. ¶ 31,006, at 31,168, *order on reh’g*, Order No. 571-A, 69 FERC ¶ 61,411 (1994).

⁸ *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 6 (2007) (“[T]he Commission uses a percentage comparison test in the context of a protest to an index-based filing to assure that the indexing procedure remains a simple and efficient procedure for the recovery of annual cost increases. [Footnote omitted.] This screening approach at the suspension phase is a snap shot approach that avoids extensive arguments over issues of accounting accuracy and rate reasonableness within the time limits available for Commission review, and highlights the simplicity of the filing procedure. It also precludes the use of the protest procedure to complicate what should in most cases be merely a price adjustment that is capped at the industry’s average annual cost increases.”).

⁹ SFPP’s revised FERC Form No. 6, page 700 reports a total cost of service for 2009 of \$149,344,962 and \$143,336,577 for 2010, a decrease of \$6 million, which represents a 4.0 percent decrease.

SFPP an approximately 10.9 percent revenue increase under its transportation rates.¹⁰ The Commission previously found this magnitude of a divergence between the pipeline's change in costs, as expressed in percentage terms, and the proposed rate increase raises an issue of reasonableness that the Commission will investigate.¹¹

12. In *Calnev*, the pipeline proposed an index-based rate increase of 6.15 percent, but had experienced a 4.8 percent cost decrease, which would have resulted in a 10.95 percent increase in revenue if the Commission allowed the index increase. The Commission concluded *Calnev's* proposed index increase may be so substantially in excess of its change in actual costs that the proposed rate may be unjust and unreasonable such that it was appropriate to set the matter for hearing. The *Calnev* case is directly on point in that the percentage increase in revenue that SFPP would experience if allowed the index-based rate increase is almost identical to the percentage increase at issue in the *Calnev* case (10.9 percent versus the 10.95 percent in *Calnev*). Accordingly, we find that SFPP's proposed index-based rate increases may be so substantially in excess of its change in actual costs that the proposed rates may be unjust and unreasonable. Based on this finding, the Commission accepts SFPP's tariff records for filing and suspends them, to become effective July 1, 2011, subject to refund and hearing.

13. The Commission consistently encourages parties to resolve disputes of this nature through settlement, and believes that formal settlement procedures may lead to a resolution of this case. Therefore, the Commission will hold the hearing in abeyance pending the outcome of formal settlement procedures in this matter.

The Commission orders:

(A) SFPP's FERC Tariff Nos. 194.1.0, 195.1.0, 196.3.0, 197.1.0, 198.3.0, 199.1.0, 200.1.0, and 201.1.0 are accepted and suspended and made effective July 1, 2011, subject to refund and further order of the Commission.

(B) Pursuant to the authority contained in the Interstate Commerce Act, particularly sections and 15(1) and 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by SFPP's tariff filing.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to

¹⁰ SFPP proposes a 5.6 percent increase for the Watson Volume Deficiency Charge, so SFPP would experience an approximately 9.6 percent revenue increase with respect to that charge.

¹¹ See *Calnev Pipe Line, L.L.C.*, 115 FERC ¶ 61,387, at P 10-11 (2006) (*Calnev*).

appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.