137 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enterprise TE Products Pipeline Company LLC Docket No. OR11-6-000

ORDER ON APPLICATION FOR
MARKET POWER DETERMINATION AND ESTABLISHING HEARING PROCEDURES

(Issued October 7, 2011)

1. On March 11, 2011, Enterprise TE Products Pipeline Company LLC (Enterprise TEPPCO) filed an application for authority to charge market-based rates for the transportation of refined petroleum products to the following three delivery locations: Little Rock, Arkansas; Arcadia, Louisiana; and Jonesboro, Arkansas. As discussed below, the Commission finds that there is an issue of whether Enterprise TEPPCO is barred by a prior settlement from filing for market-based rates for Little Rock and Arcadia. In addition, there are significant material issues of fact regarding the composition of the destination markets and quality of alternative options for shippers. Accordingly, the Commission sets all issues raised by the filing for hearing.

## I. Background

2. Enterprise TEPPCO is a common carrier petroleum products pipeline subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA). Enterprise TEPPCO transports various natural gas liquids (NGL) and refined petroleum products from Baytown, Texas and other origins, to various destinations between Texas and New York. The Enterprise TEPPCO pipeline system exits the origin market at Beaumont, Texas on 20-inch and 14-inch pipelines. The 20-inch line extends northeastward from Beaumont all the way to Ohio. The 14-inch line transports refined products to El Dorado, Arkansas. At El Dorado the 14-inch line feeds into a 16-inch line that terminates at Seymour, Indiana.

3. Enterprise TEPPCO explains that its predecessor, TE Products Pipeline Co., L.P. (TE Products) previously filed for market-based rate authority at all of its receipt and delivery locations.[1] Parties protested the application and the Commission set the matter for hearing. TE Products and the protesting parties later reached a settlement[2] which gave TE Products market-based rate authority for its origin markets and some of it destination markets. The settlement excluded TE Products from receiving market-based rate authority at the Little Rock and Arcadia destinations. Enterprise TEPPCO states the Jonesboro destination has not been approved for market-based rates because it was not a delivery location on the TE Products system.

## II. Description of the Filing

4. Enterprise TEPPCO asserts that operating under the Commission's indexing procedures and cost-of-service alternatives constrain its ability to respond appropriately to the market forces in the destination markets. Enterprise TEPPCO states market-based rate authority at the destination markets would allow it to gain flexibility in setting refined products rates. Enterprise TEPPCO claims that competitive situation for the Little Rock and Arcadia destination markets has substantially changed enough since the 1999 Application to warrant extending market-based rate authority.

5. Enterprise TEPPCO defines the relevant product market as the transportation and delivery of all pipeline-able refined petroleum products, which include motor gasoline, distillates (diesel fuel and No. 2 home heating oil), and jet fuel.

### A. Origin Market

6. Enterprise TEPPCO states the origin markets for deliveries into the Little Rock, Arcadia, and Jonesboro destination markets are the US Gulf Coast and El Dorado. Enterprise TEPPCO continues that the Little Rock and Jonesboro also have Shreveport, LA as an origin. The US Gulf Coast Origin Market contains all the refineries located in the area extending form Corpus Christi, Texas to Lake Charles Louisiana. Enterprise TEPPCO received authority to charge market-based rates from these origins in 2001.[3]

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[1] May 11, 1999 Application of TE Products Pipeline Company L.P. for Authority to Charge Market Based Rates, Docket No. OR99-6-000 (1999 Application).

[2] *See TE Products Pipeline Co., LP.*, 95 FERC ¶ 61,108 (2001) (*TEPPCO*) .

[3] *See TEPPCO.*

## B. Destination Markets

7. To determine the Enterprise TEPPCO's market power in the destination markets, first the size of the geographic market must be determined. Enterprise TEPPCO proposes a 125-mile radius around the Little Rock, Arcadia and Jonesboro delivery locations, which the Commission has found to be acceptable in sparsely populated areas, such as the ones under consideration here. Enterprise TEPPCO's expert witness, Dr. George R. Schink, calculates a delivered price test for gasoline for each county within the 125 mile radius around each of the three proposed delivery locations. Based on Dr. Schink's analysis, Enterprise TEPPCO deemed all truck deliveries from a terminal location to a county as cost effective if the delivered price for gasoline for the location to the largest/central city of the county was no more than 1 or 2 percent higher that the lowest delivery price from all potential supply sources. The competitive suppliers in the three destination markets include: local refineries, pipelines supplying truck terminals, and barges supplying terminals.

8. To determine Enterprise TEPPCO's market power in the destination markets, Dr. Schink calculates market shares and Herfindahl-Hirschman Indexes (HHI)[4] of market concentration for all three destinations. The data compiled to calculate market power include the level of local consumption and the capacity of Enterprise TEPPCO and other pipelines to bring refined petroleum products in to the market. Enterprise TEPPCO describes the HHI and market share for the movement of petroleum products into the market using two different methodologies: (1) effective capacity; and (2) adjusted capacity.

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[4] HHI measures the likelihood of a pipeline exerting market power in concert with other sources of supply. One derives an HHI by squaring the market shares of all the firms competing in a particular geographic market and adding them together. The HHI can range from just above zero, where there are a very large number of competitors in the market, to 10,000, where a monopolist only serves the market. A high HHI indicates significant concentration. This means that a pipeline is more likely to exercise market power either unilaterally or through collusion with rival firms in the market. The HHI figures of 1,800 and 2,500 or lower are indicators typically used by pipelines applying for market-based rate authority to reflect what they consider is an accurate depiction of tolerable levels of concentration based on the Department of Justice and Federal Trade Commission *1992 Horizontal Merger Guidelines*. A threshold of 1,800 would be met if a market were served by between five and six equally sized competitors. The 2,500 threshold would indicate a market served by four equally sized competitors.

9. The first methodology, effective capacity, is defined as the lesser of a pipeline's or refiner's capacity and the consumption of the refined petroleum products within the destination market. The second methodology used by Enterprise TEPPCO is the Department of Justice's (DOJ) *Oil Pipeline Deregulation Study* method, or adjusted capacity, which assumes each supplier has an equal probability of making a delivery into the market, regardless of the size of its pipeline or refinery. Theoretically, each supplier captures an equal share of demand. If each supplier has the capability of supplying an equal share, then one can assign each supplier a capability to supply this amount. However, if a supplier does not have the capacity to supply an equal share, then one assigns each of the remaining pipelines, an equal amount of product above the subject supplier's maximum capacity.

10. In addition, Enterprise TEPPCO calculates the excess capacity ratio, or the total effective capacity divided by total consumption of pipelineable refined products in the destination market.

11. For the proposed Little Rock, Arcadia, and Jonesboro destination markets, based on the 1 and 2 percent delivered price tests, Enterprise TEPPCO states the alternative supply sources include the following:

| Little Rock | Arcadia | Jonesboro |
|---|---|---|
| Refineries: | Refineries: | Refineries: |
| El Dorado, AR (Lion Oil) | El Dorado, AR (Lion Oil) | El Dorado, AR (Lion Oil) |
| Memphis, TN (Valero) | Memphis, TN (Valero) | Memphis, TN (Valero) |
| Shreveport, LA (Calument) | Shreveport, LA (Calument) | |
| Tyler, TX (Delek) | Tyler, TX (Delek) | |
| | | |
| Inbound Pipelines: | Inbound Pipelines: | Inbound Pipelines: |
| Center, TX (Sunoco) | Center, TX (Sunoco) | Fort Smith, AR (Magellan) |
| Fort Smith, AR (Magellan) | Fort Smith, AR (Magellan) | Mt. Vernon, MO (ConocoPhillps) |
| Mt. Vernon, MO (ConocoPhillps) | Rogers, AR (TransMontainge) | Rogers, AR (TransMontainge) |
| Rogers, AR (TransMontainge) | Waskom, TX (Sunoco) | Springfield, MO (Magellan) |
| Springfield, MO (Magellan) | | |
| Waskom, TX (Sunoco) | | |
| | | |
| Barges: | Barges: | Barges: |
| Arcadia, LA | Arcadia, LA | Cape Girardeau, MO |
| Cape Girardeau, MO | Greenville, MS | Greenville, MS |
| Greenville, MS | Little Rock/Pine Bluff, AR | Little Rock/Pine Bluff, AR |
| Little Rock/Pine Bluff, AR | Memphis, TN | Memphis, TN |
| Memphis, TN | Vicksburg, MS | Vicksburg, MS |
| Vicksburg, MS | | |

12. The table below summarizes Enterprise TEPPCO's HHI, market share, and excess capacity ratio analyses.

**1% and 2% Delivered Gasoline Price Criteria**

Table 1.

| | 1% Delivered Price Criteria | | | 2% Delivered Price Criteria | | |
|---|---|---|---|---|---|---|
| | Little Rock | Arcadia | Jonesboro | Little Rock | Arcadia | Jonesboro |
| Effective Capacity HHI | 2,136 | 1,914 | 1,201 | 1,289 | 1,588 | 1,354 |
| Adjusted Capacity HHI | 2,094 | 1,408 | 921 | 1,190 | 1,261 | 1,148 |
| Effective Capacity-Based Market Share | 34.7% | 27.7% | 22.0% | 24.9% | 22.3% | 16.7% |
| Excess Capacity Ratio | 1.78 | 3.62 | 4.54 | 2.37 | 2.45 | 2.18 |

13. Enterprise TEPPCO notes the recent entry of new competitors in the destination market and the excess supply capacity. Indeed, Enterprise TEPPCO claims that the new entrants—through the expansion of refinery or pipeline capacity—illustrate that there are no serious barriers to entry and, therefore, act as a very real constraint on Enterprise TEPPCO's behavior. The excess supply capacity, Enterprise TEPPCO continues, has the same effect as new entrants because competitors can expand output almost instantaneously. Furthermore, Enterprise TEPPCO argues the barge and tanker industry is very competitive with fairly low barriers of entry and exit.

## III. Interventions and Protests

14. Pursuant to section 348.2(g) of the Commission's regulations, interventions or protests to Enterprise TEPPCO's application were required to be filed by May 4, 2011. On April 29, 2011, Lion Oil Company (Lion) and Chevron Products Company (Chevron) (collectively, "protestants") submitted requests for summary disposition and protests. On May 16, 2011, Enterprise TEPPCO filed an answer to the motions for summary disposition. Lion filed reply comments to Enterprise TEPPCO's answer on May 31, 2011. On June 6, 2011, Enterprise TEPPCO responded to Lion's comments.

### A. Lion's and Chevron's Protests

15. In their protests, Lion and Chevron request summary disposition of Enterprise TEPPCO application for the Little Rock and Arcadia delivery points. Lion and Chevron state the settlement Enterprise TEPPCO's predecessor, TE Products, entered into precludes Enterprise TEPPCO's ability to request market-based rate authority at the Little Rock and Arcadia destination points. Specifically, the settlement required TE Products to withdraw its application for these delivery points and provided that "[TE Products']

future rates for the Little Rock destination market and the Arcadia destination in the Shreveport/Arcadia destination market will be governed by the provisions of 18 C.F.R. § 342." Lion and Chevron argue since the settlement does not limit the term "future rates," the term must be held at face value and enforced as such.

16. Lion and Chevron also request the Commission summarily deny Enterprise TEPPCO's application, based on analytical tests that the Commission rejected in *Mobil Pipe Line Company*, 133 FERC ¶ 61,192 (2010) (*Mobil*), at all three of the destination points proposed by Enterprise TEPPCO. Lion and Chevron claim Enterprise TEPPCO overstates the competitive alternatives that are available to the destination market and fail to provide the facts necessary to measure market power. Enterprise TEPPCO's application relies on 1-2 percent small but significant non-transitory increase in price (SSNIP) of wholesale prices as the basis for its market power analysis. Lion and Chevron refer to the Commission's decision in *Mobil* rejecting the 1-2 percent price test in favor of defining SSNIP as a 15 percent increase in the prevailing transportation rate. The Commission noted in *Mobil* that the 1-2 percent price criteria improperly links the transportation rate with the commodity price, which would allow for massive price increases because the transportation costs are only a small portion of the overall delivered price.

17. Lion and Chevron state Enterprise TEPPCO's use of the 1-2 percent test overstates the geographic footprint and presence of competitive alternatives, thus the calculations of market share and market concentration are incorrect. Both Lion and Chevron refer to an analysis performed by their expert witness, Dr. Daniel S. Arthur, to illustrate the effect of altering the SSNIP criteria. Under Enterprise TEPPCO's methodology, Dr. Arthur, shows that the transportation rate for petroleum products delivered from El Dorado to Little Rock could increase 90-179 percent (from $0.961/barrel to $1.8212 and $2.681, respectively) because of the effect the commodity price has on the wholesale price. In contrast, Dr. Arthur continues, if the SSNIP criteria were based on a 15 percent increase, the price per barrel would be $1.105.

18. In addition to questioning Enterprise TEPPCO's SSNIP test, Lion and Chevron state the delivered price analysis preformed by Dr. Schink contains three flawed assumptions and should be summarily dismissed as a result. The three flaws are the following: (1) using branded gasoline price data instead of unbranded gasoline price data to compute the delivered price; (2) reliance on trucking prices that are unrealistically low and unsupported; and (3) failure to account for capacity constraints on alternative pipelines.

19. Dr. Arthur recalculates the HHI statistics for the Little Rock destination market with the revised 15 percent SSNIP methodology and adjusting for the three assumptions made in Enterprise TEPPCO's application. Dr. Arthur estimates the effective capacity HHI for Little Rock is 6,911 and the excess capacity ratio is 1.21. Dr. Arthur explains

that he is unable to calculate the HHI statistics for Arcadia and Jonesboro because of insufficient unbranded price data, but expects a significant increase in the HHI calculations in those destinations as well.

20. In the event that the Commission does not summarily deny Enterprise TEPPCO's application, the protesters request that the Commission set all of the issues raised by the application for hearing.

### B. Enterprise TEPPCO's Response

21. Enterprise TEPPCO asserts there is no basis for the Commission to summarily dismiss its market-based rates application for several reasons. First, Enterprise TEPPCO states neither Lion nor Chevron has shown that it has any economic interest in the Jonesboro destination or put forward alternative market power measure to rebut the application. Second, Enterprise TEPPCO argues that since Dr. Arthur's testimony does not include any calculation of alternative market power measures for Arcadia, the protesters fail to rebut Enterprise TEPPCO's findings. Third, for the Little Rock destination, Enterprise TEPPCO concedes that the protesters raise factual allegations regarding the market and a further investigation may be necessary, but it does not warrant a summarily dismissal. Fourth, Enterprise TEPPCO contends the prior settlement agreement does not bar it from seeking market-based rates in Little Rock and Arcadia. Enterprise TEPPCO argues that the regulatory provision cited in the settlement allows the use of oil pipeline rate methodologies and procedures generally, which Enterprise TEPPCO asserts includes future applications for market-based rates; thus, the normal panoply of rules governing pipeline rate changes would apply for the future. Enterprise TEPPCO claims the purpose of the settlement with respect to the Little Rock and Arcadia destinations was to restore the regulatory *status quo* as though no application for the destinations had ever been filed. Enterprise TEPPCO therefore concludes it is permitted at some future time from the settlement's restoration of the *status quo* to change the rates for Little Rock and Arcadia by any means delineated in the Commission's regulations, including an application for a determination that it lacks market power (even for the destinations for which this *status quo* was restored). [5]

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[5] The Commission finds that this position -- that no "future" filing under the Commission's oil pipeline regulations was barred by the settlement, would have allowed the pipeline to re-file an application for a market power determination for Little Rock and Arcadia the very day after the settlement was signed. In other words, the protests and Enterprise TEPPCO's answer raise these questions: (1) if the settlement did contemplate such a "future" filing, when could the pipeline and parties reasonably have intended this "future" to begin; and (2) alternatively, how should the settlement be construed if there

(continued…)

22. With regard to the three flaws – branded gasoline, trucking costs, and capacity adjustments – highlighted by the protesters, Enterprise TEPPCO submits these arguments raise factual issues that do not provide a basis for summary dismissal and that the claims are without merit. Enterprise TEPPCO states the use of branded gasoline price data is appropriate since it accounts for the majority of the gas sales in the United States and the unbranded gasoline data at the relevant terminals was sporadic and unreliable. Enterprise TEPPCO asserts Dr. Arthur's trucking cost are also not appropriate because the quote that he relies on were provided in April 2011, which is several months after the July 2009 through June 2010 period used to measure gasoline prices and does not take into account the increase in fuel prices during the period. Finally, Enterprise TEPPCO states the capacity adjustments made by Enterprise TEPPCO is fully consistent with prior Commission precedent.[6]

### C. <u>Lion's Response to Enterprise TEPPCO's Answer</u>

23. Lion's response to Enterprise TEPPCO's answer focuses on two arguments: (1) the settlement bars Enterprise TEPPCO's application for market-based rates in Little Rock and Arcadia, and (2) the Commission's decision in *Mobil* outlines the methodology for classifying good competitors. First, Lion contends the comments in support of the governing settlement filed by Commission Staff, TE Products, and Lion undercut Enterprise TEPPCO's interpretation presented in this proceeding. For instance, Commission Staff commented that the rates in Little Rock and Arcadia would remain cost-based under the indexing system. Lion also asserts Paragraph 1 of the settlement established that rates would be recalculates to conform to the Commission's maximum rate ceiling and states the intention of the parties is that the indexing methodology would govern for the future. As such, Lion contends Enterprise TEPPCO's current understanding of the settlement cannot be reconciled with the intent of the settling parties. Lion asserts the Commission must interpret the settlement as a whole, and cannot read the terms of the settlement in a manner that renders and portion meaningless.

24. Second, Lion explains Enterprise TEPPCO's entire application rests on an SSNIP calculation that the Commission rejected in *Mobil* and that a plain reading of *Mobil* shows no intent by the Commission that the decision should be only narrowly applied to crude oil pipelines in origin markets. Lion contends *Mobil* clarifies that when a pipeline seeks market-based rate authority it must use an SSNIP that is tied to the transportation rate; otherwise, a pipeline with the ability to impose and sustain a price

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was no meeting of the minds on such a future market-power application, such that the pipeline believed this future lay open to it, while the other parties did not.

[6] *See Explorer Pipeline Company*, 87 FERC ¶ 61,374, at 62,391 (1999).

increase could nonetheless appear to lack market power. In addition, Lion claims Enterprise TEPPCO's assertion that the use of the 1-2 percent delivered price test is fully consistent with Commission precedent relies on orders that pre-date the *Mobil* decision; which is the guiding determination. Lion also asserts Enterprise TEPPCO makes numerous misstatements regarding Dr. Arthur's affidavit. In particular, Lion notes Enterprise TEPPCO admonished Dr. Arthur's analysis for not including HHI indicators for Arcadia and Jonesboro; however, Dr. Arthur stated that discovery would be necessary to obtain information to adequately calculate the HHI statistics.

### D. Enterprise TEPPCO's Answer to Lion's Response

25. Enterprise TEPPCO's answer reiterates its claim that the settlement does not limit the rate changing methodology to indexing the rates, but also allows for market-based rates under 18 C.F.R. § 342. Enterprise TEPPCO also counters Lion's contention stating that the comments related to the settlement provide do not undermine applying the plain meaning of the agreement and it is not necessary to infer the intent of the settlement. Furthermore, Enterprise TEPPCO continues, nothing in the comments prohibit it from using other rate changing methodologies permitted under 18 C.F.R. § 342. Finally, Enterprise TEPPCO rejects Lion's assertion that if Lion interpretation is not adopted the settlement would be rendered meaningless. Enterprise TEPPCO states the purpose of the settlement was to restore the regulatory *status quo* with regard to Little Rock and Arcadia, not to permanently restrict its ability to use alternative rate changing methodologies.

## IV. Discussion

26. Section 348.1(c) of the Commission's regulations requires an oil pipeline seeking a market power determination and authority to charge market-based rates to: (1) define the relevant product and geographic markets, including both destination and origin markets; (2) identify the competitive alternatives for shippers, including potential competition and other competition constraining the pipeline's ability to exercise market power; and (3) compute the market concentration and other market power measures based on the information provided about competitive alternatives.[7]

27. Lion and Chevron have raised several issues of material fact concerning the proper geographic market, competitive alternatives, and the validity of the market concentration and market power measures submitted in Enterprise TEPPCO's application for market-based rates. In addition, Lion and Chevron question whether Enterprise TEPPCO can apply for market-based rates in Little Rock and Arcadia under the terms of

[7] 18 C.F.R. § 348.1(c) (2011).

the prior settlement. The language in the agreement and its intent are ambiguous with regard to both the time frame in which the agreement governs and the limits placed on Enterprise TEPPCO ability to use rate changing methodologies other than indexing. Accordingly, the Commission sets all issues raised in this proceeding for hearing.

28. Due to the nature of the protests, the hearing will need to be a two-step process. In the first-step it is necessary to determine whether the settlement bars Enterprise TEPPCO from obtaining market-based rate authority in the Little Rock and Arcadia destination markets. If it is determined that the settlement does not bar Enterprise TEPPCO from the Little Rock and Arcadia destinations, then the issues of material fact raised by Lion and Chevron in all three destination markets—Little Rock, Arcadia, and Jonesboro—will advance into hearing on the substantive market power issues. However, if it is determined that Enterprise TEPPCO is barred from applying for market-based rates in Little Rock and Arcadia, then only the Jonesboro destination market will continue in the hearing. The Commission leaves it up to the presiding Administrative Law Judge (ALJ) to structure or phase the hearing proceedings as he or she sees fit.

<u>The Commission orders:</u>

(A) Pursuant to the authority of the Interstate Commerce Act, particularly section 15(1) thereof, and the Commission's rules and regulations, a hearing is established to determine whether Enterprise TEPPCO lacks significant market-power in the Jonesboro market and to address whether Enterprise TEPPCO is barred by settlement from applying for market-based rates in the Little Rock and Arcadia destination markets, and if not barred, whether Enterprise TEPPCO lacks significant market power in the latter two destination markets as well. If Enterprise TEPPCO is barred by settlement from applying for market-based rates at Little Rock and Arcadia, the hearing will continue solely with respect to the Jonesboro market.

(B) Pursuant to section 375.304 of the Commission's regulations, 18 C.F.R. § 375.304 (2011), the Chief ALJ shall designate a Presiding ALJ for the purpose of conducting a hearing. The Presiding ALJ is authorized to conduct further proceedings pursuant to this order and the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.