

141 FERC ¶ 61,153  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

HollyFrontier Refining & Marketing LLC  
v.  
Osage Pipe Line Company, LLC

Docket No. OR12-21-000

ORDER ON COMPLAINT ESTABLISHING HEARING AND SETTLEMENT JUDGE  
PROCEDURES

(Issued November 27, 2012)

1. On June 25, 2012, HollyFrontier Refining & Marketing LLC (HollyFrontier) filed a complaint against Osage Pipe Line, LLC (Osage) pursuant to section 13(1) of the Interstate Commerce Act (ICA)<sup>1</sup> contending that Osage's rates for Items 200, 201, 202, and 203 in Osage's Tariff FERC No. 16.2.0 are not just and reasonable. As discussed below, the Commission will set the complaint for hearing and settlement judge procedures.

**I. Background**

**A. Osage's Currently Effective Rates**

2. Osage is a common carrier pipeline that transports crude petroleum from Cushing, Oklahoma to El Dorado, Kansas. Osage's currently effective Tariff FERC No. 16.2.0 lists four different rates, each corresponding to a different type of crude petroleum:

Origin and Destination	Item	Applicability	Rates in Cents Per Barrel of 42 U.S. Gallons
	200	Applies to Light Crude Petroleum with a viscosity up to 20 centistokes at 60	26.47

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<sup>1</sup> 49 U.S.C. App. § 13(1).

Cushing, Oklahoma  to  Eldorado, Kansas		degrees Fahrenheit	
	201	Applies to Medium Crude Petroleum with a viscosity between 20 and 100 centistokes at 60 degrees Fahrenheit	29.13
	202	Applies to Heavy Crude Petroleum with viscosity between 100 and 250 centistokes at 60 degrees Fahrenheit	32.96
	203	Applies to Super Heavy Crude Petroleum with viscosity between 250 and 350 centistokes.	34.43

### **B. The Energy Policy Act of 1992**

3. In 1992, Congress enacted the Energy Policy Act (EPAAct 1992).<sup>2</sup> The EPAAct 1992 deemed as just and reasonable any rate in effect for the full year ending on the date of the enactment of the EPAAct (October 24, 1992) and which had not been subject to protest, complaint, or investigation during the prior year. However, under the EPAAct 1992, such a “grandfathered” rate can be challenged if “evidence is presented to the Commission which establishes that a *substantial change* has occurred after the date of the enactment of this Act -- (A) in the economic circumstances of the oil pipeline which were a basis for the rate; or (B) in the nature of the services provided which were a basis for the rate” (emphasis added).

4. On October 24, 1992, the date of enactment of the EPAAct 1992, the tariff of Osage’s predecessor, Osage Pipe Line Company (OPLC) established under Item 200 a rate of 17.8 cents per barrel for movement from Cushing, Oklahoma, to Eldorado, Kansas. This rate applied to “Merchantable Oil,” which the tariff defined as petroleum with a “[v]iscosity of not more than 325 seconds Saybolt Universal at 60 degrees Fahrenheit.” The viscosity of 325 seconds Saybolt is equivalent to approximately 70 centistokes at 60 degrees Fahrenheit. The tariff did not provide for service related to oil with a higher level of viscosity.

5. On May 24, 2007 in Docket No. IS07-223-000, Osage filed its Tariff F.E.R.C. No. 7, which established the rate structure in its current tariff, including rates for petroleum with viscosity up to 350 centistokes. Osage modified existing Item No. 200 so that this

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<sup>2</sup> Pub. L. No. 102-486, 106 Stat. 2776.

rate only applied to oil of viscosity up to 20 centistokes rather than 70 centistokes as had been the case under Osage's prior tariffs. Osage described its filing as "contain[ing] new rates in Item Nos. 201, 202, and 203 to allow shippers to ability to ship additional types of crude petroleum products on the pipeline system from Cushing, Oklahoma, to Eldorado, Kansas."<sup>3</sup>

## **II. HollyFrontier's Complaint**

6. HollyFrontier asks the Commission to find that all of Osage's rates are unjust and unreasonable under sections 1(5), 8, 9, 13 and 15 of the ICA and that the Commission establish just and reasonable rates pursuant to section 15(1) of the ICA.

7. HollyFrontier asserts that there is a reasonable basis to believe that Osage's existing rates are unjust and unreasonable.<sup>4</sup> HollyFrontier contends that Osage's Form No. 6 for 2011 at page 700 demonstrates that Osage collected Total Interstate Operating Revenues in 2011 of \$15,442,068 when its Total Cost of Service was only \$7,464,671, representing an over-recovery of 106 percent. HollyFrontier states that Osage also reported significant over-recoveries in 2010 and 2009. HollyFrontier states that Osage's pipeline facilities have been operational since at least 1975 and that as the rate base declines, it is likely that the Osage's return on equity has increased to unjust and unreasonable levels.<sup>5</sup>

8. HollyFrontier states that none of Osage's rates are entitled to grandfathered protection pursuant to the EAct 1992. HollyFrontier states that because Items 201, 202 and 203 became effective after the passage of the Energy Policy Act of 1992, these rates are not entitled to any grandfathered protection.

9. HollyFrontier contends that Item 200 is also not subject to grandfathering protection. HollyFrontier acknowledges that a rate for Item 200 was effective for the 365 days preceding the enactment of EAct 1992 on October 24, 1992. However, Osage states that in 2007 HollyFrontier substantially redefined the product subject to the Item 200 rate and that Item 200 rate now applies to a substantially narrower class of crude petroleum (up to 20 Centistokes) than previously shipped under the previously effective single rate (up to 70 Centistokes). Consequently, HollyFrontier states that Osage no

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<sup>3</sup> Osage, Transmittal Letter, Docket No. IS07-223-000, at 1 (filed May 24, 2007).

<sup>4</sup> In support of its complaint, HollyFrontier attaches the affidavit of Daniel S. Arthur and the verified statement of Thomas G. Creery.

<sup>5</sup> HollyFrontier Complaint 15 (citing *Tesoro Refining and Marketing Co., v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214, at P 63 (2011)).

longer offers the service subject to the rate deemed just and reasonable by the EAct 1992 and that the Commission should treat Item 200 as a new rate placed into effect subsequent to the enactment of EAct 1992.

10. HollyFrontier further argues that if the Item 200 rate at one point qualified for grandfathering, Item 200 is no longer entitled to such protection. First, HollyFrontier states that the EAct 1992 provides that a rate is “de-grandfathered” if a substantial change has occurred “in the nature of the services which were a basis for the rate.”<sup>6</sup> HollyFrontier reiterates that the current Item 200 rate applies to a narrower range of crude petroleum than the Item 200 rate effective at the time of the EAct 1992.

11. Second, HollyFrontier states EAct 1992 provides that a rate is also “de-grandfathered” if a substantial change has occurred “in the economic circumstances of the oil pipeline which were a basis for the rate.”<sup>7</sup> HollyFrontier states that in *Calnev*, the Commission explained that a complainant must demonstrate an increase in the rate of return of 25 percent since the effective date of the EAct 1992, and that upon such a showing, the Commission will consider other factors to determine whether the change is “substantial.”<sup>8</sup> HollyFrontier states that the affidavit of Daniel S. Arthur has demonstrated applying Commission policy that there was an estimated change in Osage’s realized return on equity of 70.7 percent. HollyFrontier states that the over-recovery on page 700 of the 2011 Form No. 6 and the increase of equity calculated by Dr. Arthur provides prima facie evidence of a substantial cost over-recovery.

12. To the extent that Item 200 is subject to grandfathering protection, HollyFrontier states that Item 200 can only be grandfathered at the 17.8 cent level that was in effect preceding October 24, 1992. HollyFrontier states that any rate exceeding 17.8 cents is subject to challenge to the same extent as Osage’s other rates.

13. With respect to Osage’s non-grandfathered rates, HollyFrontier seeks reparations pursuant to sections 8, 9 and 16 of the ICA for all amounts in excess of the rates and charges determined to be just and reasonable commencing two years prior to the date of the complaint.

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 12-13 (citing *Tesoro Refining and Marketing Co., v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214, at PP 17-18, 61-62 (2011)).

### **III. Notice and Osage's Answer**

14. Public notice of the complaint was issued June 26, 2012. On July 16, Osage filed its answer. In its answer, Osage states that HollyFrontier's complaint is barred by a throughput and deficiency agreement entered into with Osage. Osage states that this agreement was entered into in response to HollyFrontier's request to upgrade its system to transport higher viscosity and greater volumes of crude oil. Osage also contends that its rates for Item 200, 201, 202 and 203 are grandfathered under the EAct 1992. Osage states that to the extent Items 201 through 203 differ from the tariff in effect at the time of the EAct 1992, this is because Items 201 through 203 incorporate surcharges for higher viscosity crude oil. Third, Osage contends that HollyFrontier fails to make the proper showing that there has been a substantial change after enactment of the EAct 1992 "in the nature of the services which were the basis for the rate" or the "economic circumstances of the pipeline that are the basis for the rate." Additionally, Osage argues that HollyFrontier has not satisfied the standard for challenging cumulative rate increases pursuant to the Commission's indexing regulations.

#### **Commission Analysis**

15. Rule 385.213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority. The Commission rejects the additional answers filed by the parties.

16. The Commission's preliminary analysis indicates that HollyFrontier's complaint raises issues of material fact. Therefore, the Commission will set the complaint for hearing and settlement judge procedures.

17. While the Commission is setting this matter for hearing, the Commission encourages parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, the Commission will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>9</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge (Chief ALJ) will select a judge for this purpose.<sup>10</sup> The settlement judge shall report to the Chief ALJ and the

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<sup>9</sup> 18 C.F.R § 385.603 (2012).

<sup>10</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief ALJ by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a Presiding Administrative Law Judge (Presiding ALJ).

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning HollyFrontier's complaint against Osage. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order and the ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,<sup>11</sup> the Chief ALJ is hereby directed to appoint a settlement judge in this proceeding within 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 ALJ designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief ALJ within five days of the date of this order.

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

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a Presiding ALJ, to be designated by the Chief ALJ, shall, within 15 days of the date of the Presiding ALJ'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

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<sup>11</sup> 18 C.F.R. § 385.603 (2012).

schedule. The Presiding ALJ 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.