

*Chevron Products Company v. SFPP, L.P.*

*ConocoPhillips Company v. SFPP, L.P.*

*Tesoro Refining and Marketing Company v. SFPP, L.P.*

ORDER DISMISSING COMPLAINTS

138 FERC ¶ 61,115 (2012)

In this matter, in three separate dockets, three shippers, Chevron Products Company, ConocoPhillips Company, and Tesoro Refining and Marketing Company, filed three similar complaints against SFPP, L.P. (SFPP). These three shippers primarily challenge the ceiling levels attendant to SFPP's withdrawal of its filings for index-based rate increases for index year 2011. Upon those withdrawals the previous rates took effect. SFPP also had submitted a table showing those rates and the corresponding ceiling levels. The Commission indicated that its regulations hold that a complaint must challenge carrier rates, operation or practice. Ceiling levels are none of these. They are arithmetic calculations that provide caps on the rates a pipeline may charge. The Commission dismissed the complainants.



## I. Background

2. SFPP is a common carrier oil pipeline that transports refined petroleum products in interstate commerce. SFPP has four separate pipeline segments which are commonly referred to as the West, East, North, and Oregon Lines. SFPP has two additional jurisdictional charges which affect West Line shipments. One is the rate for transportation over the Sepulveda Line which connects Sepulveda Junction with Watson Station for further transportation on the West Line. The other charge is the Watson Volume Deficiency Charge for volumes entering Watson Station which do not meet minimum flow rate and pressure requirements (Watson Station Charge).

3. On May 27, 2011, in Docket No. IS11-444-000, SFPP filed 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 to implement an index-based rate increase under section 342.3,<sup>2</sup> of the Commission's regulations for the 2011 index year<sup>3</sup> (2011 Indexed Rates). SFPP's proposed 2011 Indexed Rates reflected a proposed increase of 5.6 percent in the Watson Station Charge and an increase of 6.9 percent for all of SFPP's transportation rates on the West, East, North, Oregon and Sepulveda Lines. SFPP also included with its filing a summary table of SFPP tariff rates which included the 2010 and 2011 ceiling levels, current rates and proposed rates. The summary table lists the July 2011 ceiling level for each tariff that is equal to SFPP's 2010 ceiling level multiplied by 1.068819, the Commission-published index figured for the 2011 index year.<sup>4</sup> Multiple shippers protested SFPP's 2011 Indexed Rates filing. By order dated June 30, 2011, the Commission accepted and suspended SFPP's 2011 Indexed Rates to become effective July 1, 2011, subject to refund,<sup>5</sup> and established hearing and settlement judge procedures.

4. On September 20, 2011, in Docket No. IS11-585-000, SFPP filed FERC Tariff Nos. 194.3.0, 195.3.0, 197.3.0, 199.3.0, 200.3.0, and 201.3.0 withdrawing, except with respect to SFPP's West Line, its 2011 Indexed Rates (Withdrawal Filing). By withdrawing the tariffs that reflected the 2011 index rate increase, the previous tariff rates (i.e., the rates that were in effect on June 30, 2011) were reinstated, effective immediately. As it did in its tariff filing in Docket No. IS11-444-000, SFPP included in

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<sup>2</sup> 18 C.F.R. § 342.3 (2011).

<sup>3</sup> The 2011 index year is from July 1, 2011 to June 30, 2012.

<sup>4</sup> *Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992*, Notice of Annual Change in the Producer Price Index for Finished Goods, 135 FERC ¶ 61,133 (2011).

<sup>5</sup> *SFPP, L.P.*, 135 FERC ¶ 61,274 (2011) (June 2011 Order).

its Withdrawal Filing a summary table of SFPP's tariff rates and its ceiling levels. Specifically, the summary table included SFPP's 2010 and 2011 ceiling levels, the rates in effect on June 30, 2011, the currently effective indexed West Line rates, and the reinstated rates for the remaining SFPP interstate movements, i.e., the East, North, Oregon, and Sepulveda Lines and the Watson Station Charge. The 2011 ceiling levels listed in the summary table are identical to the 2011 ceiling levels listed in the summary table provided in Docket No. IS11-444-000.

5. Multiple shippers,<sup>6</sup> including Chevron, ConocoPhillips and Tesoro, protested the Withdrawal Filing challenging the ceiling levels listed in SFPP's summary table. The protestants urged the Commission to reject SFPP's ceiling levels arguing that the ceiling levels would allow rate increases that are unjust, unreasonable, and unlawful under sections 1(5), 5, 8, 9, 13 and 15 of the Interstate Commerce Act.<sup>7</sup> The protestants asked the Commission to order SFPP to reinstate its prior 2010 ceiling levels.

6. On October 20, 2011, the Commission issued an order denying the protests stating:

[S]ection 343.2(c) of the Commission's regulations provides that a party may protest: (1) rates established under sections 342.3 or 342.4 of the Commission's regulations, or (2) non-rate matters, which include operations or practices of the pipeline, other than rates. Shipper Protestants only challenge SFPP's ceiling levels. Ceiling levels, which are calculated annually pursuant to the Commission's indexing regulations, are not rates, nor are they a non-rate operation or practice. In sum, Shipper Protestants are not aggrieved by, and thus have no basis for protesting, the mere calculation of SFPP's ceiling levels. Should SFPP at some future point file a tariff to raise rates above its June 30, 2011 rate levels, the filing may be

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<sup>6</sup> The shippers, either individually or as groups, that filed protests in Docket No. IS11-585-000 included (i) BP West Coast Products, LLC, Holly Frontier Refining & Marketing Co., LLC, Navajo Refining Co., L.L.C., Valero Marketing and Supply Co., and Western Refining Co., L.P.; (ii) ConocoPhillips; (iii) Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., and U.S. Airways Inc. and Chevron; and (iv) Tesoro.

<sup>7</sup> 49 U.S.C. app. § 1(5), 5, 8, 9, 13, and 15.

protested at that time. For the foregoing reasons, the protests are denied.<sup>8</sup>

## II. The Complaints

7. The Complainants filed substantively identical complaints against SFPP pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206, the Procedural Rules Applicable to Oil Pipeline Proceedings, 18 C.F.R. § 343.2, and the Interstate Commerce Act (ICA).<sup>9</sup> Complainants challenge the lawfulness of SFPP's 2011 "ceiling rates"<sup>10</sup> which SFPP published in its May 27, 2011 Tariff Filing in Docket No. IS11-444-000 and which SFPP retained in its September 20, 2011 Withdrawal Filing in Docket No. IS11-585-000.

8. Complainants argue that SFPP is seeking to retain ceiling rate increases for 2011 which have not been justified. Complainants further state that these increased 2011 ceiling levels will allow rate increases which the Commission has already found may be so substantially in excess of the change in SFPP's cost of service that such rates may be unjust and unreasonable.<sup>11</sup> Complainants state that if the Commission does not reject the increased ceiling levels, the Commission should order a hearing to determine whether rates allowed by the increased ceiling levels would be just and reasonable. Complainants further argue that under the Commission's regulations, SFPP would be able, at any time, to reinstate any of the withdrawn rate increases up to the increased ceiling level, without providing any justification and without opportunity for challenges by shippers or review by the Commission.<sup>12</sup>

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<sup>8</sup> *SFPP, L.P.*, 137 FERC ¶ 61,078 (2011) (Withdrawal Order) (internal footnotes omitted).

<sup>9</sup> 49 U.S.C. app. § 1 *et seq.*

<sup>10</sup> Complainants appear to use the terms "ceiling rates" and "ceiling levels" interchangeably in their complaints. The term "ceiling rates" is a misnomer. The correct term, as used in the Commission's indexing regulations, is "ceiling level."

<sup>11</sup> Chevron Complaint at P 18; ConocoPhillips Complaint at P 18; and Tesoro Complaint at P 17. Complainants cite the June 2011 Order, 135 FERC ¶ 61,274 at P 11-12.

<sup>12</sup> Chevron Complaint at P 18; ConocoPhillips Complaint at P 18; and Tesoro Complaint at P 17. Complainants cite 18 C.F.R. § 342.3(a).

9. Complainants further state the Commission should not allow SFPP to retain the increased ceiling rates as the base ceiling level for future index rate increases in 2012 with no examination of SFPP's decrease in costs between 2009 and 2010 which prompted the Commission to order the investigation in Docket No. IS11-444-000. Complainants state they are aggrieved by SFPP's increased ceiling rates asserting that the overpayments which "would result from the rate increases which would be allowed by the increase 'ceiling rates' challenged by th[ese] Complaint[s]." <sup>13</sup> Complainants also assert that the Commission previously reviewed and rejected ceiling rate increases proposed by SFPP even where there was no corresponding increase in tariff rates. <sup>14</sup>

### III. SFPP's Answer

10. On October 25, 2011, SFPP filed an answer responding to the complaints. SFPP notes that Complainants challenge the ceiling levels that remained after SFPP withdrew its 2011 Indexed Rates in Docket No. IS11-585-000. <sup>15</sup> SFPP states that Complainants challenge the reasonableness of applying the 2011 index to derive SFPP's ceiling levels, alleging that the increased ceiling levels would allow for future rate increases that are so substantially in excess of the cost increases incurred by SFPP that such rates would be unjust and unreasonable. SFPP notes the withdrawal of its 2011 Indexed Rates (except with respect to the West Line) and reinstatement of its prior rates did not trigger a resetting or recalculation of its ceiling levels. Rather, SFPP notes it complied with the Commission's indexing regulations, which requires carriers to "compute the ceiling level each index year without regard to the actual rates filed pursuant to this section." <sup>16</sup>

11. SFPP states the complaints are without merit and urges the Commission to dismiss them. SFPP argues that Complainants are attempting to challenge SFPP's ceiling levels as though they are rates, operations or practices of SFPP, which they are not. SFPP states the Commission's regulations only permits a party to challenge, whether by protest or complaint, rates established under sections 342.3 or 342.4 of the Commission's regulations, <sup>17</sup> or non-rate matters, specifically a carrier's operations or practices other

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<sup>13</sup> Chevron Complaint at P 24; ConocoPhillips Complaint at P 18; and Tesoro Complaint at P 22.

<sup>14</sup> Complainants cite *SFPP, L.P.*, 127 FERC ¶ 61,312, at P 2, 19 (2009) (2009 Order).

<sup>15</sup> As noted above, in its Withdrawal Filing SFPP withdrew all of its 2009 Indexed Rates except for the West Line rates.

<sup>16</sup> 18 C.F.R. § 342.3(d)(3).

<sup>17</sup> *See id.* §§ 342.3 and 342.4.

than rates.<sup>18</sup> SFPP states that no shipper, including the Complainants are paying rates set at SFPP's 2011 ceiling level. SFPP further notes that in the Withdrawal Order the Commission denied shippers' protests of the ceiling levels finding that a pipeline's ceiling levels are not rates nor are they a non-rate operation or practice, and thus cannot be subject to challenge under section 343.2(c) of the Commission's regulations.<sup>19</sup> SFPP argues that because Complainants fail to challenge a rate, practice or operation of SFPP there are no issues of fact in question. Thus, the Commission should summarily dismiss the complaints.

12. SFPP further asserts that the Complainants' ceiling level challenge is essentially a collateral attack on the Commission's indexing regulations<sup>20</sup> and Order Nos. 561 and 561-A, in which the Commission established its indexing regulations.<sup>21</sup> SFPP argues that it is inappropriate to challenge the Commission's ceiling level calculation requirements set forth in section 342.3(d) of the Commission's regulations through a complaint against a carrier's ceiling levels. SFPP states Complainants must instead challenge the Commission's regulations. SFPP further states the complaints frustrate one of Congress' stated goals in enacting EPCA of 1992, as implemented by the Commission in Order No. 561, to establish a simplified and generally applicable ratemaking methodology to avoid unnecessary costs and delays. SFPP contends the relief sought by the Complainants would inevitably lead to protracted litigation between the parties and cause the parties, as well as the Commission, to expend significant time and resources to analyze the justness and reasonableness of rates that SFPP is not charging and may never charge.

13. Next, SFPP disagrees with Complainants' assertion that should SFPP raise its rates up to the ceiling level in the future, that there is no forum to challenge the increased rate. SFPP states that as made clear in the Withdrawal Order, sections 343.2(c), 343.3, and 343.4 of the Commission's regulations gives an opportunity to challenge any such increased rates. SFPP further argues that these challenges to its ceiling levels are premature in that Complainants request that the Commission investigate the possibility that SFPP could increase its rates. SFPP asserts that the courts have repeatedly held that

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<sup>18</sup> See *id.* § 343.2(c) (setting forth the requirements for filing protests or complaints).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* § 342.3.

<sup>21</sup> *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act*, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,949 (1993), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (1994).

a “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”<sup>22</sup>

14. SFPP also responds to Complainants’ assertion that in a 2009 order, the Commission reviewed and rejected “ceiling rate” increases proposed by SFPP even where there was no corresponding increase in tariff rates.<sup>23</sup> SFPP notes the 2009 Order solely addressed a question of whether SFPP accurately calculated its ceiling level in a case where in the prior index year, SFPP agreed to a revised rate as part of a settlement with some, but not all of its shippers.

15. Last, SFPP argues that Complainants failed to demonstrate a good faith effort to quantify the financial impact or burden as SFPP’s 2011 ceiling levels have no financial impact on the Complainants.

#### **IV. Commission Determination**

16. Notice of Chevron’s complaint issued on October 5, 2011 and notices of Tesoro’s and ConocoPhillips’ complaints issued on October 6, 2011. No motions to intervene were filed.

17. Consistent with the Commission’s determination in the Withdrawal Order, the Commission finds that the Complainants are not aggrieved by, and thus have no basis to challenge SFPP’s ceiling levels. Section 343.2(c) of the Commission’s regulations, which sets forth the procedural rules applicable for oil pipeline proceedings for filing complaints, are clear. A complaint must challenge either rates established under sections 342.3 or 342.4 of the Commission’s regulations or a carrier operation or practice, otherwise the complaint will be dismissed.<sup>24</sup> Complainants challenge SFPP’s ceiling levels, alleging that the ceiling levels are unlawful because they will allow unjust and unreasonable rate increases. Complainants do not assert that the ceiling level is a carrier operation or practice. Further, the Commission has previously found that a ceiling level is not a rate.<sup>25</sup>

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<sup>22</sup> SFPP October 25, 2011 Answer to Complaints Against Increased Ceiling Rates at 9 (SFPP Answer) (quoting *Devia v. Nuclear Regulatory Comm’n*, 492 F.3d 421, 425 (D.C. Cir. 2007)).

<sup>23</sup> Complainants cite 2009 Order, 127 FERC ¶ 61,312 at P 2, 19.

<sup>24</sup> See 18 C.F.R. § 343.2(c).

<sup>25</sup> Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949 (stating “the index establishes a *ceiling* on rates – it does not establish the rate itself”) (emphasis in original).

18. The complaints reflect a misunderstanding of “ceiling levels” as used in the context of oil pipeline indexing regulations (18 C.F.R. § 342.3). In Order No. 561, the Commission explained that “the index is intended to limit the amount by which a rate may be increased on an annual basis.”<sup>26</sup> The Commission further clarified:

Each pipeline will establish an annual ceiling level for each of its rates. ... Of course, a company is not required to charge the ceiling rate, and if it does not, it may adjust its rates upwards to the ceiling at any time during the year upon filing of the requisite data, discussed below, and upon giving the appropriate notice. Since this is an annual *ceiling level*, it is not necessarily the rate which will actually be charged, contrary to the assertions of PEG and SIGMA on this point.<sup>27</sup>

Accordingly, ceiling levels, which carriers are required to calculate annually pursuant to the Commission’s indexing regulations,<sup>28</sup> are neither rates<sup>29</sup> nor a carrier operation or practice.

19. Moreover, the Commission also dismisses these complaints on the grounds that the issue, whether the rates that SFPP could seek to charge based on the 2011 ceiling levels would be just and reasonable, is premature and not ripe for review.<sup>30</sup> SFPP, by calculating the 2011 ceiling levels for each of its rates, has not changed its tariffs or any term or condition of service for the Complainant shippers. In short, SFPP’s shippers are not subject to the 2011 ceiling levels as SFPP’s calculation of the ceiling level does not itself change the rates SFPP charges. A ceiling level is only an arithmetic calculation that provides a cap on the rate a pipeline *may*, but is not required to, seek to charge. The justness and reasonableness of a possible, future index-based rate increase is not ripe for Commission review until SFPP actually submits a tariff filing proposing to charge such rates.

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<sup>26</sup> *Id.* at 30,954. The indexing system is predicated upon cost changes in the economy as a whole, not to individual pipelines. *Id.* at 30,963.

<sup>27</sup> *Id.* at 30,953.

<sup>28</sup> 18 C.F.R. § 342.3(d).

<sup>29</sup> Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949.

<sup>30</sup> See, e.g., *Louisiana Pub. Serv. Comm’n v. Entergy Corp., et al.*, 132 FERC ¶ 61,104 (2010) (dismissing complaint as premature and not ripe for Commission consideration).

20. Further, the Commission is not persuaded by Complainants' assertion that should SFPP in the future file for rate increases up to its ceiling levels, there would be no opportunity for challenges by shippers or review by the Commission. To support their statement, Complainants only cite to 18 C.F.R. § 342.3(a). Nothing in section 342.3(a) states or suggests an index-based rate increase filed by SFPP cannot be challenged by SFPP's shippers and reviewed by the Commission. As stated by the Commission in the rulemaking adopting the indexing regulations "under the approach adopted in this final rule, increased rates that comply with the indexed ceiling levels will be subject to challenge through protests."<sup>31</sup> On rehearing, the Commission reiterated:

The indexing methodology also provides a mechanism for ensuring in individual cases that the actual rates charged are within the zone of reasonableness required by the just and reasonable standard of the ICA. A protest may be filed against a rate increase that is within the applicable ceiling, if the increase is substantially in excess of the actual increase in costs experienced by the pipeline.<sup>32</sup>

Moreover, the Commission's regulations governing complaints against oil pipelines are clear, that a protest and/or complaint maybe filed against a rate proposed or established pursuant to section 342.3 (indexing regulations).<sup>33</sup> Thus, Complainants' statement, that there is no opportunity to challenge, is incorrect. Further, as noted in the Withdrawal Order, should SFPP at some future point file an index-based rate increase to raise rates above its June 30, 2011 rate levels, the filing may be protested or challenged via a complaint at that time.<sup>34</sup>

21. Last, the Commission finds the 2009 Order cited by Complainants to be irrelevant. Complainants' statement that the 2009 Order rejected ceiling rate increases proposed by SFPP even where there was no corresponding increase in tariff rates mischaracterizes the 2009 Order. The Commission did not reject a ceiling level increase. Rather, the Commission found that SFPP incorrectly calculated its ceiling level. Specifically, at issue was whether SFPP properly calculated the 2009 index year ceiling level for SFPP's

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<sup>31</sup> Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,952.

<sup>32</sup> Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,092.

<sup>33</sup> 18 C.F.R. § 343.2(c)(1).

<sup>34</sup> Withdrawal Order, 137 FERC ¶ 61,078 at P 13.

East Line.<sup>35</sup> The Commission found that because SFPP agreed to settlement rates during the 2008 index year those settlement rates became SFPP's new ceiling level for the 2008 index year. Accordingly, SFPP was instructed to calculate its 2009 ceiling levels by adding the 2009 index (7.6025) to the East Line settlement rate amount.<sup>36</sup> Accordingly, the Commission did not, as Complainants suggest, reject SFPP's annual increase to its ceiling level. Thus, the 2009 Order is irrelevant because Complainants do not allege that SFPP miscalculated its 2011 ceiling levels.

22. Based on the foregoing, the complaints are dismissed.

The Commission orders:

Chevron's, ConocoPhillips', and Tesoro's complaints filed, respectively, in Docket Nos. OR12-1-000, OR12-2-000, and OR12-3-000 against SFPP's 2011 ceiling levels are dismissed for the reasons stated in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>35</sup> 2009 Order, 127 FERC ¶ 61,312 at P 5, 19 (protestors argued that in calculating the ceiling rates applicable to SFPP's East Line, SFPP should have used the settlement rates as the 2008 ceiling level, which levels would serve as the basis for calculating the 2009 ceiling level).

<sup>36</sup> *Id.* P 19.