

MarkWest Michigan Pipeline Company, L.L.C.

ORDER DENYING REHEARING

130 FERC ¶ 61,084 (2010)

In this case, MarkWest Michigan Pipeline Company, L.L.C. (MarkWest) requested that the Commission rehear its earlier decision rejecting MarkWest's filing of February 24, 2009, for an index-based rate increase pursuant to the Commission's indexing regulations. In that filing, MarkWest sought to increase its rates to the ceiling levels that would have obtained absent MarkWest's decision about certain provisions in a 2006 settlement agreement describing an annual inflation cap. The Commission denied the request for rehearing. It noted that MarkWest had established rates based on the settlement provisions, and not indexing, and because those settlement rates had taken effect during the index year, they constituted the ceiling levels for that index year, July 1, 2008 - June 30, 2009.

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130 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MarkWest Michigan Pipeline
Company, L.L.C.

Docket No. IS09-147-001

ORDER DENYING REHEARING

(Issued February 2, 2010)

1. This order addresses a rehearing request by MarkWest Michigan Pipeline Company, L.L.C. (MarkWest) of the Commission's March 31, 2009 order¹ rejecting MarkWest's tariff filing in Docket No. IS09-147-000. The Commission denies the rehearing request.

I. Background

2. On February 24, 2009, MarkWest filed revised tariff F.E.R.C. No. 5 seeking to increase its rates pursuant to section 342.3(a) to the current "FERC index ceiling level."² Specifically, MarkWest proposed to increase its rates to the ceiling levels that would have applied on February 1, 2009 under section 342.3 of the Commission's regulations absent a 2006 Settlement Agreement (the Settlement)³ between MarkWest and several of its shippers. On January 31, 2006, MarkWest filed the Settlement in Docket No. IS06-41-000 under which MarkWest established initial FERC tariff rates.⁴ In addition, the

¹ *MarkWest Michigan Pipeline Co., L.L.C.*, 126 FERC ¶ 61,300 (2009) (March 31 Order).

² MarkWest, February 24, 2009, Tariff Filing at p. 1.

³ *MarkWest Michigan Pipeline Co., L.L.C.*, 115 FERC ¶ 61,002 (2006) (Order Approving Settlement).

⁴ *MarkWest Michigan Pipeline Co., L.L.C.*, Docket No. IS06-41-000, Jan. 31, 2006 Offer of Settlement (the "Settlement").

settlement established a three year rate moratorium prohibiting MarkWest from adjusting its rates with limited exceptions. One exception to the moratorium permitted MarkWest to increase its rates annually up to the "Annual Inflation Cap."⁵ However, the allowed increases were less than would have been permitted under the Commission's indexing methodology. The moratorium was in effect from January 31, 2006 through January 31, 2009. During the moratorium, MarkWest increased its rates three times applying the Settlement's Annual Inflation Cap. As a result of the Settlement rate cap, upon expiration of the moratorium, MarkWest's rates were below what its rates would have been had MarkWest taken the full annual index adjustment pursuant to 18 C.F.R. § 342.3.

3. The Commission's March 31 Order rejected MarkWest's February 2009 filing as inconsistent with the Commission's regulations.⁶ The Commission also clarified that MarkWest's ceiling rates for the index year ending June 30, 2009 were the rates established by MarkWest's July 1, 2008 rate filing, not the ceiling rates that would have existed on February 1, 2009 absent the Settlement.⁷

II. Request for Rehearing

4. On rehearing, MarkWest raises the following issues:

- a. Whether the Commission erred in finding that the rates MarkWest filed each year during the moratorium period became MarkWest's ceiling rates for the ensuing index year.
- b. Whether the Commission erred in finding that MarkWest relinquished the right to increase its rates to the FERC index-based ceiling level after the Settlement expired.
- c. Whether the Commission erred in concluding that the Settlement bars MarkWest from altering its rates until July 1, 2009.

III. Commission Determination

5. The Commission denies rehearing on all three issues. MarkWest fails to demonstrate that the rulings in the March 31 Order do not represent reasoned decision-making.

⁵ The Annual Inflation Cap is a defined term in the Settlement.

⁶ March 31 Order, 126 FERC ¶ 61,300 at P 1.

⁷ *Id.* P 10 & Ordering Paragraph B.

A. Ceiling Rates During Settlement Term

6. MarkWest contends the rates it filed each of the three years during the term of the Settlement were not its “ceiling rates” for each ensuing index year.⁸ MarkWest argues that sections 2.04(a)(i) and (ii) of the Settlement required MarkWest to calculate rate ceiling levels for each year using FERC’s indexing methodology, which “rates” would be independent of the rates calculated under the Settlement using the Annual Inflation Cap.⁹ MarkWest further states the Settlement parties did not intend for the Settlement Agreement to supplant the Commission’s index-based ceiling rates. MarkWest asserts that the Commission’s decision rests upon an illogical and unsupportable reading of the Settlement.¹⁰

7. MarkWest’s argument is without merit and is premised on an erroneous reading of the Commission’s indexing regulations, 18 C.F.R. § 342.3.¹¹ Section 2.04 of the Settlement governs the three year rate moratorium. Section 2.04 provides:

Subject to the specific exceptions set forth herein, the Parties agree to a mutual moratorium commencing on the date this Settlement has been executed by all Parties and continuing for three (3) years thereafter (“Moratorium Period”).

⁸ The Settlement, MarkWest’s rehearing request, and the March 31 Order all use the term “ceiling rate.” The term as set forth in the indexing regulations, 18 C.F.R. § 342.3, is “ceiling level.” To avoid confusion, ceiling level is the term used in this order. Under the Commission’s indexing regulations, there is no “ceiling rate.” Rather, the indexing methodology calls for every carrier to annually calculate its ceiling level. The ceiling level is used to determine the level of the required index-based rate reduction (under section 342.3(e)) or the permitted index-based rate increase (under section 342.3(a)).

⁹ See MarkWest Michigan Pipeline Co., L.L.C., April 30, 2009, Request for Rehearing at 5-6 (MarkWest Rehearing).

¹⁰ *Id.* at 8.

¹¹ 18 C.F.R. § 342.3 (2009). The Commission summarized the issue in the March 31 Order: “should the index rates under the [S]ettlement be the new basis for further indexing increases under the Commission’s indexing regulations, or should the index rates under the [S]ettlement be increased so that further indexing increases begin from a rate level as if the [S]ettlement had never existed.” March 31 Order, 126 FERC ¶ 61,300 at P 6.

(a) During the Moratorium Period, MarkWest shall not seek at the FERC or the MPSC to alter any rates or charges (including the pipeline loss allowance) for service on the Michigan Line, except as follows:

(i) MarkWest may file to increase Michigan Line rates effective each July 1st during the Moratorium Period to reflect positive inflation adjustments as promulgated annually by the FERC pursuant to 18 C.F.R. Section 342.3(d); and Sunoco, GulfMark and Merit agree not to protest MarkWest's rate changes, provided, however, that any increase in rates does not exceed an annual inflation cap herein agreed to by the Parties ("Annual Inflation Cap"), which Annual Inflation Cap shall be the sum of the following:

- 1) the Producer Price Index for Finished Goods Less Food and Energy . . .
- 2) fifty percent (50%) of the Energy component of the Producer Price Index for Finished Goods . . .

(ii) The Parties agree that July 1st adjustments to MarkWest's rates under the Annual Inflation Cap shall be limited to no less than zero (0) percent and no more than ten (10) percent in any year. MarkWest shall reflect negative inflation adjustments only to the extent such decreases are required by 18 C.F.R. Section 342.3(e) due to MarkWest's ceiling rates falling below the rates permitted under Section 2.04(a)(i).¹²

8. MarkWest states that pursuant to the Settlement effective each July 1st during the Moratorium Period, "MarkWest would (1) calculate new ceiling levels using the FERC's indexing methodology, (2) in the event of a positive FERC indexing adjustment, raise its rates to the level provided for under the Annual Inflation Cap, not to the FERC ceiling levels, and (3) in the event of a negative FERC indexing adjustment resulting in

¹² The Settlement at § 2.04.

‘MarkWest’s ceiling rates falling below’ the Annual Inflation Cap rates, lower its rates to the FERC ceiling levels.”¹³

9. The issue lies with MarkWest’s application of the indexing framework in the context of its Settlement. Specifically, MarkWest’s argument on rehearing regarding its ceiling level ignores section 342.3(d)(5) of the Commission’s regulations. The relevant part of section 342.3(d)(5) provides:

When an initial rate, or rate changed by a method other than indexing, takes effect during the index year, such rate will constitute the applicable ceiling level for that index year.¹⁴

In the March 31 Order, the Commission determined that the rate increases that MarkWest took on July 1, 2008 pursuant to the terms of the Settlement became MarkWest’s ceiling level for that index year, July 1, 2008 through June 30, 2009.¹⁵ As detailed below, the implication of this determination is that the rates MarkWest filed each year during the moratorium period became MarkWest’s ceiling level for the remainder of that index year by operation of section 342.3(d)(5) of the Commission’s regulations.

10. Under section 342.3(d)(1) of the Commission’s regulations, every index year a pipeline must establish an annual ceiling level. In MarkWest’s case, the ceiling level for the July 1, 2006 – June 30, 2007 index year would have been the initial rates established under the 2006 Settlement multiplied by the Commission’s published index for the 2006/2007 index year. Pursuant to section 2.04(a)(ii) of the Settlement, MarkWest should have used that ceiling level to determine whether it was required to decrease its rates. If not, pursuant to section 2.04(a)(i) of the Settlement, MarkWest was free to increase its initial Settlement rate up to the Annual Inflation Cap established by the Settlement terms. On July 27, 2006,¹⁶ MarkWest filed to increase its settlement rates up to the Annual Inflation Cap. Because MarkWest changed its rates during the 2006/2007 index year by a method other than indexing, pursuant to section 342.3(d)(5) of the Commission’s regulations, MarkWest’s July 27, 2006 filed rate became its ceiling level for the remainder of the 2006/2007 index year.

¹³ MarkWest Rehearing at 7.

¹⁴ 18 C.F.R. § 342.3(d)(5) (2009).

¹⁵ March 31 Order, 126 FERC ¶ 61,300 at P 10 & Ordering Paragraph B.

¹⁶ See MarkWest’s July 27, 2006 petition to increase its rates as filed in Docket No. IS06-487, which rates became effective on September 1, 2006.

11. MarkWest should have repeated this process for the two subsequent index years. Specifically, MarkWest's rate changes made during the 2007/2008 and 2008/2009 index years pursuant to the terms of the Settlement became MarkWest's ceiling level for the remainder of the respective index year pursuant to section 342.2(d)(5) of the Commission's regulations. Thus, for the 2008/2009 index year, once MarkWest's July 25, 2008 rate increase filing,¹⁷ which it made pursuant to its Settlement, became effective, those rates became MarkWest's ceiling level for the remainder of the 2008/2009 index year; i.e., through June 30, 2009.

12. In short, section 2.04 of the Settlement is clear. MarkWest was to calculate its ceiling level annually for the sole purpose of determining whether MarkWest would be, required, pursuant to the Settlement, to reduce its Settlement rates any given year. Nothing in the settlement suggests, as MarkWest infers, that MarkWest was to maintain "FERC index-based ceiling rates" that were separate from the "Annual Inflation Cap rates."¹⁸ Further, nothing in the Settlement suggests that the rates filed pursuant to its terms are not "settlement rates." The Commission's determinations in the March 31 Order are based upon the conclusion that the rates MarkWest filed in 2006, 2007, and 2008 pursuant to section 2.04 of the Settlement are "settlement rates."¹⁹ MarkWest does not challenge on rehearing, or submit any evidence to dispute the Commission's finding that the rates it filed during the three year term of the Settlement were settlement rates. The closest MarkWest comes to broaching this issue on rehearing is the following:

Although the Commission's regulations otherwise would have entitled MarkWest to raise its rates to the new ceiling level in each of those years, MarkWest did not do so in conformity with the Settlement Agreement. Rather, MarkWest only raised its rates to the level provided under the Annual Inflation Cap. However consistent with the terms of Section 2.04 of the Settlement Agreement and Section 342.3(d)(3) of the Commission's regulations, 18 C.F.R. § 342.3(d), MarkWest calculated the ceiling level for its rates for

¹⁷ See MarkWest's July 25, 2008 petition to increase its rates as filed in Docket No. IS08-383, which rates became effective on July 25, 2008.

¹⁸ MarkWest Rehearing at 8.

¹⁹ March 31 Order, 126 FERC ¶ 61,300 at P 5-6 (finding that MarkWest's rates filed with the Settlement were section 342.4(c) settlement rates that "were to be implemented as part of an indexing process over the course of the settlement").

each new index year and included these ceiling levels in each of its *indexing tariff filings*.²⁰

The fact that MarkWest's Settlement references 18 C.F.R. § 342.3 and uses the Commission's indexing regulations as a procedural framework to implement the Settlement does not change the character of the rates MarkWest filed pursuant to the terms of the Settlement.

B. Right to Increase Rates to Index-Based Ceiling Level

13. MarkWest seeks rehearing on what it characterizes as the Commission's finding that MarkWest relinquished the right to increase its rates to the index-based ceiling level after the expiration of the moratorium period.²¹ MarkWest argues that unless it expressly and explicitly agreed to forgo its rights under section 342.3(a) of the Commission's regulations, the Commission must find that MarkWest has not given up that right. MarkWest states the Settlement is silent on this issue, thus MarkWest believes upon expiration of the rate moratorium on January 31, 2009, it had the right to increase its rates pursuant to section 342.3(a) to the ceiling levels that would have been applicable under section 342.3 of the Commission's regulations absent MarkWest's 2006 Settlement Agreement. To bolster its argument, MarkWest points to a 2008 SFPP settlement agreement that includes a provision explicitly prohibiting SFPP, after the settlement rate moratorium expires, from seeking a rate increase based on an index adjustment at what would have been permissible under section 342.3 of the Commission's regulations during the Moratorium Period but for the index adjustments provided in SFPP's settlement agreement.²²

14. The Commission denies rehearing on this issue. As MarkWest states, the Settlement does not limit MarkWest's right to petition for a rate change after the expiration of the three year Moratorium Period. After, January 31, 2009, the date the moratorium expired, MarkWest was free to file a petition to change its rates pursuant to any rate methodology available to it under the applicable Commission regulations. For example, MarkWest could have filed for cost-of-service rates, market-based rates, or new settlement rates.²³ However, MarkWest may not change its rates in a manner that is

²⁰ MarkWest Rehearing at 4 (emphasis added).

²¹ *Id.* at 8-9.

²² *Id.* at 10 (citing Joint Explanatory Statement Regarding Settlement Agreement in Satisfaction of Protests and Complaints, Docket Nos. IS08-28-000, *et al.*, at Attachment 1, pp. 10-11 (Section III.D(4)) filed Oct. 22, 2008).

²³ *See* 18 C.F.R. § 342.4 (2009).

inconsistent with the Commission's regulations. This was the Commission's holding in the March 31 Order.

15. The Commission determined in the March 31 Order that the operation of the Commission's indexing regulations, in conjunction with the Settlement precludes MarkWest during the 2006/2007, 2007/2008, and 2008/2009 index years from raising its rates to what MarkWest's ceiling level would have been if it had not been subject to the Settlement. As described above, section 342.3(d)(5) of the Commission's regulations mandates that a rate changed by a method other than indexing that takes effect during the index year is the applicable ceiling level for that index year. In MarkWest's case, each of its rate increases made pursuant to section 2.04(a)(i) of the Settlement were settlement rates. Thus, pursuant to section 342.3(d)(5), the increased rates became MarkWest's ceiling level for the duration of the index year (until June 30th). Section 342.3(a) of the Commission's regulations authorizes a carrier to increase its rates up to its ceiling level during each index year. Once MarkWest's third annual increase to its settlement rates became effective on July 1, 2008, those rates became MarkWest's ceiling level through the end of that index year, June 30, 2009. Thus, no further increases were permissible under 18 C.F.R. § 342.3(a).

16. This result is consistent with the Commission's intent when it implemented the indexing regulations. In adopting the indexing regulations, the Commission clarified that within a particular index year, a pipeline may not move back and forth between indexing and an alternative ratemaking method.

If the rate in effect is changed during the year through a method other than indexing, or if the rate in question is an initial rate established during the year, then the pipeline must defer any rate change pursuant to the indexing system to the next subsequent adjustment date – i.e., the following July 1. This limitation is to preserve the integrity of the annual indexing concept. The index is intended to limit the amount by which a rate may be increased on an annual basis. To allow a rate established, or changed by a method other than indexing, during the index year to be further increased by the full amount allowed by the index would be contrary to the policy that the ceiling level is established on an annual basis, to be applied during an index year.²⁴

²⁴ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs., Regs. Preambles January 1991-June 1996 ¶ 30,985, at 30,954 (1993), *order on reh'g*, Order 561-A, 59 FR 40242 (Aug. 8, 1994), FERC Stats. & Regs., Regs. Preambles, January 1991-June 1996 ¶ 31,000 (1994); *aff'd*, *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

17. We do not need to reach MarkWest's argument regarding the SFPP settlement as another carrier's settlement agreement is not relevant to this proceeding.

C. Moratorium Expiration

18. MarkWest also seeks rehearing on the Commission's determination that the Settlement Agreement prohibits MarkWest from raising its rates under the Commission's indexing methodology until July 1, 2009. MarkWest argues that the plain, unambiguous language of the Settlement Agreement permits MarkWest to alter its rates as of February 1, 2009 (three years after the execution of the Settlement Agreement).²⁵ As discussed above, the Settlement rate moratorium terminated January 31, 2009, leaving MarkWest free to petition for a rate change to the extent permitted under the Commission's oil pipeline rate methodologies.²⁶ However, because MarkWest changed its rates by a method other than indexing in the 2008/2009 index year, and, pursuant to 18 C.F.R. § 342.3(d)(5), those rates became MarkWest's ceiling level, by operation of the Commission's indexing regulations MarkWest was barred from seeking a further rate increase under 18 C.F.R. § 342.3(a) during the remainder of the 2008/2009 index year, i.e., through June 30, 2009.²⁷ For the foregoing reasons, the Commission denies rehearing on this issue.

The Commission orders:

MarkWest's request for rehearing in Docket No. IS09-147-001 is denied for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ MarkWest Rehearing at 10-11.

²⁶ See 18 C.F.R. Part 342 (2009). For example, MarkWest could have made a cost-of-service filing to increase its rates under section 342.4(a) of the Commission's regulations.

²⁷ *Id.* § 342.3(a) & (d).