

106 FERC ¶ 61,171
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Big West Oil Company

Docket No. OR01-2-000

v.

Frontier Pipeline Company and
Express Pipeline Partnership

Chevron Products Company

Docket No. OR01-4-000

v.

Frontier Pipeline Company and
Express Pipeline Partnership

ORDER REJECTING COMPLIANCE FILING

(Issued February 18, 2004)

1. This order resolves the final issue in consolidated proceedings involving complaints filed by Big West Oil Company (Big West) and Chevron Products Company (Chevron)¹ against Frontier Pipeline Company (Frontier) and Express Pipeline Partnership (Express) challenging the lawfulness of certain local and joint rates for the transportation of crude oil and syncrude. At the request of the parties, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision Terminating the Proceeding insofar as it pertained to the local rates.² In this order, only the issue of reparations arising from payments under the joint rates remains for the Commission's determination.

¹ Big West and Chevron are referred to jointly in this order as Complainants.

² Big West Oil Company v. Frontier Pipeline Co., 98 FERC ¶ 63,013 (2002).

2. On July 18, 2002, Complainants and Frontier filed a joint stipulation addressing reparations for joint tariff shipments.³ A description of the elements of the stipulation follows below. However, on August 9, 2002, Frontier filed a compliance filing contending that Complainants are not entitled to reparations for alleged past overpayments under the joint rates at issue. On September 9, 2002, Complainants filed a response, challenging Frontier's assertion regarding the reparations (Response).

3. As discussed below, the Commission rejects Frontier's compliance filing and finds that Complainants are entitled to reparations for past overpayments under the joint rates. This order is in the public interest because it completes the resolution of a lengthy proceeding and provides relief to shippers who paid rates that were unjust and unreasonable.

BACKGROUND

4. Big West and Chevron filed complaints on January 5, 2001, and February 15, 2001, respectively, challenging, *inter alia*, the lawfulness of (1) certain local rates charged by Frontier for crude oil and syncrude transportation service and (2) Frontier's "portion" of the division of certain joint rates established in tariffs published by Express. In subsequent amendments to the complaints, Complainants alleged that they paid rates in excess of the sum of the lawful local tariff rates of the carriers participating in the joint tariff along with Frontier. Complainants sought reduced local and joint rates for the future, as well as reparations for the allegedly unlawful local and joint rates charged during past periods.

5. In an order issued March 28, 2001, the Commission accepted Big West's complaint against Frontier and Express, consolidated it with a similar complaint against Anschutz and Express and set the consolidated proceedings for settlement judge proceedings and hearing (March 28, 2001 Order).⁴ The Commission further directed

³ In the July 18, 2002 joint stipulation filed by Complainants and Frontier, the parties stated that the joint rates at issue are and have been charged for movements of crude oil and syncrude from: (1) the International Border between Canada and the United States via Express to Casper, Wyoming; (2) from Casper to Ranch Station, Wyoming, via Frontier; (3) from Ranch Station to Kimball Junction, Utah, via Anschutz Ranch East Pipeline Inc. (Anschutz); and (4) from Kimball Junction to Salt Lake City, Utah, via Chevron Pipeline Company (CPL). Although the complaints originally challenged the rates of Anschutz, as well as those of Frontier, the Anschutz rates are not at issue in this order.

⁴Big West Oil Company v. Frontier Pipeline Co., 94 FERC **¶**61,339 (2001).

that, if the settlement judge procedures proved unsuccessful and the complaints were set for hearing, the hearing would be limited to the issue of whether the Frontier and Anschutz local rates are and have been just and reasonable. In the March 28, 2001 Order, the Commission cited Texaco Pipeline, Inc., (Texaco)⁵ stating that the Commission's "policy has been that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file with the Commission."⁶ The Commission further stated as follows:

At hearing the presiding judge shall examine the local interstate rates of Frontier and Anschutz ... to determine whether they are just and reasonable. If it is established that the local rates of Frontier and Anschutz are just and reasonable, it can be assumed that the subject Express joint rates meet the standard set forth in Texaco. However, if it is shown that the local rates of Frontier and Anschutz are not just and reasonable, then the Express joint rates must be recalculated in accordance with Texaco.⁷

On May 29, 2001, the Commission issued an order denying requests for rehearing of the March 28, 2001 Order.⁸

6. In an order issued May 17, 2001, the Commission accepted complaints filed by Chevron against Frontier and Express on February 15, 2001, and against Anschutz and Express on February 28, 2001. Finding these complaints similar to the Big West complaints described above, the Commission accepted Chevron's complaints and consolidated them with the Big West complaints for settlement judge and hearing proceedings. However, the Commission directed that separate proceedings be established to consider only the complaints against Frontier and Anschutz if the settlement judge procedures failed to resolve the complaints.⁹

⁵ 72 FERC **&**61,313 (1995).

⁶ Big West Oil Company v. Frontier Pipeline Co., 94 FERC **&**61,339, at 62,259 (2001).

⁷ Id. at 62,260.

⁸ Big West Oil Company v. Frontier Pipeline Co., 95 FERC **&**61,281 (2001).

⁹ Big West Oil Company v. Frontier Pipeline Co., 95 FERC **&**61,229 (2001).

7. On January 15, 2002, Complainants and Frontier filed with the ALJ a motion to terminate the hearing proceedings along with a stipulation regarding Frontier's local rates. They stated that Frontier had agreed to publish reduced local rates for the future and to pay reparations to Complainants for past movements under the local rates. Additionally, to facilitate a prompt disposition of the matter not set for hearing, *i.e.*, Frontier's obligation, if any, to pay reparations to Complainants for past movements under certain joint rates in which Frontier participates, the parties stipulated the amount of the local rates on which the Commission could base such reparations. As the parties requested, the ALJ issued an initial decision on January 24, 2002, terminating the hearing procedures.¹⁰

8. In the July 18, 2002 joint stipulation, Complainants and Frontier agreed to certain facts applicable to the calculation of possible reparations: (1) the just and reasonable rate for Frontier's local tariff from the two-year period prior to the date the complaints were filed until February 1, 2002, was \$0.57 per barrel for light petroleum; (2) the quantity of light petroleum that Big West shipped under the Express/Frontier joint tariff on a five-year term basis from January 1, 1999, to January 31, 2002, and the rate Big West paid for those shipments; (3) the quantity of light petroleum that Chevron shipped under the Express/Frontier joint tariff on a five-year term basis from January 1, 1999, to January 31, 2002, and the rate Chevron paid for those shipments; (4) the quantity of light petroleum that Big West shipped under the Express/Frontier joint tariff on a fifteen-year term basis from January 1, 1999, to January 31, 2002, through third parties and the rate Big West paid for those shipments; and (5) the quantity of light petroleum that Chevron shipped under the Express/Frontier joint tariff on a fifteen-year term basis from January 1, 1999, to January 31, 2002, through third parties and the rate Chevron paid for those shipments. The parties agreed to ask the Commission to determine the amount of reparations, if any, plus interest, if any, to which Complainants are entitled.

DISCUSSION

9. The principal issue before the Commission is whether it should base the calculation of the reparations on the sum of the local rates on file with the Commission or the sum of the indexed ceiling levels applicable to the local rates. As discussed below, the Commission concludes that reparations must be calculated using the sum of the local rates on file with the Commission because it is the Commission's policy that a joint rate

¹⁰ Anschutz and Complainants resolved all issues raised in the complaints against Anschutz, including joint tariff reparation issues. Consequently, on February 8, 2002, Complainants filed a notice with the Commission formally withdrawing their complaints with respect to Anschutz.

must be equal to or less than the sum of the intermediate local rates on file with the Commission, not on the sum of the ceiling levels applicable to those local rates.

10. In its compliance filing, Frontier argues at length that Complainants are not entitled to reparations because they have not shown that the joint rates they paid under the Express/Frontier joint tariff were unjust and unreasonable in relation to the underlying costs-of-service. Frontier also maintains that the Texaco case adopted as the standard the sum of the ceiling levels associated with individual tariff rates currently on file.¹¹ In addition, Frontier contends, *inter alia*, that the Commission cannot award reparations for shipments made prior to the issuance of the March 28, 2001 Order because the Commission cannot apply a new rule retroactively. Further, Frontier asserts that Complainants are not entitled to reparations for shipments by third parties who purportedly shipped on behalf of Complainants because Complainants lacked privity with the carrier in those instances.

11. In response, Complainants argue that Express and Frontier acknowledged the applicability of the Texaco standard when they published their first joint tariff in 1998, but that Frontier now advances an erroneous application of that standard. As discussed below, the Commission rejects Frontier's interpretation of the standard. At this juncture, there are no factual disputes relating to the award of reparations in this proceeding, and Complainants assert that they are entitled to reparations for overcharges from two years prior to the filing of their complaints through January 31, 2002, in the following amounts (including interest as of August 31, 2002): Big West -- \$1,903,601.52 and Chevron -- \$3,875,153.32. These amounts include reparations that Complainants claims for third-party shipments, although as discussed in greater detail below, the Commission concludes that Complainants may not receive reparations for the third-party shipments.

I. Affirmation of Legal Standard

12. Section 4 of the Interstate Commerce Act (ICA) provides in part: "It shall be unlawful for any common carrier subject to this chapter ... to charge any greater compensation as to a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter...."¹² In accordance with the statute, the Commission's consistent policy has been that the rate for a joint movement may not exceed the sum of the local rates on file with the Commission and actually being charged for transportation -- whether the rates are at the applicable maximum ceiling levels or lower

¹¹ 72 FERC ¶61,313 (1995).

¹² 49 U.S.C. app. § 4(1) (1988).

than the applicable maximum ceiling levels.¹³ In applying ICA Section 4, the Commission held in Texaco that, “[i]n the context of a joint rate proposal, ... the ceiling level for a joint rate is the sum of the ceiling levels associated with individual tariff rates currently on file.”¹⁴ However, in Texaco, the rates on file were identical to the ceiling levels.

13. Frontier argues here that the Commission must determine the justness and reasonableness of a joint rate based on a cost-of-service analysis of the facilities and costs underlying the rate. However, a joint rate is not based on a cost-of-service. Rather, as described above, the justness and reasonableness of a joint rate is based on a determination of whether it is equal to or less than the sum of the local rates of the participating carriers that are on file with the Commission.¹⁵ Parties may challenge the local rates of the participating carriers on a cost-of-service basis as they did here, and if, as a result, the local rates are lowered, adjustments to the joint rate may be necessary. Here, the parties have stipulated to a rate of \$0.57 per barrel as Frontier’s local rate, thus requiring a recalculation of the joint rate utilizing that rate. This in turn will result in a new total and limit for the applicable joint rate.

14. Frontier also contends that the Commission must calculate reparations with reference to the applicable indexed ceiling levels of the underlying local rates rather than on the sum of the underlying local rates on file with the Commission. Frontier maintains that the Texaco decision supports its position. However, Frontier’s interpretation of the Commission’s policy is erroneous and contrary to the provisions of the ICA and Commission precedent.

¹³ The Commission recently affirmed this policy in Express Pipeline, LLC, 104 FERC ¶ 61,207, at 61,717-18 (2003), where the Commission stated as follows: “The Commission’s policy on joint rates, as enunciated in Big West Oil and Texaco, states that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file with the Commission.” See also Order No. 561, in which the Commission stated as follows: “[T]he index rate establishes a ceiling on rates -- it does not establish the rate itself.” Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, FERC Stats. & Regs. (Regulations Preambles January 1991 – June 1996) ¶30,985, at 30,949 (1993). The local rates on file with the Commission and charged by the pipelines may be and often are below the maximum ceiling levels calculated in accordance with the index.

¹⁴ Texaco Pipeline Inc., 72 FERC ¶61,313, at 62,310 (1995).

¹⁵ See 49 U.S.C. app. § 4(1) (1988).

15. The Texaco decision is consistent with the ICA and this statement of policy. In Texaco, the Commission cited seven actual filed local rates, which coincidentally were at the maximum indexed ceiling levels applicable to the individual local movements.¹⁶ Accordingly, in that case, the Commission correctly stated that the ceiling level of a joint rate is the sum of the ceiling levels associated with individual tariff rates on file. However, the same would not be true in situations in which the sum of the local rates on file is lower than the sum of the applicable maximum ceiling levels, as is the case with the joint rates at issue in this proceeding.

16. Frontier's reliance on Plantation Pipe Line Co. (Plantation) likewise is misplaced. Plantation sought a declaratory order asking in part that the Commission approve proposed joint rates involving movements by Plantation and an affiliate not yet formed. Therefore, no initial rate had been established for the proposed new pipeline. The Commission cited the Texaco policy, but made it clear that it was not ruling on an existing rate, stating in part: "Plantation's joint discounted rate proposal meets ... [the Texaco standard] if, as indicated by Plantation, the joint rates offered will be less than the ceiling levels associated with the combination of Plantation's local rates to Bremen and the new affiliated pipeline's rates on file with the Commission."¹⁷ The Plantation decision is fully consistent with the Texaco standard and the Commission's rulings in the instant case.

17. Because the Commission is applying its policy in a manner that is consistent with the ICA and Commission precedent, there is no merit to Frontier's contention that the Commission is improperly applying a new rule retroactively. Accordingly, the Commission will base the calculation of reparations in this case on the difference between the joint rate charged for transportation and the sum of the applicable local rates, including the stipulated \$0.57 per barrel rate for Frontier.¹⁸ As required by ICA Section

¹⁶ Texaco Pipeline Inc., 72 FERC ¶ 61,313, at 62,310-11 (1995).

¹⁷ Plantation Pipe Line Co., 98 FERC ¶ 61,219, at 61,866 (2002).

¹⁸ Complainants state that, from January 5, 1999, to January 31, 2002, Frontier's local tariff rate on file varied from \$1.4992 to \$1.5116 per barrel. See Response at 4.

16(3)(b), reparations are due from two years prior to the filing of the complaints until February 1, 2002, the effective date of the new joint rate filed by Express and Frontier.¹⁹

II. Calculation of Reparations

18. Frontier argues that the Commission should base its determination of the applicable local interstate ceiling levels on the carriers' "regular rates," which are uncommitted or non-incentive rates. Frontier claims that, in Explorer Pipeline Co.,²⁰ the Commission held that, when the PPI-1 index declined, Explorer only had to lower its maximum non-discounted rate and not the lower volume discount rates that already were below the maximum index ceiling.²¹

19. Complainants respond that reparations should be based on the actual rates they paid rather than on the uncommitted rate. Complainants also emphasize that Frontier has stipulated that they shipped entirely under the five-year and fifteen-year term rates, but made no shipments under the uncommitted joint tariff.

20. The Commission finds no merit to Frontier's contention that it should calculate reparations based on the uncommitted rates. First, it is undisputed that Complainants made no shipments under the uncommitted joint rate. Further, the Commission decisions cited by Frontier do not require the result that Frontier seeks. In Explorer Pipeline Co.,²² the Commission explained that the indexing required by the Commission's regulations would result in a reduction in the ceiling levels applicable to pipelines' rates. However, the Commission determined that Explorer had not calculated its ceiling levels properly and that it had proposed new rates that were the same as its then-existing rates. As a result, some of Explorer's proposed rates exceeded the applicable ceiling levels, and the

¹⁹ 49 U.S.C. app. § 16(3)(b) (1988) states in relevant part:

All complaints subject to this chapter for recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues...

²⁰ 71 FERC ¶61,416, at 62,640 (1995).

²¹ Frontier also cites Express Pipeline LLC, 99 FERC ¶61,229, at 61,951 (2002); cf. Shell Pipeline Co., 100 FERC ¶61,139 (2002) (permitting Shell to withdraw a discounted local through rate on the ground that "Shell is under no obligation to continue offering that discount").

²² 71 FERC ¶ 61,416 (1995).

Commission directed Explorer to recalculate its ceiling levels. Because the recalculated ceiling levels would be higher than the highest level of incentive rates, the Commission did not require the pipeline to reduce its incentive rates. Nothing in the Explorer decision mandates the use of the uncommitted rates in the determination of reparations in the instant case.

21. Further, in Express Pipeline LLC,²³ the Commission accepted proposed cancellations of joint and proportional tariffs. The Commission explained that, even if shippers would pay more for the through movement under local rates, that was only because the joint rate constituted a discount from the sum of the individual local rates. However, the Commission emphasized that, when the discount ended, the shippers would not be required to pay more than the rates set forth in the individual carriers' rates on file with the Commission. Accordingly, the Express decision is consistent with the Commission's determination in the instant case because it confirms that shippers are required to pay only the rates that are on file with the Commission.

22. Frontier also argues that the movement at issue in this case requires the facilities of certain station and transfer equipment owned by Platte Pipeline Company (Platte) in addition to the facilities of Express, Frontier, Anschutz, and CPL. Complainants respond that the attachments to their Response show that each of the relevant joint tariffs published by Express for the period from January 5, 1999, to January 31, 2002, states explicitly that the participating carriers in the tariff are Express, Frontier, Anschutz, and CPL.

23. For purposes of determining reparations in this case, the issue is not whether the facilities owned by Platte were necessary for movement under the joint rate at issue here. The Commission finds that Platte is not listed as a participant on any joint tariff at issue here.²⁴ Accordingly, no rate attributable to Platte may be included in the calculation of reparations due.

24. Finally, Frontier asserts that Complainants are not entitled to reparations for shipments by third parties who purportedly shipped on their behalf because, in those instances, Complainants lacked "privity with the carrier from which the reparations

²³ 99 FERC ¶ 61,229 (2002).

²⁴ 49 U.S.C. app. § 6(4) (1988) provides as follows: "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required by the Commission...."

arise."²⁵ Although Frontier acknowledges that privity is not required for standing under the ICA to seek prospective relief, Frontier asserts that the Commission and the courts never have awarded reparations to a party that did not pay the rate or have an obligation to pay the rate in question. In fact, contends Frontier, the cases cited by Complainants did not involve awards of reparations to parties that did not pay the rate.²⁶

25. Complainants respond that the requirements of their refineries cause them to ship crude oil or syncrude directly -- *i.e.*, in their own names -- or through third-party shippers on the basis of the business opportunities available to them. However, regardless of whether shipments are made in the name of the refiner or in the name of a third-party shipper, Complainants emphasize that they, as the ultimate users, paid the pipeline tariff.²⁷ Moreover, argue Complainants, their right to obtain reparations for third-party shipments has been litigated in this proceeding. Complainants state that, on March 14, 2001, Express filed a motion to dismiss the portions of the complaints that sought reparations for third-party shipments.²⁸ Complainants maintain that Frontier was silent at that time, and Complainants urge the Commission to award reparations for the third-party shipments to avoid producing windfall benefits for Frontier.

26. The Commission concludes that Complainants are not entitled to collect reparations for shipments by third parties. An examination of the contracts that Complainants attached to their Response in Exhibits G and H shows that Complainants purchased and took title to the oil at Salt Lake City. Complainants paid prices for the crude oil that were calculated under formulae including the joint rates at issue here. None of the cases cited by Complainants involved a Commission requirement that a carrier award reparations to a party not in privity with the carrier.

27. In Gaviota Terminal Co., the Commission determined that the Producers Group members had standing to file the complaint, even though they lacked privity with Gaviota

²⁵ Frontier cites SFPP, L.P., 93 FERC ¶63,023, at 65,093 (2000); Amerada Hess Pipeline Corp., 64 FERC ¶63,008, at 65,038-39 (1993).

²⁶ Frontier cites OXY USA, Inc. v. FERC, 64 F.3d 679 (D.C. Cir. 1995); OXY USA, Inc. v. Amerada Hess Pipeline Corp., 83 FERC ¶61,283 (1998); Gaviota Terminal Co., 67 FERC ¶61,358 (1994).

²⁷ Complainants cite Exs. G and H to their Response.

²⁸ Complainants cite Answer of Express Pipeline LLC to Big West Oil Co.'s Second Amendment to Complaint, Docket No. OR01-2-000, at 2 (November 5, 2001).

and did not pay actual rates.²⁹ However, Frontier is correct that the Commission did not hold in that case that the Producers Group would be entitled to reparations, nor were any awarded. In fact, the Commission did not address remedies in that order: “The remaining issues raised by the filings address the level of the rate, the competitiveness of the market, and the nature of the remedy, if any, that should be provided. These are all issues that are more appropriately addressed at hearing.”³⁰

28. Additionally, Complainants’ contention that the Commission or the courts have expressed doubt about the privity requirement in awarding reparations is not persuasive. For example, they cite Gabbert v. Atchison, T. & S.F. Ry. Co. (Gabbert),³¹ in which the petitioners bought and took title to coal in Colorado that was shipped to them in Texas, although consignors advanced the money to pay the shipping charges, acting as agents for the owners of the coal. Therefore, the facts in Gabbert differ from the case currently before the Commission, in which Complainants did not take title to the crude oil until it reached Salt Lake City. Likewise, two other decisions cited by the parties are inapposite to the issue of privity of contract and third-party reparations and thus do not support an award of reparations for third-party shipments in this case.³²

29. The Commission finds that Tables 1 and 2 of Appendix C to Complainants’ Response correctly reflect the amount of reparations due Complainants consistent with the Commission’s determinations in this order. As stated above, the amount of reparations due in this case is the difference between the rates paid by Complainants and the sum of the local rates on file at the time, except for Frontier’s rates, which the parties stipulated should have been \$0.57 per barrel. Table 1 shows that Big West is entitled to reparations for direct shipments made during the applicable period in the amount of \$1,355,140.44. Table 2 shows that Chevron is entitled to reparations for its direct shipments in the amount of \$2,861,694.11. Complainants also are entitled to interest calculated in accordance with the Commission’s regulations.

²⁹ Gaviota Terminal Co., 67 FERC ¶ 61,358, at 62,248 (1994) (“Since Gaviota’s rate has an impact on the netback paid to the Producers Group, it would be harmed if the rate is unjust and unreasonable and, therefore, it has standing to file the complaint”).

³⁰ Id. at 62,248-49.

³¹ 93 F.2d 562, 563 (5th Cir. 1937).

³² OXY USA, Inc. v. FERC, 64 F.3d 679 (D.C. Cir. 1995); OXY USA, Inc. v. Amerada Hess Pipeline Corp., 83 FERC ¶ 61,283 (1998).

The Commission orders:

(A) Frontier's compliance filing is rejected, as discussed in the body of this order.

(B) As discussed in the body of this order, Complainants are entitled to reparations for their direct shipments under the joint tariffs at issue in this proceeding plus interest calculated in accordance with the Commission's regulations.

(C) Within 15 days of the date of issuance of this order, Frontier must submit a revised compliance filing reflecting the calculation of reparations and interest consistent with the Commission's determinations in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.