

123 FERC ¶ 61,271
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Western Refining Pipeline Company

Docket No. IS08-131-002

ORDER DENYING REHEARING

(Issued June 19, 2008)

1. This order denies the Navajo Nation and the Navajo Nation Oil and Gas Company's (Navajo Nation) and Resolute Natural Resources Company and Resolute Aneth, LLC's (Resolute) requests for rehearing of the Commission's March 7, 2008 Order accepting Western Refining Pipeline Company's (Western) tariffs.¹

Background

2. On February 8, 2008, Western filed FERC Tariff No. 1, the Rules and Regulations tariff governing the interstate movements of crude petroleum at Local and Proportional Rates provided in FERC Tariff No. 2. FERC Tariff No. 2 established common carrier service between the origin points of TEPPCO Midland, Texas (Midland), and Lynch, New Mexico; and the destination points of Star Lake and Bisti, New Mexico. Western stated that, pursuant to section 342.2(b)² of the Commission's regulations, it filed an affidavit stating that a non-affiliated shipper had agreed to the initial rates in FERC Tariff No. 2. Western requested that the tariffs be made effective March 10, 2008.

3. Resolute and the Navajo Nation filed protests arguing that Western was attempting to use the tariffs to secure Commission validation of Western's exercise of market power by illegally preferring its affiliates and discriminating against third parties who are seeking access to competitive markets for their crude oil. Resolute and the Navajo Nation requested that the Commission suspend Western's proposed rates for the maximum period and require Western to justify its rates through a cost-of-service showing. Resolute and the Navajo Nation also requested that the Commission find that

¹ *Western Refining Pipeline Company*, 122 FERC ¶ 61,210 (2008) (March 7, 2008 Order).

² 18 C.F.R. § 342.2(b) (2007).

Western was proposing a discriminatory service under its tariff and require Western to offer an exchange or displacement service that would provide producers reasonable access to a competitive market.

4. On March 7, 2008, the Commission issued an order accepting Western's tariffs, to be effective March 10, 2008. The Commission found that neither Resolute nor the Navajo Nation had shown that they have a substantial economic interest in the transportation of crude oil over Western that would warrant them having standing to protest the filing. The order stated that Resolute and the Navajo Nation lacked standing because they were not shippers on Western, they did not intend to ship on Western, and they had not made a valid transportation request to Western for shipments. Since Resolute and the Navajo Nation did not have standing to protest, the Commission found that Western was not required to file cost, revenue, and throughput data supporting the rate in accordance with section 342.2 of the Commission's regulations. The March 7, 2008 Order also found that the arguments of Resolute and the Navajo Nation alleging an anticompetitive exercise of market power by Western were speculative and unsupported with respect to oil pipeline transportation services.

5. On April 7, 2008, Resolute and the Navajo Nation filed requests for rehearing of the March 7, 2008 Order.

Requests for Rehearing

6. On rehearing, Resolute and the Navajo Nation continue to assert Western is no more than an extension of its affiliate refineries and that its refusal to provide an exchange service is the cornerstone of an overall scheme to vest Western and its refining affiliates with anticompetitive control over oil production in the Four Corners area of southern Utah and northern New Mexico. Resolute and the Navajo Nation argue that they are potential shippers on Western and that they have a substantial economic interest in Western's proposed service. Resolute and the Navajo Nation assert that selling crude oil at the prices offered for their production by Western's refining affiliates will reduce their revenues. Additionally, the Navajo Nation asserts that its royalty and tax revenues will also be reduced. Resolute and the Navajo Nation contend that by refusing to provide an exchange service, Western will eliminate any opportunity for them to move their crude oil production to competitive markets in southeast New Mexico and West Texas.

7. Resolute and the Navajo Nation argue that the standard applied by the March 7, 2008 Order to determine standing is inconsistent with the Commission's regulations and Order Nos. 561 and 561-A.³ Resolute and the Navajo Nation assert that Order No. 561

³ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. and Regs., Regs. Preambles January 1991-June 1996 ¶ 30,985 (1993); Order No. 561-A, FERC Stats. and Regs., Regs. Preambles January 1991-June 1996 ¶ 31,000 (1994).

established that standing to file a protest should not be limited solely to shippers or other specification classifications. Resolute and the Navajo Nation contend that Order No. 561 determined that the key factor for standing should be the magnitude of the economic stake of the person protesting the proposed rate. Resolute and the Navajo Nation submit that they made valid transportation requests for backhaul service and that the requests were intended to notify Western that they sought to bring production to crude oil markets in southeastern New Mexico and West Texas. Resolute additionally argues that it can protest the tariff filings because it fully satisfies the standing requirement applicable to both rate matters and non-rate matters.

8. Resolute and the Navajo Nation assert that the March 7, 2008 Order misunderstands the nature of the transportation requested by Resolute and the Navajo Nation. Resolute and the Navajo Nation argue that they are seeking an exchange transportation service from the pipeline and not a private exchange agreement with Western or a third party shipper. Resolute and the Navajo Nation submit that the Commission has ample authority under the Interstate Commerce Act (ICA) to require Western to offer the exchange transportation service in order to remedy the discriminatory exercise of market power the tariff represents. Resolute and the Navajo Nation argue that the Commission has a duty under section 3(1) of the ICA to prevent a common carrier from subjecting any region or territory to undue or unreasonable prejudice or disadvantage in any respect whatsoever. Resolute and the Navajo Nation contend that Western's refusal to provide an exchange service results in such prejudice and discrimination to oil producers in the Four Corners region. Finally, Resolute and the Navajo Nation submit that the Commission failed to address Western's obligations under the Mineral Leasing Act.

Discussion

9. On rehearing Resolute and the Navajo Nation argue that they have standing to protest Western's tariffs and that the Commission should require Western to file a cost justification for its rates, remove allegedly discriminatory terms and conditions, and offer an exchange transportation service. The Commission finds, as it did in the March 7, 2008 Order, that Resolute and the Navajo Nation do not have a substantial economic interest in Western's tariff filing and, therefore, lack standing to protest the filing.

10. The Commission does not dispute that the price that Resolute and the Navajo Nation receive for the crude oil may be reduced due to increased competition from crude oil that will be moving north on Western to refineries in the Four Corners region. However, that fact alone does not establish that Resolute and the Navajo Nation have a substantial economic interest in the tariff filing and transportation of crude oil over Western. While Resolute and the Navajo Nation are correct in asserting that the Commission in Order No. 561 did not adopt specific classifications such as customer, customer of customer, or competitor for purposes of standing, that finding did not mean that such considerations were irrelevant in determining whether a party had a substantial

economic stake in a tariff filing and the associated pipeline transportation. As the Commission has recognized, “[t]he ‘substantial economic interest’ standard is intended to assure that parties protesting a filing have sufficient interest in the matter to warrant the commitment of agency and pipeline resources to a review of the merits.”⁴ The Commission has found that whether a party was a current or future shipper is relevant in determining if a party has a substantial economic interest in the tariff filing.⁵

11. In this case, Resolute and the Navajo Nation were not shippers on the pipeline under the prior owners, Giant Pipeline Company (Giant), and did not intend to ship on Western under its proposed tariff. Resolute and the Navajo Nation’s argument that its oral and written transportation requests to Western are evidence of their intent to ship on the pipeline is without merit. Shipments on the Western pipeline system, as well as under the predecessor Giant, were in a northerly direction from Midland, Texas to points in northwestern New Mexico. The oil production of Resolute and the Navajo Nation are in the Four Corners region of Utah and New Mexico and they have not shown that they have barrels of oil available to ship north from Midland or other receipt points in southeastern New Mexico. The fact that Resolute and the Navajo Nation requested an exchange transportation service, which Western is not even offering, does not constitute a valid transportation request demonstrating an intent to become a future shipper on Western’s pipeline.

12. Moreover, the fact that Western is not offering an exchange transportation service does not constitute discrimination under the ICA or a failure of Western to fulfill its common carrier duty of providing service upon reasonable request. Western’s tariff indicates that it is not bi-directional and that it is offering service from Midland, Texas, and Lynch, New Mexico in a northerly direction to Star Lake and Bisti, New Mexico. The tariff clearly states that no out-of-line movements are allowed and that it will not make backhaul movements. The fact that other oil pipelines may offer exchange transportation services does not compel Western to offer such services. In addition, the Commission cannot compel Western to offer an exchange transportation service. In *Chevron Pipeline Company*,⁶ in a situation similar to the one at hand, the pipeline suspended the receipt of crude oil from barges at one of its terminals. A user of the barge dock protested arguing that it was an attempt to put independent oil producers out of

⁴ *Shell Pipeline Company, LP*, 104 FERC ¶ 61,021, at 61,052 (2003).

⁵ *Bridger Pipeline, LLC*, 112 FERC ¶ 61,349, at P 21 (2005); *Rocky Mountain Pipeline System, LLC*, 101 FERC ¶ 61,269, at P 37 (2002); *Equilon Pipeline Company, LLC*, 91 FERC ¶ 61,210, at 61,762 (2000) (prospects of some unspecified future shipments is a speculative assertion that is insufficient to establish a substantial economic interest).

⁶ 64 FERC ¶ 61,213 (1993).

business and to manipulate the price of crude oil for the benefit of the pipeline's parent. The Commission found that allegations of anticompetitive conduct were unsubstantiated and that it did not have the jurisdiction over the pipeline's ability to suspend operations or to order the pipeline to provide new services. Here, Resolute and the Navajo Nation have shown that they are likely to receive a lower price for their crude oil due to increased competition from deliveries of crude oil from Midland to the refineries in northwestern New Mexico, but that is not evidence that Western has engaged in anticompetitive conduct with respect to oil pipeline transportation service. Resolute and the Navajo Nation have also speculated that Western's actions are part of an overall scheme designed to give Western and its refining affiliates anticompetitive control over crude oil production in the Four Corners region. Such allegations are beyond the jurisdiction of the Commission.

13. Finally, Resolute and the Navajo Nation's argument that the Commission has its own enforcement authority under the Mineral Leasing Act (MLA) is without merit. The pertinent part of the MLA at 30 U.S.C. § 185(r)(5) reads as follows:

Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, *he may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.* (Emphasis added).

The statute clearly requires the Secretary of the Interior to request the Attorney General to prosecute a proceeding before the appropriate agency or court, including the Commission. Resolute and the Navajo Nation do not point to any part of the MLA that confers independent authority on this Commission, nor has the Attorney General sought to prosecute a proceeding before this Commission. Accordingly, for these reasons, the requests for rehearing of Resolute and the Navajo Nation are denied.

The Commission orders:

The April 7, 2008 requests for rehearing of Resolute and the Navajo Nation are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.