143 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NuStar Logistics, L.P. Docket No. IS12-503-001

ORDER DENYING REHEARING

(Issued May 16, 2013)

1. On September 4, 2012, Valero Marketing and Supply Company (Valero) filed a request for rehearing of the Commission's August 2012 Order which accepted NuStar Logistics, L.P.'s (NuStar) index-based rate increase pursuant to section 342.3 of the Commission's regulations.[1] As explained below, the Commission denies the request for rehearing.

I. Background

2. On July 5, 2012, NuStar submitted tariffs proposing a revised index-based rate increase of approximately 8.29 percent. The August 2012 Order accepted NuStar's filing. The August 2012 Order explained that the Commission evaluates protests to an index-based tariff filing using the carrier's FERC Form No. 6, Page 700 data in a percentage comparison test.[2] The August 2012 Order explained that NuStar's 1.56 percent decrease in costs between 2010 and 2011 as reported on Form No. 6, Page 700 combined with the proposed index-based rate increase of 8.29 percent results in divergence of 9.85 percent. Based upon the percentage comparison test, the August 2012 Order concluded that NuStar's proposed rate increase was not so substantially in excess of the actual cost changes incurred by the carrier that the rate adjustment should be disallowed.

[1] *NuStar Logistics, L.P.*, 140 FERC ¶ 61,107 (2012) (August 2012 Order).

[2] *Id.* P 7 (citing *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082, at P 10 (2010); *SFPP, L.P.*, 129 FERC ¶ 61,228, at P 7 (2009)).

II. Rehearing Requests

3. On September 4, 2012, Valero filed a request for rehearing of the August 2012 Order. Valero contends that the Commission's acceptance of indexed increases where the divergence is less than "ten percentage points" is a departure from the Commission's prior practice and not the product of reasoned decision-making. Valero further states that the use of the ten percentage point threshold, particularly given NuStar's reported cost decrease, is arbitrary, contrary to Commission regulations, and does not satisfy the Commission's statutory obligation to ensure just and reasonable rates under Section 1(5) of the Interstate Commerce Act (ICA).

4. NuStar filed a response on September 19, 2012. Rule 713(d) of the Commission's Rules of Practice and Procedure[3] prohibits answers to requests for rehearing. Accordingly, we reject NuStar's answer.

Discussion

5. The Commission denies Valero's request for rehearing. As explained in the August 2012 Order, protests challenging an index-based rate increase are governed by section 343.2(c)(1) of the Commission's regulations, which provides in part:

> A protest or complaint filed against a rate proposed or established pursuant to § 342.3 [indexing] of this chapter must allege reasonable grounds for asserting that . . . the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable . . . .[4]

6. As the August 2012 Order elaborated, to maintain the relative simplicity of the oil indexing process, the Commission evaluates a protest to an index-based tariff filing using the carrier's FERC Form No. 6, Page 700 data in a "percentage comparison test."[5] The percentage comparison test is a very narrow test that "compare[s] the Page 700 cost data contained in the company's annual FERC Form No. 6 to the data that is reflected in the

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[3] 18 C.F.R. § 385.713(d) (2012).

[4] *Id.* § 343.2(c)(1) (2012).

[5] *Calnev*, 130 FERC ¶ 61,082 at P 10; *SFPP*, 129 FERC ¶ 61,228 at P 7. The Commission will not consider protests that raise arguments beyond the scope of the percentage comparison test. The Commission will apply a wider range of factors beyond the percentage comparison test in reviewing a complaint against an index-based rate increase. *See Calnev*, 130 FERC ¶ 61,082 at P 11 (citing *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at PP 8-9 (2007)).

index filing for a given year with the data for [the] prior year. . . ."[6] This test is the "preliminary screening tool for pipeline [index-based] rate filings,"[7] and is the sole means by which the Commission determines whether a protest meets the section 343.2(c)(1) standard.[8]

7. NuStar's FERC Form No. 6, Page 700 showed a total cost of service decrease between 2010 and 2011 of approximately 1.56 percent. NuStar's 1.56 percent decrease in costs combined with the proposed index-based rate increase of 8.29 percent resulted in divergence of 9.85 percent under the percentage comparison test. The Commission confirms the August 2012 Order's finding that this magnitude of divergence between the pipeline's change in costs and revenues is insufficient for Valero's protest to satisfy the requirements of section 343.2(c)(1). As the August 2012 Order stated, the Commission has never found an index rate increase to be "substantially in excess" of actual cost changes under section 343.2(c)(1) when the difference between the proposed index rate increase and the pipeline's actual change in cost is less than 10 percent.[9] The

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[6] *Calnev*, 130 FERC ¶ 61,082 at P 10; *BP West Coast Products, LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261, at P 8 (2007). The percentage comparison test compares proposed changes in rates against the change in the level of a pipeline's cost of service.

[7] *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, 59 Fed. Reg. 59,137 (Nov. 16, 1994), FERC Stats. & Regs. ¶ 31,006, at 31,168, *order on reh'g*, Order No. 571-A, 69 FERC ¶ 61,411 (1994).

[8] *Calnev*, 130 FERC ¶ 61,082 at P 10 (citing *BP West Coast Products*, 121 FERC ¶ 61,141 at P 6 ("[T]he Commission uses a percentage comparison test in the context of a protest to an index-based filing to assure that the indexing procedure remains a simple and efficient procedure for the recovery of annual cost increases. [Footnote omitted.] This screening approach at the suspension phase is a snap shot approach that avoids extensive arguments over issues of accounting accuracy and rate reasonableness within the time limits available for Commission review, and highlights the simplicity of the filing procedure. It also precludes the use of the protest procedure to complicate what should in most cases be merely a price adjustment that is capped at the industry's average annual cost increases.")).

[9] August 2012 Order, 140 FERC ¶ 61,107 at P 8. Valero states that in Docket No. IS11-444-000 the Commission set for hearing rates that only resulted in a 9.6 percent divergence under the percentage comparison test. *SFPP, L.P.*, 135 FERC ¶ 61, 274 (2011). However, this case does not undermine the findings of the August 2012 Order. In Docket No. IS11-444-000, SFPP had proposed its index increases for all of its pipeline systems in one filing. While the percentage divergence for the Watson Volume Deficiency Charge was 9.6 percent, for each of SFPP's East, West, North, and Oregon lines, the percentage comparison test yielded a divergence of 10.9 percent between

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Commission also has previously explained that section 343.2(c)(1) does not preclude an index increase for pipelines that experience a cost decrease.[10] In this proceeding, the Commission will exercise its discretion not to investigate NuStar's index increase.[11]

The Commission orders:

Valero's request for rehearing is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

SFPP's proposed rate increase (6.9 percent) and the company-wide cost decrease (4.0 percent) reported by SFPP on its page 700. The Commission determined that the 10.9 magnitude of divergence "raises an issue of reasonableness that the Commission will investigate." *Id.* P 11. It was on this basis that the Commission in Docket No. IS11-444-000 set the filing for hearing. The Commission only referred to the percentage comparison test as applied to the Watson Volume Deficiency Charge in a footnote. *Id.* at n.10. No party contended that the Commission should deny the protests only with respect to the Watson Volume Deficiency Charge while accepting the protests with respect to SFPP's remaining rates, and in setting the entire filing for hearing procedures, the Commission never addressed this possibility.

[10] *Calnev Pipeline LLC*, 115 FERC ¶ 61,387, at PP 3, 9 (2007); *Shell Pipe Line Co.*, 102 FERC ¶ 61,350, at PP 4, 10, *order on reh'g*, 104 FERC ¶ 61,021, PP 8-9 (2003).

[11] *ExxonMobil Oil Corp v. FERC*, 219 Fed. Appx. 3 (D.C. Cir. Feb. 27, 2007) (holding that a decision not to investigate a proposed indexed rate increase is committed to Commission discretion); *ExxonMobil Oil Corp. v. FERC*, 2007 WL 2306949, *1 (D.C. Cir. Jul 27, 2007) (same).