

148 FERC ¶ 61,208
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Shell Pipeline Company LP

Docket No. IS14-106-000

ORDER ON PARTIAL INITIAL DECISION

(September 18, 2014)

1. This order reviews and adopts the April 10, 2014 Partial Initial Decision issued in the captioned docket.¹ The Initial Decision addressed whether the interveners in a tariff filing by Shell Pipeline Company LP (Shell) establishing rates for the transportation of petroleum had standing to protest the tariff rates. This order affirms the Initial Decision's finding that these interveners had standing.

I. Procedural Background

2. On December 10, 2013, Shell filed three related tariffs to establish initial rates for petroleum transportation from, and to, various locations in Texas and Louisiana. Pursuant to 18 C.F.R. § 342.2(b) (2014), Shell filed affidavits stating that the new rates set forth in FERC Tariff Nos. S-158.0.0, S-159.0.0, and S-160.0.0, respectively, had been agreed to by a non-affiliated shipper who intended to use the service described in the tariffs. In Docket No. IS14-104-000, Shell filed FERC Tariff No. S-158.0.0 to establish contract and uncommitted rates for transportation from Houston, Texas, to Houma, Clovelly, and St. James, Louisiana. Similarly, in Docket No. IS14-105-000, Shell filed FERC Tariff No. S-159.0.0 to establish uncommitted rates for transportation from Houston to Nederland and Port Neches, Texas, and Lake Charles, Louisiana. Lastly, in Docket No. IS14-106-000, Shell's FERC Tariff No. S-160.0.0 sought to establish uncommitted rates for petroleum transportation from Erath, Louisiana, to Houma, Clovelly, and St. James, Louisiana.

¹ *Shell Pipeline Co. LP*, 147 FERC ¶ 63,002 (2014) (hereinafter Initial Decision).

3. On December 20, 2013, several parties filed timely motions to intervene in the Shell rate proceedings, including Anadarko Petroleum Corporation, ConocoPhillips Company, Marathon Oil Company, and Pioneer Natural Resources USA, Inc. (collectively, Liquids Shippers Group). On December 26, 2013, these parties timely filed a joint protest pursuant to Commission Rule 211,² and the Commission's regulations at Parts 342.2, 343.2, and 343.3,³ supported by affidavits, against each of the three Shell tariff filings. Liquids Shippers Group requested that the Commission require Shell to provide supporting cost and revenue data and establish an evidentiary hearing to determine whether the proposed rates are just and reasonable under the Interstate Commerce Act (ICA).
4. On December 31, 2013, pursuant to Commission Rule 213⁴ and Commission regulation 343.3(b),⁵ Shell filed a response to Liquids Shippers Group's protest requesting that the Commission dismiss the protest and deny the relief requested by Liquids Shippers Group. In its response to the protest, Shell averred that Liquids Shippers Group's statements supporting a substantial economic interest and standing were "highly generic" and not specifically tailored to the tariffs at issue.
5. On January 7, 2014, Liquids Shippers Group timely filed a motion for leave to answer Shell's Response, pursuant to Commission Rules 212⁶ and 213, and also sought leave to supplement their original affidavits with affidavits and statements providing additional detail of economic interest to support standing. In addition, Liquids Shippers Group's answer criticized Shell's definition of substantial economic interest as too narrow and inconsistent with Commission precedent to justify denial of standing in this case.
6. On January 9, 2014, the Commission accepted and suspended Shell's three tariffs effective December 12, 2013, subject to refund and conditions, and set the matter for hearing to determine whether Shell's initial uncommitted rates were just and reasonable.⁷ In the Hearing Order, the Commission concluded that Liquids Shippers Group adequately

² 18 C.F.R. § 385.211 (2014).

³ *Id.* §§ 342.2, 343.2, and 343.3.

⁴ *Id.* § 385.213.

⁵ *Id.* § 343.3(b).

⁶ *Id.* § 385.212.

⁷ *Shell Pipeline Co. LP*, 146 FERC ¶ 61,009 (2014) (Hearing Order).

showed that they have a substantial economic interest in Shell's initial non-contract rates in Docket Nos. IS14-104-000 and IS14-105-000 and, thus, had standing to protest them. The Commission directed Shell to file cost, revenue, and throughput data supporting the initial rates in those dockets pursuant to section 346 of the Commission's regulations.⁸ However, the Commission concluded that it was unclear whether Liquids Shippers Group had standing to protest the initial rates filed in Docket No. IS14-106-000. The Commission therefore directed the Presiding Administrative Law Judge (Presiding Judge) to determine whether Liquids Shippers Group had standing to protest the rates in that docket.

7. On April 10, 2014, after briefs were filed and a hearing on the standing issue was held, the Initial Decision from the Presiding Judge issued. The Presiding Judge found that Liquids Shippers Group "ha[s] shown a substantial economic interest in the rates in Docket No. IS14-106-000 to warrant the commitment of resources to review the merits . . . [and therefore has] standing to protest."⁹

8. On May 12, 2014, Shell filed its Brief on Exceptions and argued that the Initial Decision erred for a variety of reasons, but primarily because it applied an incorrect standard for granting standing instead of the substantial economic interest standard, which Shell avers the Liquids Shippers Group failed to demonstrate. On May 12, 2014, the Association of Oil Pipe Lines (AOPL) filed an *Amicus Curiae* Brief on Exceptions arguing that the Presiding Judge's ruling lowers the threshold for oil rate protests and renders the substantial economic interest standard meaningless, which undermines its purpose to ensure fair and efficient rate pipeline proceedings, and results in unwarranted hearings.

9. On June 2, 2014, Liquids Shippers Group filed their Brief Opposing Exceptions and contended that the Initial Decision's grant of standing was justified because the Presiding Judge correctly applied the substantial economic interest standard, which is not a bright line test, and appropriately recognized their economic stake in each rate determination within the entire Houston to Houma pipeline segment.

10. On June 17, 2014, Shell filed a Limited Answer to the Brief Opposing Exceptions of the Liquids Shippers Group.¹⁰

⁸ 18 C.F.R. § 346 (2014).

⁹ Initial Decision, 147 FERC ¶ 63,002 at P 27.

¹⁰ The Commission acknowledges that Shell's Answer to the Liquids Shipper Group's Answer was filed in this docket but will not address it. Answers to briefs opposing exceptions are not provided for by the Commission's rules of practice, and (*continued ...*)

II. Discussion

11. Consistent with the direction of the Hearing Order, the Initial Decision addressed whether Liquids Shippers Group has standing to protest the pipeline transportation rates in Docket No. IS14-106-000. Pursuant to the ICA and section 343.2(b) of the Commission's regulations governing oil pipeline proceedings, standing to protest pipeline rates depends on whether the complainant has a substantial economic interest in the tariff filing. The Presiding Judge examined the evidentiary record to determine if Liquids Shippers Group had met their substantial economic interest burden. The Presiding Judge concluded that Liquids Shippers Group had indeed met their burden and ordered Shell to file cost, revenue, and throughput data supporting the initial rates within 15 days of the issuance of the Initial Decision and adopted the hearing schedule of the related rates proceeding for Docket No. IS14-106-000.

12. The Commission affirms the Presiding Judge and adopts her reasoning as well. As discussed below, the Initial Decision reasonably concluded that Liquids Shippers Group demonstrated a substantial economic interest in the tariff rates and therefore met their burden for establishing standing to protest. Although Shell argues that the Presiding Judge must be strictly constrained to only one suitable interpretation of the Hearing Order, the Presiding Judge must independently assemble a factual record and determine issues of Commission law and policy based on the relevant record evidence. To aver otherwise would misapprehend the separate adjudicatory function that administrative law judges perform with respect to the Commission.

A. The Hearing Order

13. In its review of Shell's filing of three related tariffs, the Commission observed that "the only issue to be addressed in this proceeding is whether [Liquids Shippers Group has] standing to file a valid protest"¹¹ because Shell had complied with all other applicable tariff filing requirements. The Commission concluded that Liquids Shippers Group has "adequately shown that [it has] a substantial economic interest in Shell's initial non-contract rates in Docket Nos. IS14-104-000 and IS14-105-000 because [it is] either [a] potential future shipper[] on Shell's system or [a] potential supplier[] to shippers on Shell's system."¹² Although the Commission granted standing for Liquids

absent the Commission's determination to consider such an answer, are a procedural nullity.

¹¹ Hearing Order, 146 FERC ¶ 61,009 at P 14.

¹² *Id.* P 15.

Shippers Group in Docket Nos. IS14-104-000 and IS14-105-000, it concluded that it was “unclear whether [Liquids Shippers Group has] standing with respect to the initial rates filed in Docket No. IS14-106-000.”¹³

14. In its short discussion of the standing and substantial economic interest issue with respect to Docket No. IS14-106-000, the Commission concluded that it “has no way of determining at this juncture if” Liquids Shippers Group is “not active in the [Erath] production area”¹⁴ The Commission went on to suggest that if the Liquids Shippers Group was found not to have been active in the Erath production area, then it is “unlikely” that Liquids Shippers Group “could establish a substantial economic interest in the rates” in question “as a potential shipper or supplier to potential shippers.”¹⁵ The Commission reasoned that because Liquids Shippers Group “will have the opportunity to clarify the facts supporting their position,” it was appropriate to direct the Presiding Judge “to determine whether the Liquids Shippers Group has standing to protest the rates . . . based on whether they are active in the production area supplying Erath.”¹⁶

15. Therefore, the Commission directed the Presiding Judge “to make a determination with respect to the Liquids Shippers Group’s standing and to either establish hearing procedures for those rates if it is determined Liquids Shippers Group has a substantial economic interest in [Docket No. IS14-106-000], or to dismiss the protest in that docket if it is determined they do not.”¹⁷

B. The Initial Decision

16. Based on the record in the case established through briefs and a hearing, the Presiding Judge found that Liquids Shippers Group had demonstrated a substantial economic interest in the Erath rates and thus had met their burden for standing to protest.¹⁸ Further, the Presiding Judge cited the administrative efficiency benefits of examining all three related rate filings together in one proceeding in order to establish just and reasonable rates contemporaneously and at the initiation of new, reversed

¹³ *Id.* P 17.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*, Ordering Paragraph (D).

¹⁸ Initial Decision, 147 FERC ¶ 63,002 at P 27.

pipeline service as supporting its finding.¹⁹

17. The Presiding Judge found that the Liquids Shippers Group had a substantial economic interest in the Erath tariff filing, and thus standing to protest it, for several reasons. First, consistent with the rationale applied in the Commission's grant of standing to the Liquids Shippers Group in the other two related tariff filings, the Presiding Judge found that "there is a potential that [Liquids Shippers Group] could be 'potential future shippers' or 'potential suppliers to shippers' at Erath because production locations vary over time due to purchases, sales, new discoveries, etc."²⁰ The Presiding Judge found that the "potential shipper" rationale is consistent with this Commission's reasoning in *Enbridge (Southern Lights) LLC*,²¹ which the Hearing Order cited as well.

18. The Commission's rejection of discrete classifications as providing a basis for standing in Order No. 561 was also determinative in the Initial Decision's grant of standing in this case. The Presiding Judge cited to the proposition in Order No. 561 that "the key factor in determining standing should be the magnitude of the economic stake of the person seeking standing to challenge a proposed rate."²² The Presiding Judge also reiterated that the Commission's economic interest test was consistent with the intent of EPCA 1992 to limit proposed oil pipeline rate investigations, which was codified in Section 343.2(b).²³

19. The Presiding Judge went on to find that because the Commission concluded that the Liquids Shippers Group had standing to protest the rates in the other two Shell rate filings along the same larger pipeline segment, "by logical extension they also have standing to contest the rates along a segment within this pipeline flow."²⁴ The Presiding Judge elaborated as follows:

¹⁹ *Id.*

²⁰ *Id.* P 23 (quoting Liquids Shippers Group Initial Br. at 8).

²¹ 134 FERC ¶ 61,067, at P 11 (2011).

²² Initial Decision, 147 FERC ¶ 63,002 at P 23 (citing *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats & Regs ¶ 30,985, at 30,964 (1993) (internal quotation marks omitted)).

²³ *Id.*

²⁴ *Id.* P 24.

Erath is just a point in the flow of volumes for which the Commission granted standing . . . [that] will use the same facilities that provide service [on the larger segment] As a result, the costs and revenues associated with the Erath shipments will need to be examined at a hearing in order to ensure proper and accurate rates for service from Houston.²⁵

This analysis supported the Presiding Judge’s determination that the three separate rates were related, and thus that Liquids Shippers Group had standing to protest in Docket No. IS14-106-000.

20. Further, the Presiding Judge found that the Liquids Shippers Group had a substantial economic interest in the Erath rates because “costs and revenues must be allocated among all of the origin and destination shipments on the Shell Houston to Houma system to establish just and reasonable rates for Houston-sourced shipments.”²⁶ According to the Presiding Judge, this logically implies that the “rates for all the hauls are interrelated and mutually interdependent, since the total costs of the service for the system must be allocated across all of the shipments” giving rise to a potential for “over-recovery and or over or under apportionment of costs to [the] specific tariff rates in question.”²⁷ The Presiding Judge supported her finding of standing on this “cost responsibility” rationale.²⁸

C. Shell’s Brief On Exceptions

21. Shell argues that the Commission should reverse the Initial Decision’s grant of standing to Liquids Shippers Group because Liquids Shippers Group failed to demonstrate that it possesses “a substantial economic interest in the tariff filing.”²⁹ Shell asserts that the Presiding Judge mistakenly equates a “possible future interest” standard with the correct “substantial economic interest” standard that misconstrues the Commission’s Hearing Order, as well as the limitation on standing set forth in Order No. 561.³⁰ Accordingly, Shell argues that considering a “possible future interest” might

²⁵ *Id.*

²⁶ *Id.* P 26.

²⁷ *Id.*

²⁸ *Id.* P 27.

²⁹ 18 C.F.R. § 343.2(b).

³⁰ Shell Brief on Exceptions at 1.

transform anyone in the United States, and possibly the world, into a “potential shipper” that has sufficient economic interests to meet the standing threshold, thus rendering Commission regulation of oil pipeline rates meaningless.³¹

22. Shell further asserts that the Presiding Judge illogically concluded that a party’s interest in proper cost allocation could satisfy the Commission’s standing requirement.³² Conflating these issues, insists Shell, would render the limitations on standing meaningless because concern over shared costs would thus equal a substantial economic interest. Shell points out that pipelines involved in rate litigation often have rates that are not jurisdictional, not subject to cost of service analysis, and not subject to a suspension and investigation order, which does not impair the Commission’s ability to make appropriate cost allocations among the rates that will be, and will not be, subject to an investigation order within the same proceeding.³³ Therefore, because the nexus between the right to allocate costs properly and whether a protesting party has a substantial economic interest is lacking, the Commission has improperly granted standing to Liquids Shippers Group.³⁴

23. Shell also claims that the Presiding Judge’s administrative efficiency rationale for granting standing is misplaced because the nature of Commission regulation following the Energy Policy Act of 1992 is not to litigate all possible rates, but rather to narrowly focus ratemaking on rates subject to challenge by interested parties.³⁵ Further, according to Shell, utilizing such a rationale for granting standing in this instance would undercut the Commission’s ability to rely on settlement of rates as a key means of resolving rate disputes.³⁶

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ *Id.*

D. AOPL Amicus Curiae Brief On Exceptions

24. AOPL agrees with Shell and contends that the Presiding Judge's ruling lowers the threshold for oil rate protests and renders the substantial economic interest standard meaningless, which undermines its purpose to ensure fair and efficient rate pipeline proceedings and results in unwarranted hearings.³⁷ According to AOPL, if the Commission were to affirm the Initial Decision's grant of standing to Liquids Shippers Group in this case, the substantial economic interest standard "would be stretched to the point where any person that does, or may at some time in the future, engage in the business of producing or selling petroleum, would have standing to protest any oil pipeline rate."³⁸ AOPL further asserts that the Initial Decision lowers the bar for standing and that this would undermine the Commission's policy of encouraging oil pipeline rate settlements.³⁹ According to AOPL, the Initial Decision mistakenly "frustrate[s] these policy goals and, ultimately, increase[s] the need to rely on evidentiary hearings to resolve oil pipeline rate disputes."⁴⁰

E. Liquids Shippers Group Brief Opposing Exceptions

25. Liquids Shippers Group argues in their Brief Opposing Exceptions that the Presiding Judge correctly applied the substantial economic interest standard and that the ruling should be upheld.⁴¹ Liquids Shippers Group asserts that the Presiding Judge's subsidiary finding that the tariff rates at issue in this case "directly impact" the other related tariff proceedings is correct and supports the main finding that Liquids Shippers Group has a substantial economic interest in the tariff rates and therefore has standing to protest. Further, Liquids Shippers Group contends that a finding of substantial economic interest in this case promotes the Commission's policy of reducing administrative burdens in oil pipeline proceedings because it eliminates the need for any additional agency or pipeline resources.⁴²

³⁷ AOPL Brief on Exceptions at 2.

³⁸ *Id.* at 9.

³⁹ *Id.* at 11.

⁴⁰ *Id.* at 12.

⁴¹ Liquids Shippers Group Brief Opposing Exceptions at 2.

⁴² *Id.*

26. Liquids Shippers Group opposes all of Shell's and AOPL's exceptions filed in this case. Liquids Shippers Group insists that Shell and AOPL raise "straw man" and "slippery slope" arguments that misunderstand the nature of the proceedings and the Initial Decision.⁴³ In rebuttal to the arguments of Shell and AOPL that the Presiding Judge imprudently stretches the substantial economic interest standard to include nearly anyone as a party allowed to protest, Liquids Shippers Group stresses that the Initial Decision is "limited to the unique facts of this case" and, therefore poses no policy risk as Shell and AOPL suggest.⁴⁴

27. Regarding the substantial economic interest test as applied by the Presiding Judge, Liquids Shippers Group asserts that Shell's argument inappropriately assumes the Hearing Order adopts a bright line test that requires a showing of production behind Erath.⁴⁵ Liquids Shippers Group rejects such a reading of the Hearing Order and avers that if the Commission were to agree with that reading, it would upset Commission precedent on standing to protest in oil pipeline rate cases.⁴⁶ In promulgating the section 343.3(a) regulation governing standing in oil pipeline cases, Liquids Shippers Group maintains that the Commission specifically chose not to adopt any bright line tests for standing based on group classifications; rather the Commission adopted the substantial economic interest standard in order to avoid disenabling persons potentially aggrieved by rate filings from protesting and triggering a rate investigation.⁴⁷ Liquids Shippers Group contends that Shell's argument contradicts the Commission's decision in *Enbridge (Southern Lights) LLC*, which affirmed Order No. 561 and the substantial economic interest standard and rejected the use of a bright line test.⁴⁸ Liquids Shippers Group goes on to argue that, if the Hearing Order had intended the application of such a bright line test, "it would have expressly overruled its precedent that holds otherwise, and would not have set the matter for further proceedings before the Presiding Judge."⁴⁹

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.*

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 9-10.

⁴⁹ *Id.* at 12.

28. Liquids Shippers Group also rejects Shell's argument that the Presiding Judge mistakenly assumed ratemaking cost allocation equates to a substantial economic interest for standing purposes.⁵⁰ Liquids Shippers Group asserts that the Initial Decision's grant of standing did not rest solely on a cost allocation rationale but rather on the logical conclusion that having a substantial economic interest in the entire pipeline segment at issue necessarily implies that there is a substantial economic interest in the shorter segment that is subsumed within the larger one.⁵¹ According to Liquids Shippers Group, this is particularly the case when the separate rates to be determined are causally connected and calculated.⁵² Liquids Shippers Group further reasons that the zero sum nature of the Commission's pipeline ratemaking process logically implies that their economic interest is at stake for each haul within the entire Houston to Houma pipeline segment.⁵³

29. With respect to administrative efficiency, Liquids Shippers Group rejects Shell's argument that the Initial Decision's holding was contrary to the streamlining purposes of Order No. 561 and EPart 1992 in oil pipeline cases.⁵⁴ According to Liquids Shippers Group, Shell incorrectly paints the Initial Decision as attempting to "sweep in all possible oil pipeline rates for litigation."⁵⁵ Further, Liquids Shippers Group argues that any streamlining purpose imposed by Order No. 561 and EPart 1992 clearly will not be served if standing were not granted in this case because unnecessary and duplicative rate cases concerning the Houston to Houma rates would likely result.⁵⁶ Liquids Shippers Group argues that there is no additional administrative burden in permitting Liquids Shippers Group to participate in the instant rate determination because Erath costs, revenues, and throughput data will already be considered in the transportation rate determinations in the other two docket proceedings.⁵⁷

⁵⁰ *Id.* at 18-19.

⁵¹ *Id.* at 20.

⁵² *Id.*

⁵³ *Id.* at 16.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.*

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 13-14.

F. Commission Determination

30. We affirm the Initial Decision for the reasons discussed below. The Commission held in *Enbridge (Southern Lights) LLC*, that standing in oil pipeline proceedings “is based on all the facts and circumstances of the particular proceeding.”⁵⁸ The Commission also held that there is no requirement that a future shipper’s plan to ship must be imminent.⁵⁹ Further, the Commission rejected discrete classifications as providing a basis for standing in Order No. 561 and, rather, focused on “the magnitude of the economic stake of the person seeking standing to challenge a proposed rate.”⁶⁰

31. The Initial Decision reflects a reasoned analysis of the facts as presented at hearing, and is consistent with prior Commission precedent regarding standing to protest in oil pipeline rate proceedings. The Commission finds the Presiding Judge reasonably concluded that Liquids Shippers Group demonstrated a substantial economic interest in the Erath rates based on the facts and circumstances of this particular proceeding. First, the Presiding Judge found that “there is a potential that [Liquids Shippers Group] could be ‘potential future shippers’ or ‘potential suppliers to shippers’ at Erath because production locations vary over time due to purchases, sales, new discoveries, etc.”⁶¹ Second, the Presiding Judge found that because Liquids Shippers Group had standing to protest the rates in the other two related Shell rate filings along the same larger pipeline segment, “by logical extension they also have standing to contest the rates along a segment within this pipeline flow.”⁶² Finally, the Presiding Judge found that the Liquids Shippers Group had a substantial economic interest in the Erath rates because “costs and revenues must be allocated among all of the origin and destination shipments on the Shell Houston to Houma system to establish just and reasonable rates for Houston-sourced shipments.”⁶³ As discussed in *Enbridge (Southern Lights) LLC*, there is not a bright line test for determining that a person has standing to protest. The substantial economic interest standard is intended to assure that parties protesting a filing have a sufficient

⁵⁸ 134 FERC ¶ 61,067 at P 11.

⁵⁹ *Id.*

⁶⁰ Initial Decision, 147 FERC ¶ 63,002 at P 23 (citing Order No. 561, FERC Stats & Regs ¶ 30,985 at 30,964 (internal quotation marks omitted)).

⁶¹ *Id.* P 23 (quoting Liquids Shippers Group Initial Br. at 8).

⁶² *Id.* P 24.

⁶³ *Id.* P 26.

interest in the matter to warrant the commitment of agency and pipeline resources to a review on the merits.⁶⁴ The Initial Decision's rationale about production areas varying over time would not alone establish standing, but taken in the context of the Liquids Shippers standing in the two related Shell filings and the interconnected rate design aspects of the pipeline segments, the Commission affirms the Initial Decision's determination that the Liquids Shipper Group has sufficient economic interest to justify standing to protest the Erath Rates.

The Commission orders:

The Initial Decision in this proceeding is affirmed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁴ 134 FERC ¶ 61,067, at P 11 (2011) citing *Shell Pipeline Co. LP*, 104 FERC ¶ 61,021, at 61052 (2003).