

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

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Chevron Products Company
(Complainant)
v.

Docket No. OR03-5-000

SFFP, L.P.
(Respondent)

ORDER ON COMPLAINT

(Issued October 28, 2003)

1. On July 3, 2003, Chevron Products Company (Chevron) filed a complaint against SFPP, L.P. (SFPP) together with a motion to consolidate this proceeding with the proceedings in Docket No. OR96-2-000, *et al.* Chevron also requests that the Commission accept this complaint as of February 11, 2002, the date Chevron had filed a complaint against SFPP in Docket No. RP02-4-000, which complaint was dismissed by the Commission.¹ Chevron asserts that SFPP, a common carrier interstate oil pipeline charges rates on its jurisdictional lines, known as the North, East, West and Oregon Lines, and the Watson Station Drain-Dry facilities, that are unjust and unreasonable. SFPP filed an answer requesting the Commission to reject the complaint, but if the complaint is accepted, the Commission should deny the motion to consolidate. For the reasons set forth below, the Commission will accept the complaint, deny the motion to consolidate, deny the motion to accept the complaint as if filed on February 21, 2002, and hold the matter in abeyance pending a final decision in Docket No. OR96-2-000. This action serves the public interest by maintaining adherence to the Commission's complaint procedures while conserving the resources of the parties and the Commission.

¹ The Commission dismissed Chevron's complaint in OR02-4-000 on May 21, 2002, *Chevron Products Company v. SFPP, L.P.*, 99 FERC ¶ 61,196 (2002), Order Denying Rehearing, 100 FERC ¶ 61,329 (2002) (September 25 Order), and Order Denying Reconsideration, 103 FERC ¶ 61,231 (2003).

Background

2. The Energy Policy Act of 1992 (EPAct), Pub. L. No. 102-486, 106 Stat. 2776 (1992) essentially divides oil pipeline rates into two categories: (1) grandfathered rates – *i.e.*, certain existing rates that are given some “protection” from the complaint procedure of the Interstate Commerce Act (ICA); and (2) non-grandfathered rates – *i.e.*, all other rates, existing or to be created in the future that are not given such protection. A grandfathered rate is deemed to be just and reasonable, and to trigger the complaint-procedure of the Interstate Commerce Act (ICA) a complainant must show that “a substantial change has occurred after [October 24, 1992] ... in the economic circumstances of the oil pipeline which were a basis for the rate; or ... in the nature of the services provided which were a basis for the rate....” Once this is satisfied, the rate is subject to the same test as a non-grandfathered rate, which is whether it is just and reasonable.

3. The EPAct also directed the Commission to establish a simplified and generally ratemaking methodology. In response, the Commission established the current indexing system for rate changes. The methodology applies to both grandfathered and non-grandfathered rates. Basically, pursuant to the Commission’s regulations (18 C.F.R. §§ 342.0-342.4(2003)), the indexing system produces an annual ceiling on the individual rates of specific pipelines, but does not establish any particular rate. A party can challenge an indexed rate by showing there is a “substantial divergence” between the rate’s actual costs and its indexed rate.

4. Since the enactment of the EPAct, SFPP’s rates have been subject to numerous complaints. At present there is an ongoing, consolidated proceeding in Docket No. OR96-2-000, et al. involving a number of complaints challenging SFPP’s rates. In an order issued May 17, 2000, in Docket No. OR96-2-000, the Commission determined that SFPP’s West Line, North Line, and Oregon Line, and SFPP’s charges relating to its Watson Station Drain-Dry Facilities, are grandfathered pursuant to the EPAct. SFPP’s East Line’s rates were not determined to be grandfathered by the Commission. Arco Products Company, et al. v. SFPP, L.P., 91 FERC ¶ 61,142, at 61,549 (2000) (ARCO). On June 24, 2003, the Administrative Law Judge (the ALJ) issued an Initial Decision in that proceeding, making findings as to whether SFPP’s rates, both grandfathered and non-grandfathered, were just and reasonable. 103 FERC ¶ 63,055. Notwithstanding the recent ALJ decision, until there is a final order by the Commission, the West Line, North Line, and Oregon Line, and SFPP’s charges relating to its Watson Station Drain-Dry Facilities are considered grandfathered until the Commission rules otherwise.

The Instant Complaint

5. Chevron states that at all material times, it has been a shipper on SFPP's West, East, North and Oregon Lines, and has been subject to SFPP's rates on those lines, and it also pays the charges at Watson Station .
6. Chevron asserts that SFPP's jurisdictional rates are unjust, unreasonable and unlawful under Sections 1(5), 8, 9, 13, and 15 of the ICA.
7. Chevron contends that there are "reasonable grounds" for believing that the challenged rates are outside the zone of reasonableness. Specifically, Chevron argues that the discrepancy between SFPP's actual costs and the existing rate levels is so substantial that there exists a reasonable ground to believe the existing rates are not just and reasonable.
8. Chevron asserts that to the extent that the challenged rates are indexed rates established under 18 C.F.R. §342.3, the complaint demonstrates that the rates are so substantially in excess of the actual costs incurred by SFPP that the rates are unjust and unreasonable and outside any zone of reasonableness. This would involve the East Line rates that were not determined to be grandfathered. Chevron contends that it does not need to establish substantially changed circumstances as to the indexed portion of SFPP's rates since the grandfather provisions of the EAct do not apply.
9. Chevron asserts that SFPP's unjust and unreasonable rates produce such excessive revenues as to violate the standards of both the ICA and EAct in both 2001 and 2002. Chevron states that it seeks reparations commencing two years prior to February 11, 2002, which was the date it filed the complaint in Docket No. OR02-4-000.²
10. Chevron states that the complaint discusses SFPP's revenues in 2001 and 2002, and also discusses SFPP's revenues in 1996 because it is seeking consolidation with Docket No. OR96-2-000.
11. Chevron also claims that, with respect to grandfathered rates, substantial changes have occurred after the date of EAct's enactment in the economic circumstances of SFPP that were a basis for the challenged rates. Chevron asserts that the substantially changed circumstances include, among others, changes in (1) income taxes expenses and

² Chevron states that it filed a Petition for Review with the United States Court of Appeals in the District of Columbia of the Commission's order dismissing the complaint in Docket No. OR02-04-000.

(2) throughput volumes. To support its assertions, Chevron includes the affidavit of Mr. Paul Premo, a self-employed energy consultant. In his affidavit, Mr. Premo states that his calculations and conclusions were based upon his review and analysis of publicly-available documents such as SFPP's Form 6 filed with the Commission, as well as information from the Docket No. OR96-2-000 proceeding.

12. In summary, Chevron contends that SFPP's rates on its West Line, North Line, and Oregon line are too high as of 1996 because (1) SFPP's volumes have increased by a proportionally greater percentage than its costs, and (2) the Commission's decision in Lakehead Pipe Line Co., Opinion No. 497, 71 FERC ¶ 61,338 (1995), reh'g denied, 74 FERC ¶ 61,181 (1996) (Lakehead), which reduces SFPP's allowable cost of service. Chevron argues that since SFPP had recovered its total investment in the Watson Station Facilities by 1996, the existing rates are excessive. Chevron alleges that SFPP's East Line rates are unjust and unreasonable.

13. Chevron requests that the Commission consolidate this Complaint with the proceedings at Docket No. OR96-2-000, et al. Chevron states that while the issues here apply to different time frames than those in that proceeding, all the basic statutory, procedural, rate design, cost allocation, and evidentiary issues are common to both this complaint and the proceedings at Docket No. OR96-2-000, et al.

14. Finally, Chevron requests that the Commission accept this complaint for filing as of the date Chevron filed the complaint in Docket No. OR02-4-000. Chevron asserts that although the Commission dismissed that complaint, that complaint put SFPP on actual notice of Chevron's claim and SFPP cannot claim any prejudice, if that date is used. Thus the date of filing of that complaint should be the reference point in calculating reparations, if any, for this complaint after the proceedings are consolidated.

15. Chevron also argues that the Commission should approve the proposed effective date based on its policy of freely permitting filings that amend complaints.

Notices and Interventions, and Subsequent Pleadings

16. The Commission issued notice of the complaint on July 3, 2003. SFPP timely filed its answer to the complaint. Valero Marketing and Supply Co., Ultramar, Inc. and Conoco Phillips Company (Indicated Shippers), and BP West Coast Product, L.L.C. and ExxonMobil Oil Corporation (BP-Exxon) timely filed to intervene. Both sets of intervenors object to the consolidation with Docket No. OR96-2-000.

17. Chevron moved for leave to respond to the answer and intervenors' opposition to the consolidation, and SFPP answered Chevron's motion to respond.³

SFPP's Answer

18. SFPP asserts that since the Commission has held that the West, North and Oregon Lines and the Watson Station charges are grandfathered, and Chevron's complaint does not show that a substantial change in economic circumstances has occurred with respect to the grandfathered rates, the complaint must be dismissed. SFPP also contended that to the extent that Chevron relies on arguments asserted by parties in Docket No. OR96-2-000, that a substantial change has occurred as of 1996, those portions of the complaint should be dismissed and any remaining arguments under the complaint held in abeyance pending a final Commission order in Docket No. OR96-2-000 as to the grandfathered status of SFPP's rates. Finally, SFPP contends that the EAct expressly bars Chevron's claims for relief with respect to grandfathered rates for any period prior to the date of its present complaint.

19. With respect to SFPP's East Line rates, which have not been grandfathered under the EAct, SFPP argues Chevron has failed to provide any evidence to support its claims that those rates are unjust and unreasonable, and those portions of its complaint should therefore be dismissed. Furthermore, SFPP argues that Chevron cannot challenge the East Line rates which are indexed rates, because Chevron has not shown that a substantial divergence exists with respect to such rates, as required by Section 342.2(c)(1) of the Commission's regulations.

20. SFPP also opposes Chevron's motion to consolidate the instant complaint with the ongoing proceeding in Docket No. OR96-2-000. SFPP states that not only has the hearing in Docket No. OR96-2-000 concluded, but the ALJ has issued the first phase of his initial decision. SFPP argues that consolidation at this late date would require a reopening of the record, which would inevitably delay that proceeding. SFPP argues that if the Commission accepts Chevron's complaint, it should hold the complaint in abeyance until the Commission issues its decision in Docket No. OR96-2-000.

21. Finally, SFPP urges, there is no basis on which the Commission can accept Chevron's request that February 11, 2002 be the effective date of this complaint, that date

³ Rule 213 of the Rules of Practice and Procedure does not allow answers to answers. We will deny the motion to respond to the answer since Chevron has not made the requisite showing under Rule 213 to permit the response. *Shell Pipeline Co.*, 104 FERC ¶ 61,021 at P 41 (2003).

when Chevron filed the OR02-4-000 complaint. The Commission dismissed that complaint on the merits, and the present complaint is not an amendment, but a new complaint.

Intervenor's Positions

22. BP-Exxon assert that they do not oppose Chevron's complaint. However, they object to consolidation for many of the same reasons urged by SFPP. Indicated Shippers state that while Chevron should be allowed to proceed with this complaint, they object to the consolidation. They state that this complaint should be set on its own procedural track apart from the Docket No. OR96-2-000 proceedings.

Discussion

23. In the ARCO, order, we held that SFPP's rates for its West Line, North Line and Oregon Line and for the Watson Station Drain-Dry Facilities have been grandfathered pursuant to the EAct. While this issue is in litigation in the pending OR96-2-000 docket, no final Commission order has been issued, so that ruling still governs. Chevron is therefore required under Section 1803(b) of the EAct to make a threshold showing of a substantial change in economic circumstances underlying those rates before the justness and reasonableness of the rates can be investigated.

24. While not the model of clarity, in the complaint, Chevron has asserted that the attached Premo affidavit, using SFPP's Form 6 reports and SFPP's 10-K reports filed with the Securities and Exchange Commission, provides specific evidence establishing that there have been substantial changes in the economic circumstances underlying SFPP's rates within the meaning of Section 1803(b) of the EAct. The evidence consists of calculations showing reduced income tax expense allowance allegedly required by the Commission's Lakehead decision. Chevron asserts that the change in only the income tax expense allowance is substantial – approximately \$36 million annually or 15% of SFPP's claimed cost-of-service.

25. The second element Chevron relies upon is an increase in the throughput on the various lines. The complaint asserts that based on information reported by SFPP, the throughput volume increased by approximately 35.5% on the West Line, by approximately 26% on the North Line, and by approximately 34% on the Oregon Line.

26. We believe that the claimed changes in SFPP's throughput volume, and the challenged income tax allowance in the cost basis used to establish SFPP's current rates, are sufficient to satisfy the reasonable grounds test under Rule 206, and accordingly warrants our accepting the complaint.

27. Whether a substantial change of circumstances has occurred as of 1996 and the subsequent justness and reasonableness of the 1996 rates on the West Line, North Line, and Oregon Line and for the Watson Station Drain-Dry Facilities are issues currently before the Commission in Docket No. OR96-2-000. Chevron requests that this complaint be consolidated with that proceeding and states that it will accept the record as it exists in that docket. We deny that request. Chevron itself concedes that its Complaint applies “to different time frames” than “the proceedings in Docket No. OR96-2-000, *et al.*” *Id.* The record in Docket No. OR96-2-000 contains cost-of-service data for individual years through 1999, although SFPP filed cost of service data for 2000 as well. The record for which Chevron claims reparations would not be the same. Moreover, the hearings have been completed, and the ALJ has issued the first phase of his initial decision, and briefs on exceptions, as well as briefs opposing exceptions have been filed. Clearly, there is no basis on which we would permit consolidation at this point.

28. Chevron’s contention that the decision in Ultramar Diamond Shamrock Corp., 82 FERC ¶ 61,043, at pp. 61,183-84 (1998) (UDS) supports its request for consolidation is without merit. In that case a complaint was filed on October 22, 1997, in Docket No. OR98-1-000 (the TRMI Complaint), and on November 21, 1997, a month later, UDS filed a motion to intervene in Docket No. OR98-1-000, with its own complaint. The Commission consolidated UDS’s complaint with the TRMI complaint, finding that it involved the same “basic statutory, procedural, rate design, cost allocation, and evidentiary issues” and materially similar time. At the same time, the Commission did not consolidate UDS’s complaint with another proceeding in Docket No. OR92-8-000, where similar issues had been litigated, and the ALJ had issued an Initial Decision since that proceeding involved materially different time frames. Instead, the Commission held the UDS and TRMI complaints in abeyance, pending the Commission’s decision in Docket No. OR92-8-000. The Commission stated that at that time the complainants could amend their complaints in light of any findings that the Commission made in Docket No. OR92-8-000. Our order here follows UDS, and we will hold this proceeding in abeyance pending our decision in Docket No. OR96-2-000, with the same proviso.

29. Chevron’s argument that it would be inequitable to deny its request for consolidation is answered by Chevron’s own actions. Chevron was an intervenor in Docket No. OR96-2-000, and Chevron has stated that “it has been an active party in the Consolidated Proceedings [Docket No. OR 96-2-000] since 1996.”⁴ Thus, it had ample opportunity to file its own complaint with respect to the rates at issue in Docket No. OR96-2-000 when there would not have any valid reason to object to consolidation.

⁴ 100 FERC ¶ 61,329 at P 6.

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30. The Commission also denies Chevron's request to treat this complaint as if it were filed on February 11, 2002, the date when Chevron filed its complaint in Docket No. OR02-4-000.

31. The Commission dismissed that complaint because Chevron had not satisfied the requirements of Rule 206. In the Order Denying Reconsideration the Commission explained that Chevron's allegations "have been investigated thoroughly and rejected."⁵ To permit the complaint here to be treated as if it had been filed when the dismissed complaint was filed would be a perverse reading of the Commission's orders in that docket.

The Commission orders:

(A) The complaint filed by Chevron is accepted, subject to the conditions stated in the body of this order.

(B) The instant complaint will be held in abeyance pending the Commission's decision in Docket No. OR96-2-000, et al.

(C) Chevron's motion to consolidate this complaint with the proceedings at Docket No. OR96-2-000, et al. is denied.

(D) Chevron's motion to treat this complaint as if it had been filed on February 11, 2002, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁵ 103 FERC ¶ 61,231 at P 5.