

**Market Based Ratemaking for Oil Pipelines**

Order No. 572-A

69 FERC ¶ 61,412 (1994)

**affirmed, Association of Oil Pipe Lines v. FERC,**  
83 F.3d 1424 (D.C. Cir. 1996)

The Commission affirmed its earlier conclusion that the Association of Oil Pipeline's (AOPL) argument that the Commission had overstepped its authority under the ICA by precluding an oil pipeline from charging market-based rates until the Commission has determined that the oil pipeline lacks significant market power in the relevant markets, was a collateral attack on Order No. 561. Order No. 572-A also denied AOPL's arguments on the merits.

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**Market Based Ratemaking  
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## [ 61,412 ]

**Market-Based Rate-making for Oil Pipelines, Docket No. RM94-1-001****Order No. 572-A; Order Denying Rehearing**

(Issued December 28, 1994)

**Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.**

On October 28, 1994, the Federal Energy Regulatory Commission (Commission) issued Order No. 572 in which it adopted procedural rules governing an oil pipeline's application for a Commission finding that the oil pipeline lacks significant market power in the relevant markets.<sup>1</sup> On November 28, 1994, the Association of Oil Pipe Lines (AOPL) filed a request for rehearing of Order No. 572.<sup>2</sup> As discussed below, the Commission denies the AOPL's request for rehearing.

In Order No. 561 [*FERC Statutes and Regulations* § 30,985], the Commission adopted section 342.4(b) of the regulations, which provides that: "Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3." Order No. 572 built on that requirement by requiring an oil pipeline to file an application for a market power determination rather than a rate filing under the ICA. Only after the Commission concludes that the oil pipeline lacks signif-

icant market power in the markets in which it proposes to charge market-based rates may it file market-based rates.

The Commission rejected as collateral attacks on Order No. 561 the argument that it had overstepped its authority under the ICA by precluding an oil pipeline from charging market-based rates until the Commission has determined that the oil pipeline lacks significant market power in the relevant markets.

The AOPL maintains that its objection does not constitute a collateral attack on Order No. 561 because its objection does not fall within the definition of collateral attack as "an improper challenge to a prior judgement attempted through a proceeding that has an independent purpose."<sup>3</sup> It avers that it did not object to Order No. 561's framework. Rather, it claims that it raised its objection to an entirely new subject: "the detailed market power application filing requirements proposed by the NOPR."<sup>4</sup> It concludes: "When two proposed

<sup>1</sup> *National Fuel Gas Supply Corporation*, 69 FERC ¶ 61,104 (1994).

<sup>2</sup> 15 U.S.C. § 717r (1988).

<sup>3</sup> 18 C.F.R. § 385.713(f) (1993).

<sup>4</sup> *Market-Based Rate-making for Oil Pipelines*, Order No. 572, 59 Fed. Reg. 59148 (November 16, 1994), *Statutes and Regulations* § 31,007 (1994).

<sup>2</sup> Sinclair Oil Corporation's motion to file a brief in response to the AOPL's request for rehearing is denied.

<sup>3</sup> Request for rehearing at p. 3, citing, *Generally 1B Moore's Federal Practice* ¶¶ 0.441-0.448.

<sup>4</sup> *Id.* at p. 4.

rules [Order Nos. 561 and 572], addressing different topics [framework and application], share a fundamental flaw, and a commenting party contests that flaw in each rulemaking, the party's objection in the second rulemaking does not constitute a collateral attack on the first rulemaking."<sup>5</sup>

The Commission denies the AOPL's request for rehearing on the collateral attack issue. It was in Order No. 561 that the Commission adopted section 342.4(b) of its regulations which prohibits an oil pipeline from charging market-based rates until the Commission determines that it lacks significant market power in the relevant markets. This was not an issue in the present rulemaking proceeding, which adopted procedural requirements relating to that determination. Indeed, the different purpose of the rulemakings is shown by the fact that if there were no Order No. 572, Order No. 561's requirement, codified in section 342.4(b), about the effectiveness of market-based rates would still govern. Nonetheless, the Commission, as in Order No. 572, will address below the AOPL's contentions on the merits.

On the merits, the AOPL maintains that the Commission has mischaracterized Order No. 561 as a permissible waiver procedure when it is an improper attempt to modify the ICA's rate change scheme where the oil pipeline files a new rate pursuant to section 6(3), which is subject to Commission review under section 15(7). The AOPL adds that the application constitutes a rate filing because the application is inextricably linked to an oil pipeline's ability to charge market-based rates. The AOPL further maintains that the Commission's inconsistent treatment of cost-based and market-based rates is not justified because shippers are protected by the ICA's refund provisions, oil pipe-

lines might have an expanded period of lost revenues if the application process lasts beyond the statutory seven-month suspension period, and the Commission has offered no reason why shippers need greater protection from presumed market forces than the statutory protection from potentially monopolistic rates.

The Commission denies the AOPL's request for rehearing with respect to the Commission's statutory authority. An oil pipeline has no right to charge market-based rates. Rather, an oil pipeline must present empirical proof that it is not a monopoly so that the Commission can ensure that *presumed* market forces are not the basis of effective rates for the transportation of oil.<sup>6</sup> The Commission has adopted the market-based ratemaking process as the procedure that will enable oil pipelines to prove that they lack significant market power in the relevant markets and are thus entitled to an exception to, that is waiver from, the generally applicable indexing method and the maximum just and reasonable rate allowed thereunder.<sup>7</sup> That the market power determination will affect the oil pipeline's ability to charge market-based rates does not as the AOPL argues, convert the application into a rate filing. It merely can lead to such a filing.<sup>8</sup> Importantly, the Commission has not precluded an oil pipeline from making rate filings to recover its costs under either the indexing method or a cost-of-service filing.

It is appropriate that the Commission has treated cost-based rates and market-based rates in a different manner by allowing an oil pipeline to file for cost-based rates under section 6(3) of the ICA but requiring an oil pipeline to obtain a market power determination before it can charge market-based rates. It is true that both constitute exceptions to the

<sup>5</sup> *Id.* at pp. 4, 5. The AOPL notes that it has challenged Order No. 561 on the legal issue by filing an appeal in the D.C. Circuit. See *AOPL v. FERC*, No. 94-1538 (filed August 5, 1994).

<sup>6</sup> *Tezaco v. FPC*, 417 U.S. 380 (1974); and *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

<sup>7</sup> In Order No. 572, the Commission referred to the Permian Basin Area Rate Cases, 390 U.S. 747 (1968), as support for the proposition that the Commission may impose a moratorium on filings for market-based rates except under the application process. In *Permian*, the Supreme Court held "that the Commission may under §§ 5 and 16 [of the Natural Gas Act] restrict filings under § 4(d) of proposed rates higher than those determined by the Commission to be just and reasonable." (at 780) It is true as the AOPL submits that *Permian* involved a temporary moratorium and the Supreme Court declined to prescribe the limitations of the Commission's authority to proscribe moratoria upon filings in other circumstances. Here, however, the Commission's moratorium

is also limited in that once an oil pipeline makes a showing that it lacks significant market power in the relevant markets, it is no longer prevented from charging market-based rates in those markets. In addition, the Supreme Court's main concern was with circumstances of changing costs as opposed to the apparent stability of production costs in *Permian*. Of course, under Order No. 561, the oil pipelines may file for cost-of-service rates.

<sup>8</sup> The AOPL further submits that, with respect to a rate filing, the Commission does not have the statutory authority to require at the threshold the kind of filing required by Order No. 572. As discussed in Order No. 571-A [*FERC Statutes and Regulations* § 31,012], issued contemporaneously with this order, the Commission concludes here that it has the authority under section 12(1) of the ICA to adopt filing requirements at the threshold for rate filings, such as for market-based rates. Of course, here, the Commission has adopted the waiver approach rather than relying on section 12(1) in connection with a rate filing.

Commission's generally applicable ratemaking method (that is, indexing) for oil pipelines. However it is within the Commission's authority to determine how an oil pipeline is to secure permission to charge rates based on a method that deviates from the generally applicable method. And the difference between cost-based rates, where the cost-of-service method is a known quantity, and market-based rates where the Commission must make a market power determination, justifies the Commission's approach of ensuring that presumed market forces will not be the basis of effective rates for the transportation of oil when an oil pipeline's application (i.e., its waiver request) is under consideration.<sup>9</sup>

The AOPL maintains further that the Commission erred by adopting rules for market-based rates that do not comport with the Act of 1992's mandate to "streamline procedures. . . relating to oil pipelines rates in order to avoid

unnecessary regulating costs and delays."<sup>10</sup> It argues that the process adopted by Order No. 572, requiring a case-in-chief if no protest is filed, cannot be characterized as a streamlining measure.

As discussed in Order No. 572, the Commission has fully complied with the mandate of the Act of 1992 by adopting the indexing methodology. The market-based ratemaking approach is not generally applicable and, in any, event, as stated in Order No. 572, does streamline procedures as to those rates. Therefore, the Commission denies the AOPL's request for rehearing on the Commission's conclusion that it did not violate the Act of 1992.

*The Commission orders:*

The AOPL's request for rehearing of Order No. 572 is denied.

<sup>9</sup> *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486,1510 (D.C. Cir. 1984).

<sup>10</sup> Section 1802(a) of the Act of 1992.