

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

SFPP, L.P.

Docket No. OR92-8-025

American West Airlines, *et al.*,
Complainants

Docket No. OR04-3-001

v.

SFPP, L.P.

BP West Coast Products LLC
and ExxonMobil Oil Corporation

v.

Docket No. OR05-4-002

SFPP, L.P.

ConocoPhillips Company

v.

Docket No. OR05-5-002

SFPP, L.P.

Chevron Products Company

v.

SFPP, L.P.

Docket No. OR03-5-000

INITIAL DECISION

(Issued March 28, 2007)

Appearances

Steven H. Brose, Esq., Timothy M. Walsh, Esq., Albert S. Tabor, and Charles Caldwell,
Esq. for SFPP, L.P.

Steven A. Adducci, Esq. and Judith M. Andrache, Esq. for Valero Marketing &

Supply Co.

Gordon Gooch, Esq. and Elizabeth R. Meyers, Esq. for B.P. West Coast Products, LLC and ExxonMobil Oil Corporation.

Kevin Bedell, Esq., Gina L. Allery, Esq., and Mark Sisk, Esq. for Tasco- ConocoPhillips

Richard E. Powers, Jr, Esq. for Arizona Fueling Facilities Corporation.

William W. Bennet, Esq. and Derek Anderson, Esq. for the Trial Staff of the Federal Energy Regulatory Commission.

Karen V. Johnson, Presiding Administrative Law Judge

Introduction

1. In Opinion 435¹, the Commission held that the drain-dry facilities that are the subject of these proceedings, are part of SFPP L.P.'s (SFPP) interstate transportation service and ordered SFPP to file a tariff stating the charge for use of those facilities. In compliance with that order, SFPP filed a FERC tariff containing the drain-dry fee, which took effect April 1, 1999, subject to refund. Proceedings to determine a just and reasonable rate for the drain-dry facilities were held in abeyance while Opinion No. 435 was subject to rehearing and judicial review. On June 1, 2005, the Commission issued an Order on Remand and Rehearing initiating this proceeding in order to establish a just and reasonable rate for use of the Watson drain-dry facilities. *SFPP, L.P.*, 111 FERC ¶ 61,334 at 62,465-66 (PP 72, 75) (2005). Orders dated August 23, 2005 and February 13, 2006 severed issues related to the Watson Station charge from other recent SFPP complaint dockets and consolidated them with Docket No. OR92-8-025. *America West Airlines, et al.*, 112 FERC ¶ 61,209 (2005); *Chevron Products Company v. SFPP, L.P.*, 114 FERC ¶ 61,133 (2006).

2. Direct testimony was prepared and filed on October 20, 2005. Shortly thereafter, SFPP, BP West Coast Products LLC (BP), ExxonMobil Oil Corporation (ExxonMobil), Chevron Products Company, ConocoPhillips Company, Tosco Corporation, Ultramar Inc., Valero Marketing and Supply Company and the Airline Shipper Parties²

¹ See *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999), *order on reh'g*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000), *order on reh'g*, Opinion 435-B, 96 FERC ¶ 61,281 (2000), *on appeal sub nom.*, *BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

² The Airline Shipper Parties include America West Airlines, Inc., Continental Airlines, Inc., Southwest Airlines Co., Northwest Airlines Inc. and Arizona Fueling Facilities Corporation.

(collectively the Shipper Parties or the Complainants and, with SFPP, the Parties) began settlement negotiations. On November 15, 2005, at the Parties' request, the Chief Administrative Law Judge appointed Administrative Law Judge Bruce L. Birchman as Settlement Judge. Settlement Judge Birchman held Settlement Judge conferences on December 1 and 6, 2005, January 19, 2006, February 10, 2006, April 4, 2006, and in the interim, numerous discussions with individual participants. On January 10, 2006, Chief Administrative Law Judge Wagner suspended the Track II procedural schedule for 30 days to allow the participants to continue settlement negotiations. Through subsequent orders issued on February 10, 2006, March 3, 15, and 31, 2006, April 11 and 21, 2006, and May 8 and 15, 2006, Chief Judge Wagner suspended the Track II procedural schedule to allow the participants to continue settlement negotiations.

3. On May 17, 2006, under Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2005), SFPP and the Shipper Parties filed with the Commission a Settlement Agreement (Settlement) to resolve all FERC protests and complaints related to the Watson Station drain-dry facilities (the Watson proceedings) for the time period after March 31, 1999, and all evidentiary and factual issues for the time period prior to April 1, 1999.³

4. Two legal issues were reserved by the Settlement for hearing and decision (Reserved Legal Issues). The first of these issues is whether SFPP's contracts with individual shippers establish the rate level or limit reparations during the period prior to April 1, 1999 (no issue of whether contracts establish a rate level or limit refunds with respect to the post-March 31, 1999 time period shall be presented). The second issue is whether the payment of any reparations that may be held to be owed should start on November 1, 1991 or upon the dates two years before the filing of each individual complaint. The Parties agreed to stipulate to the facts necessary to resolve the Reserved Legal Issues and that there would be no need for a full evidentiary hearing. Instead, the Parties agreed to argue the Reserved Legal Issues on brief and, if necessary, at oral argument. On August 2, 2006, the Commission approved the Settlement on the ground that it appears to be fair, reasonable and in the public interest and directed that the reserved legal issues be disposed of according to the terms of the Settlement. *SFPP, L.P.*, 116 FERC ¶ 61,116 at 61, 570 (PP 14, 16) (2006).

5. On August 28, 2006, the Chief Administrative Law Judge adopted a procedural schedule to govern the remainder of these proceedings (August 29, 2006 Procedural

³ The only dockets before me as Presiding Judge are those ones captioned on this Initial Decision. However, the Settlement was that was ultimately accepted by the Commission was submitted under and affects Docket Nos. OR93-5-000, OR94-4-000, OR95-5-000, OR95-34-000, OR98-1-000, OR98-13-000, OR00-9-000, OR96-2-000, OR96-10-000, OR96-15-000, OR98-2-000, OR00-8-000, OR00-4-000, OR04-3-001, and IS99-144-000 (See Appendix E of the Settlement).

Schedule).⁴ Pursuant to that schedule, on October 6, 2006, the Parties submitted a Joint Stipulation of Facts. On November 15, 2006, SFPP, the Shipper Parties and FERC Trial Staff (Staff) each submitted initial briefs on the Reserved Legal Issues.

6. On September 28, 2006, SFPP submitted a refund report in the captioned proceedings in accordance with the Commission's order dated August 2, 2006. *SFPP, L.P.*, 116 FERC ¶ 61,116 (2006). On October 4, 2006, BP and ExxonMobil filed a joint protest to the report which challenged the accuracy of the amounts listed in Attachment A to SFPP's refund report (October 4th Protest). SFPP filed a response on October 10, 2006, which the Commission accepted in its discretion under Rule 213, 18 C.F.R. § 385.213 (2006). On October 23, 2006, BP withdrew its protest. On the same date ExxonMobil filed a supplemental protest alleging that SFPP had withheld a significant amount of dollars due for the post-escrow period (October 23rd Protest).⁵ SFPP filed a response on October 30, 2006. The Commission remanded the single protest to me for a determination of the merits, if any, and whether any additional funds are due ExxonMobil (Refund Issue). SFPP's refund report was accepted as to all other amounts and recipients contained in the report. Subsequently, the Chief Judge suspended the August 29, 2006 procedural schedule until I could seek comments from the Parties on how they envisioned the Refund Issue being incorporated into the already existing briefing schedule.

7. On December 8, 2006, I issued an Order Seeking Comments on Procedural Schedule. After having received comments from the Parties and Staff, I recommended to the Chief Judge a procedural schedule for going forward with this proceeding. On December 21, 2006, the Chief Judge issued an Order Adopting Revised Procedural Schedule that incorporated a date upon which SFPP and ExxonMobil could address the Refund Issue on brief. On January 16, 2007, I was notified via letter from counsel for SFPP that ExxonMobil and SFPP had reached an agreement in principle regarding the appropriate amount of refunds owed by SFPP to ExxonMobil and that in view of this resolution, they did not intend to file briefs regarding the Refund Issue. On February 21, 2007, ExxonMobil formally submitted its notice of withdrawal of its October 4th and October 23rd Protests of SFPP's Refund Report. As such, this Initial Decision does not address the Refund Issue.

Stipulated Facts⁶

8. SFPP owns and operates Watson Station, the mainline pipelines originating at Watson Station and the Watson drain-dry facilities at issue in this proceeding. (The drain-dry facilities are also referred to herein as a "vapor recovery system.") Watson Station is the principle accumulation point on the SFPP system for products moving into

⁴ *Order of Chief Judge Adopting Procedural Schedule* issued August 29, 2006.

⁵ *Supplemental Protest of ExxonMobil Corporation* filed October 23, 2006.

⁶ Paragraphs 8-28 are taken from the Joint Stipulation of Facts filed on October 6, 2006.

two of its mainline pipelines, the West Line and the San Diego Line.

9. Watson Station is the major origin point for volumes moving on SFPP's West Line. The West Line operates from Watson Station and East Hynes in greater Los Angeles and transports petroleum products to points to the east with ultimate destinations in Arizona. The West Line has a connection to the Calnev Pipeline at Colton, California. Calnev transports petroleum products primarily to the Las Vegas, Nevada area.

10. Several refineries and terminals located in the southern Los Angeles and Long Beach area deliver refined products to Watson Station for transportation on the West Line and San Diego Line. These refineries and terminals deliver product to Watson Station through one or more pipelines connected to the Watson Station facilities.

11. Product arriving on connecting pipelines is fed into "breakout" tanks (meaning for purposes of these Stipulated Facts, large storage tanks where the product temporarily comes to rest) and then is pumped into one of the mainline pipelines originating at Watson Station. There are fifteen breakout tanks owned and operated by SFPP at Watson Station.

12. Many different types of refined petroleum products are shipped on SFPP. In general, they are classified as gasoline (e.g., the familiar three grades of motor gasoline sold at filling stations), diesel, and jet fuels, but there are many sub-classifications that turn on the chemical composition of a particular fuel. In addition, due to air quality regulations of the State and Federal governments, the chemical compounds in each sub-classification can also vary by where the product will be sold and the season of the year.

13. When a particular product comes out of any of the refineries or from storage in a terminal, that product is fungible and indistinguishable from other products of the same chemical composition (referred to herein as "specification products). For example, a premium motor gasoline that fits the specifications for a particular destination (e.g., Phoenix) has essentially the same chemical composition regardless of whether this gasoline comes from the BP refinery, the Chevron refinery, the ExxonMobil refinery or any of the other refineries. At the destination terminal each "brand" of gasoline will have its own proprietary additives injected into the tanker trucks, thus, distinguishing say, Exxon gasoline from Chevron gasoline.

14. These specification products cannot be stored in the same breakout tank at the same time. Only one type of specification product may be stored in a given tank at a given time. One simply cannot mix different specification products in a tank. Thus, unless a particular tank is to be dedicated to one specification product, the tank must be completely drained, or "turned around", so that another specification product can be temporarily stored without contamination from the product that previously was in the tank, and without allowing vapors to escape into the atmosphere. Allowing vapors to

escape into the atmosphere would violate both Federal and State Air Quality Regulations.

15. SFPP's breakout tanks have a "floating roof." As the product is pumped in, the floating roof rises; as the product is pumped out, the floating roof descends. By remaining in contact with the liquid, vapor releases are mitigated. However, it is necessary for the floating roof to have "legs" to prevent it from reaching the floor of the tank. As the product is pumped out, the floating roof stops descending a couple of feet from the floor.

16. In order to "turn around" a breakout tank, as much liquid as possible is pumped out of the space between the floating roof and floor of the tank. Nevertheless, a certain amount of vapors remain and if they were released to the atmosphere violations of air quality regulations would occur. (If the vapors were not pumped out, they would be forced into the atmosphere around the seals of the floating roof when a new batch of liquid is pumped into the tank.) Prior to installation of the vapor recovery system, SFPP kept a certain amount of liquid in the tank at all times so that the floating roof rested on the surface of the liquid, which eliminated the vapor space. This, however, required each tank to be dedicated to a specific type of product at any given time.

17. The vapor recovery equipment is designed to remove the vapors that remain in the tank when the liquid is drained. Installed on each of the tanks is a pipe that runs from above the roof line down to the bottom of the tank and thus can address the vapors remaining after the tank has been "drained dry" of liquid. Centrally located at Watson Station (and any other place where vapor recovery equipment is installed) is a vapor holding tank. The vapors left in the breakout tank are literally sucked out through this exterior pipe and delivered through a series of pipes to the vapor holding tank. The vapors are then taken by pipe to a Thermo-Oxidizer and incinerated so that none of the vapor escapes to the atmosphere.

18. The various incoming pipelines that deliver product to Watson have different pumping rates. The pumping rates affect how long it takes to move product from the refinery or terminal into the Watson Station tanks. A line with a lower pumping rate takes longer to deliver the same amount of product into a tank than does a line with a higher pumping rate.

19. In 1980, SFPP set the minimum pumping rate that shippers would have to meet in delivering through the incoming pipelines to Watson Station at 10,000 barrels per hour (BPH) for gasoline and 9,000 BPH for distillates (diesel and jet fuel).

20. On March 7, 1989, SFPP sent a letter to shippers indicating that it intended to increase the minimum pumping rates. Exhibit SWTS-3 contains a copy of the March 7, 1989 letter.

21. In response to SFPP's March 7, 1989 letter, SFPP was asked by certain shippers to consider alternatives to increasing the pumping rates because shippers would be required to incur significant costs to enable their facilities to deliver product at the higher pumping rates. For example, SFPP was contacted by ARCO, which indicated that the modifications required for it to reach the higher rate would involve a substantial investment. ARCO asked if there were possible alternatives to the higher pumping rates. As a result of the request, SFPP determined that if the incoming tankage could be operated with vapor recovery equipment, the efficiency of the Watson Station breakout tank operation would be improved and therefore the incoming pumping rate increase would not be required at that time. SFPP then advised ARCO of the cost to convert to a drain-dry operation, including the estimated charge to amortize the investment and cover operating costs. ARCO indicated that it preferred this alternative, and as a result, the service was offered as an option to all shippers at Watson Station.

22. The Watson Station drain-dry facilities went into service on November 1, 1991. From November 1, 1991 through March 31, 1999, SFPP charged product delivered to Watson Station an incremental 3.2 cents per barrel intended to recover the costs of the drain-dry facilities plus a return on investment for SFPP. During that period, the fee and terms of use for the drain dry facilities were set forth in the individual contracts with parties using the facilities. Copies of the contracts and related correspondence are set forth in Exhibit SWTS-4.

23. From April 1990 to April 1, 1992, the minimum pumping rates that shippers would have to meet in delivering through the incoming pipelines to Watson station were 12,500 BPH for gasoline and 11,250 BPH for distillates. Since April 1, 1992, the minimum levels have been 15,000 BPH for gasoline and 13,500 for distillates, but shippers did not have to meet the higher pumping rates if they paid the charge for the Watson vapor recovery system.

24. During the period November 1, 1991 through March 31, 1999, all shippers delivered product at pumping rates that were below the levels of 15,000 BPH for gasoline and 13,500 BPH for distillates. As of this date, only one supplier- Shell- has installed greater pumping power. All the rest of the suppliers, including the terminal owned by Kinder Morgan at Carson, California, continue to deliver at the 1990 level of pumping, paying the charge at Watson.

25. If shippers were to increase their pumping rates, SFPP would be required to upgrade certain pipes and valves at Watson Station in order to accommodate the shippers' higher pumping rate. For example, when Shell installed greater pumping power, SFPP also upgraded its full flow relief piping system prior to receiving product from Shell at the higher pumping rate. SFPP would need to make similar upgrades if other shippers were to increase their pumping rates.

26. Beginning in 1993, a series of complaints were filed by shippers with the Commission asserting the jurisdictional nature and challenging the justness and reasonableness of the incremental fee charged at Watson Station in connection with the drain-dry facilities. A list identifying each shipper complaint is shown on pages 3 and 4 of the Joint Motion for Leave to Dismiss Protests and Portions of Complaints submitted with the May 17, 2006 Settlement Agreement.

27. During the period November 1, 1991 through March 31, 1999, SFPP did not have on file with FERC a tariff for the charge associated with the Watson Station facilities. On January 13, 1999, FERC found the Watson Station drain-dry facilities to be jurisdictional and directed SFPP to file a rate for the drain-dry service in a FERC tariff. *SFPP, L.P.*, 86 FERC ¶ 61,022 at 61,073-76 (1999). On March 15, 1999 SFPP filed a FERC Tariff No. 44 in Docket No. IS99-144-000 which took effect on April 1, 1999.

28. In May 2006, SFPP and the shipper complainants entered into a Settlement Agreement which resolved certain issues in the complaints pending against the Watson Station drain-dry charge. On August 2, 2006, the Settlement Agreement was approved by the Commission. *SFPP, L.P.*, 116 FERC ¶ 61,116. As the Settlement Agreement and related attachments reflect agreements and representations integral to the current proceedings, both the Settlement Agreement, including all attachments and the Commission's Order approving the same were specifically incorporated in and made a part of the Joint Stipulation of Facts.

Position of the Parties

Issue One: Whether SFPP's contracts with individual shippers establish the rate level or limit reparations during the period prior to April 1, 1999?

SFPP

29. SFPP takes the position that it and the Complainants entered into valid contracts that remain enforceable for the period prior to April 1, 1999. SFPP Initial Brief (IB) at 12. SFPP argues that the Commission honors contracts between oil pipelines and their customers despite the contracts having never been filed with the Commission because contracts "ultimately represent choice" by the signatory parties. SFPP contends that the Commission, by honoring private contracts, is motivated by a respect for the sanctity of contract and the role contracts play in an orderly market place. *Id.* SFPP asserts that the contracts were structured and negotiated by sophisticated parties and that the resulting contracts indisputably manifested mutual assent, with both parties providing consideration. *Id.* at 13.

30. SFPP also argues that the Complainants have no defense to the enforcement of the contracts under the "filed rate doctrine". *Id.* at 13-14. SFPP contends that when there is

no rate on file with the Commission, as was the case in these proceedings, then there is nothing that can be given the force of law under the Interstate Commerce Act (ICA). Thus, SFPP argues that with no rate on file, the “filed rate doctrine” does not apply and cannot operate to legally trump a valid contract. Id.

31. Additionally, SFPP invokes equitable principles to defend the enforceability of the Watson contracts. SFPP argues that it would be an inequitable result to award complainants reparations on the facts presented. Id. at 15. SFPP contends that the Commission, in exercising its discretion whether or not to award reparations, should consider all the facts, circumstances and conditions surrounding the controversy at issue. Id. SFPP points to three “good and sufficient reasons” that it feels warrant a denial of reparations.

32. First, SFPP argues that given the legal uncertainty regarding the jurisdictional nature of the contracts at the time of formation, a retrospective reduction in the mutually agreeable charges would be inequitable. Id. SFPP states that it believed in good faith that the charges associated with the drain-dry facilities did not need to be filed with the Commission and that there was no indication that Complainants thought a tariff filing would be required. Id. at 16. SFPP points out that the installation of the drain-dry facilities was performed at the request of the Shipper Parties and the contract rates were negotiated without any regulatory issues being raised by Complainants until after SFPP had invested in the facilities and put them into operation. Id. at 16-17; *See* Joint Stipulation of Facts ¶¶ 13-19.

33. Second, SFPP contends that the Shipper Parties assumed responsibility for the contract terms and reparations should therefore be barred. SFPP IB at 15. SFPP argues that reparations have been denied under the ICA “where parties have adopted a pattern or practice that demonstrates affirmation of rate terms that they subsequently challenge.” Id. at 17. SFPP claims that Complainants’ reparations claims should be denied because they pursued the contracts as a means of avoiding the costlier option of meeting the pumping rate requirement. Id. SFPP argues that the Shipper Parties were sophisticated negotiators throughout the two year negotiation process and that the end result of the process was a profitable bargain for Complainants memorialized in contracts that were actively shaped for their own benefit. Id. at 18. SFPP contends that it would be inequitable to allow Complainants to escape contracts that they actively endorsed and to do so would result in a windfall for Complainants at SFPP’s expense. Id.

34. Third, SFPP argues that equitable estoppel bars reparations. Id. SFPP reiterates the fact that the drain-dry facilities were constructed at the behest of the Shipper Parties and no challenges to the contractual charges were raised until after SFPP had incurred considerable costs to install the drain-dry system. Id. SFPP contends that its reliance upon Complainant’s actions should be considered an important factor in determining the equity of reparations. Id. SFPP states that Complainants benefited from the drain-dry

facilities and to award Complainants reparations on these facts would unduly punish SFPP and unfairly reward the Complainants. *Id.* at 19.

35. SFPP further supports its argument for the denial of reparations by stating that Complainants cannot establish that they were damaged by unjust and unreasonable rates and therefore are not entitled to reparations. *Id.* SFPP contends that damages cannot be established by the sole fact that the drain-dry charge has been decreased for the period after the tariff took effect. *Id.* SFPP argues that Complainants cannot possibly claim to be harmed by a contract that they actively pursued and negotiated. Rather, SFPP believes that the Complainants benefited from the Watson Station contracts because it allowed them to avoid having to adhere to the higher pumping rate requirements. *Id.* at 20.

36. Finally, SFPP argues that principles of quasi-contract warrant SFPP's entitlement to the agreed compensation under the Watson Station contracts. *Id.* SFPP contends that the instant facts satisfy the three requirements of quasi-contract. First, SFPP provided the drain-dry service which conferred a benefit on Complainants. *Id.* at 21; Joint Stipulation of Facts ¶ 13. Second, Complainants realized the benefit. *Id.*; Joint Stipulation of Facts ¶ 17. And third, SFPP argues that Complainants would be unjustly enriched if they were permitted to retain the benefits of the drain-dry facilities without having to pay SFPP the agreed-upon rate that they themselves negotiated. SFPP at 21. SFPP contends that the proper measure of the value of the benefit received, i.e., the drain-dry service, is the agreed 3.2 cents per barrel charge contained in the Watson Station contracts. *Id.* at 22-23.

Shipper Parties

37. The Shipper Parties take the position that SFPP's private, unfiled contracts do not establish the just and reasonable rate level or limit reparations during the period prior to April 1, 1999 for the Watson Station service. Shipper Parties' Initial Brief (Shipper Parties' IB) at 10. Shipper Parties argue that SFPP's provision of jurisdictional service at Watson Station without filed tariff authority from 1991 to 1999 constituted a flagrant violation of Section 6(7) of the ICA, rendering the unfiled contract rate unlawful. *Id.*

38. To support their argument, Shipper Parties rely on both the text of the ICA, as well as two Supreme Court cases addressing the tariff-filing requirements of the ICA. Shipper Parties first point to Section 6(1) of the ICA, which states, "[e]very common carrier subject to the provisions of this chapter shall file with the Commission...schedules showing the rates, fares and charges for transportation..." 49 U.S.C. app. § 6(1) (1988). Most important, Shipper Parties argue, is Section 6(7) of the ICA, which provides in relevant part, that carriers may not:

engage or participate in the transportation of...property...
unless the rates, fares, and charges upon which the same [is]

transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation...

39. Shipper Parties rely upon *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry.*, 284 U.S. 370 (1932), to support their argument that in order for a jurisdictional rate to be legal, and thus not unlawful, a carrier's rates must be on file with the Commission. Shipper Parties' IB at 10-11. Shipper Parties also rely upon *Maislin Ind'y U.S., Inc., et al. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) to support the proposition that the tariff filing and publication requirements of the ICA are essential facets and components of the statute. *Id.* at 11. In sum, Shippers argue that they are entitled to reparations because under both the original unfiled contracts and the contract renewals, the Watson charges were unlawful and illegal because they were never filed with the Commission.

40. Shipper Parties argue that SFPP's argument that equitable considerations bar Shipper Parties from receiving reparations reflects an inaccurate portrayal of relevant Commission decisions. Shipper Parties' Reply Brief (RB) at 11. Shipper Parties contend that SFPP's "good and sufficient reasons" for denying Shippers reparations have no legal or factual basis. Rather, Shippers argue that SFPP's equitable reasons stand in stark contrast to the Commission's general presumption that reparations are due when a complainant is required to pay more for transportation than a reasonable rate. Shipper Parties' RB at 11; *See SFPP, L.P., et al.*, 91 FERC ¶ 61,135 at 61,515 (2000); *See Fry Trucking Co. v. Shenandoah Quarry, Inc., et al.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980)(finding that equitable considerations "cannot justify" violations of the ICA); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484 (1939).

41. Shipper Parties also dispute SFPP's claims that Shippers assumed responsibility for the contract terms and therefore cannot equitably receive reparations for amounts charged under the Watson contracts. Shipper Parties' RB at 11. Shippers claim that the ICC precedent that SFPP cites in its Initial Brief does not conform to the facts of this proceeding, but instead, supports the granting of reparations with interest to the Shippers. Shipper Parties' IB at 14. Shippers contend that there is nothing in the factual record that suggests that the Watson drain-dry service was a joint-venture between SFPP and the Shippers. Rather, the Shipper Parties believe the record reflects that they individually entered into contracts with a monopoly common carrier pipeline so that they could get their products to market. By doing so, SFPP reaped enormous profits because of the monopoly position it occupied, which allowed it to charge a rate far in excess of what was fair and reasonable. Shipper Parties' RB at 14-15.

42. Shippers argue that SFPP's claim that Shippers should be equitably estopped from receiving reparations is likewise without merit. *Id.* at 15. Complainants argue that the

elements of equitable estoppel under California law⁷ are not satisfied by the facts of the case. Shipper Parties' RB at 15-16. Complainants point out that that the crux of SFPP's equitable argument is that Shippers requested the drain-dry services and that SFPP relied upon that request in constructing the drain-dry facilities. *Id.* But Shipper Parties argue that this scenario falls well short of satisfying the elements of knowledge and intent that are required to establish an equitable estoppel claim. *Id.* at 16-17.

43. Shippers contend that SFPP's argument that reparations must be denied because damages cannot be established in these circumstances is without merit. Shippers argue that damages are established by operation of the Settlement Agreement because the parties expressly agreed upon, and the Commission approved, the fair and reasonable rates for each year from the beginning of operations in 1991 through the implementation of the filed tariff in 1999 for the purposes of establishing the appropriate level of reparations. *See SFPP, L.P.*, 116 FERC ¶ 61,116 at 61,570 (P 14). Furthermore, Complainants contend that SFPP's failure to file the Watson Station drain dry charge damaged shippers by denying them Commission oversight of the charge and by forcing them to pay an unfair and unreasonable rate. Shipper Parties' RB at 18. Therefore, Complainants argue that they are entitled to damages based on the unlawful Watson Station rate as provided in the Settlement Agreement. *Id.*; Shipper Parties IB at 13-15.

44. Shippers argue that SFPP's belief that the doctrine of quasi-contract operates to deny Shippers reparations is based upon an inaccurate portrayal of reparations as a revocation of the Watson contracts and not a reformation. Shipper Parties' RB at 22. Complainants contend that granting reparations will have the effect of reforming the charges in the contracts to reflect a fair and reasonable level of compensation for SFPP's services rather than revoking the contracts and denying SFPP compensation for the services that they provided to the Shippers as a common carrier. *Id.* at 21-22. Complainants argue that, if reparations are awarded, SFPP will still retain fair and reasonable compensation for the services it provided under the Watson contracts because the Settlement provides for the *quantum meruit* value of SFPP's services. *Id.* at 23; *See Settlement Agreement* at 3-4. Complainants state that the purpose of stipulating the agreed-upon annual cost-of-service rates was to provide fair value for the services provided by SFPP. Shipper Parties' RB at 22.

FERC Staff

45. Staff takes the position that private contracts do not supercede the Commission's statutory authority to ensure that all rates are just and reasonable. Staff IB at 5. Staff argues that the contract rates at issue must face an initial review for justness and

⁷ Shipper Parties' contend that the Watson contracts specify that the terms should be construed under California law. Such a determination is not necessary for the resolution of the Reserved Legal Issues.

reasonableness. *Id.* Staff states that the protection of the public interest is assured by the Commission's review and approval of these rates as just and reasonable. *Id.* at 7. However, Staff says that this is not to say that the Commission cannot make a determination that the rates contained in these private, unfiled contracts are the just and reasonable rates. Rather, Staff believes that it is the Commission's review of the rates at the outset that is the crucial determinant of lawfulness. *Id.* at 8.

Issue Two: Whether the payment of any reparations that may be held to be owed should start on November 1, 1991 or upon the dates two years before the filing of each individual complaint?

SFPP

46. SFPP argues that the ICA limits any reparations to the period two years prior to the filing of each complaint. SFPP IB at 23. SFPP points to Section 16(b)(3) of the ICA, which states that “[a]ll complaints against carriers...for the recovery of damages...shall be filed with the Commission within two years from the time the cause of action accrues, and not after...” 49 U.S.C. app. § 16(3)(b). SFPP contends that the two year statute of limitations applies with equal force to unpublished rates. SFPP IB at 23. Thus, SFPP argues that any reparations that may be held to be owed to the Shippers based on the unpublished Watson Station drain-dry facilities should be subject to the ICA's strict two-year statute of limitations and be limited to two years from the date of filing of each party's complaint.

Shippers

47. Shippers argue that the calculation of reparations should begin on November 1, 1991. Shipper Parties rely on Sepulveda Initial Decision to support its argument that because the violation of the ICA involved an unfiled rate, unlawful under Section 6(7) of the ICA, “the time limitations of § 16(3)(b) are not controlling.” *Texaco Refining and Marketing Inc. v. SFPP, L.P.*, 112 FERC ¶ 63,020 (2005) (Sepulveda Initial Decision); Shipper Parties' IB at 20. Shipper Parties argue that the Sepulveda Initial Decision stands for the proposition that because SFPP unlawfully disregarded the provisions of the ICA, which protect shippers, the pipeline cannot rely on the provisions of the ICA which place time limits on its liability for damages. Shipper Parties' IB at 20.

Staff

48. Staff takes the position that at a minimum, payment of reparations in this proceeding should start upon the dates two years before the filing of each individual complaint. Staff IB at 9. Staff looks to Section 16 of the ICA to conclude that the two year statute of limitations applies for reparations in the instant proceeding because the rates at issue are non-grandfathered, unpublished rates that did not meet the definition of

“overcharges” as that term is defined in Section 16(d) of the ICA. Id. 9-11.

Preliminary Discussion

49. These proceedings which concern SFPP’s West Line and the Watson drain-dry charges have been whittled down over the years by Commission Orders, D.C. Court of Appeals remands, a voluntary settlement agreement accepted by the Commission, and a joint stipulation to the factual circumstances surrounding the services and facilities at issue.

50. The long and winding road that has gotten us to this point has established a few important facts that will assist in the resolution of the Reserved Legal Issues. It has been established that the facilities at issues in this proceeding are part of SFPP’s interstate transportation service and that SFPP must have a tariff on file with the Commission which states the charges associated with the drain-dry service. *See SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999), *order on reh’g*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000), *order on reh’g*, Opinion 435-B, 96 FERC ¶ 61,281 (2000), *on appeal sub nom.*, *BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004). Furthermore, the Commission has concluded that the charges for the Watson Station drain dry facilities were not grandfathered under Section 1803 of the Energy Policy Act of 1992 (EPAAct), 42 U.S.C.S. §§ 13201-13556, in the years for which complaints were filed against those charges. *SFPP, L.P.*, 111 FERC ¶ 61,334 at 62,465-66 (2005).

51. Also important is the fact that immediately upon the Commission’s acceptance of the Settlement on August 2, 2006, all of the issues in these proceedings relating to the time period after March 31, 1999, and all factual and evidentiary issues related to the time period prior to April 1, 1999, including the amount SFPP will pay each Shipper Party if it is found to owe reparations, were resolved. In addition, the approved Settlement resolved the issues of: the required pumping rates for incoming lines to Watson Station (Section 1 of the Settlement); the availability of drain-dry service to suppliers that do not meet the required pumping rates (Section 1 of the Settlement); the forward-looking fee for drain-dry service (Section 2(b) of the Settlement); the appropriate cost-of-service rate for each year the drain-dry service has been in operation (Section 2 of the Settlement); the total interstate Watson volumes and each Shipper Party’s individual interstate Watson volumes for each relevant year (Section 3 of the Settlement and Appendix A to the Settlement); the timing of all required payments (Section 5 of the Settlement); and the withdrawal of various protests and complaints (Section 7 of the Settlement).

52. Carved out of the Settlement were the two Reserved Legal Issues that are the subject of this Initial Decision. The facts that are needed in order to resolve the Reserved Legal Issues have been stipulated to and the respective positions of SFPP, the Shipper Parties, and Staff with respect to each issue have been fully ventilated on brief. As soon

as the Reserved Legal Issues are resolved, the terms of the Settlement will take effect and serve to establish the remaining obligations of the parties with respect to the Watson Station charges for the time period prior to April 1, 1999.

Discussion

Issue One: Whether SFPP's contracts with individual shippers establish the rate level or limit reparations during the period prior to April 1, 1999?

53. SFPP's contracts with individual shippers neither establish the rate level nor limit reparations during the period prior to April 1, 1999. Although, the ICA was repealed in 1978, *see* Pub. L. No. 95-473 § 4(b), (c), 92 Stat. 1466, 1470 (Oct. 17, 1978), the Commission retained the ability and responsibility to regulate oil pipelines under the ICA. Specifically, 49 U.S.C. § 60502 (2003) provides that, "The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission."⁸

54. Under the ICA, the Commission has been entrusted with the duty of ensuring that the rates and charges of a carrier pipeline are just and reasonable. In order to accomplish this goal, the ICA imposes certain requirements on carrier pipelines, most importantly, the duty to file such rates and charges with the Commission in the form of a tariff. Section 6(1) of the ICA provides that "[e]very common carrier subject to the provisions of this chapter shall file with the Commission...schedules showing the rates, fares, and charges for transportation..." 49 U.S.C. app. § 6(1). Section 6(7) of the ICA provides, in relevant part, that carriers may not:

engage or participate in the transportation of...property...
unless the rates, fares, and charges upon which the same [is]
transported by said carrier have been filed and published in
accordance with the provisions of this chapter; nor shall any
carrier charge or demand or collect or receive a greater or less
or different compensation for such transportation...⁹

As relevant to the present facts and circumstances, the statute prohibits a common carrier like SFPP from transporting refined petroleum products in interstate commerce unless its

⁸ The relevant version of the ICA was, but is no longer, reprinted in the appendix to title 49 of the United States Code. Therefore, when the Commission's authority under the ICA is referred to in this Initial Decision, I will cite to the 1988 edition of the U.S. Code, as it is the last such edition that reprinted the ICA as it appeared in 1977.

⁹ 49 U.S.C. app. § 6(7).

rates have been filed and published with the Commission in accordance with the provisions of the Act.

55. As Staff cogently noted in its initial brief, “[t]here is no provision in the Interstate Commerce Act allowing private contracts to supercede the Commission’s authority to review the justness and reasonableness of oil pipeline rates.” Staff IB at 6. In his Initial Decision Finding Sepulveda Replacement Rate Unjust and Unreasonable (Sepulveda Initial Decision), Administrative Law Judge Zimmett was confronted with a dispute that involved many of the same parties and nearly identical factual circumstances. In particular, the Sepulveda proceeding involved shipper complaints against SFPP for charges for interstate service over the Sepulveda Line. As is the case here, the charges were contained in contracts between SFPP and various shippers that were not submitted to the Commission for review. Instead, “SFPP chose to flout the ICA and ignore the Commission for nearly 15 years while assessing charges for interstate service over the Sepulveda Line. All of this came to light only after complaints had been filed, drawing the Commission’s attention to the pipeline’s conduct.” *SFPP, L.P.*, 112 FERC ¶ 63,020 at 65,053 (P 15) (2005).

56. Judge Zimmett ruled that any arguments suggesting that contract rates trump the Interstate Commerce Act when questions arise as to whether the rates are just and reasonable are without merit. To conclude otherwise would deprive the Commission of its primary jurisdiction over determining rate questions under the ICA. Thus, Judge Zimmett concluded that, “[t]he Commission does not and cannot yield its ratemaking authority to private contracting parties when questions are presented about the justness and reasonableness of contract rates.” *Id.* at 65,067.

57. The Commission ultimately affirmed Judge Zimmett’s conclusions with regard to the unfiled Sepulveda rate. *Texaco Refining and Marketing Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (Order on Sepulveda Initial Decision). In doing so, the Commission noted that the Supreme Court unequivocally held that all rates or charges subject to the ICA must be filed with the appropriate regulatory agency to be valid even if the charges were included in a contract. *Id.* at P 19; *Maislin Industries, U.S., Inc. et al. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*Maislin*). The Commission stated that “the contract rate, fare, or charge embodied in the contract must be a legal or lawful rate on file with the Commission before the rate component of the contract may be enforced.” *SFPP, L.P.*, 117 FERC ¶ 61,285 at P 79 (2006). Otherwise, as Judge Zimmett warned, “[t]he regulatory process simply would collapse if every public utility, whose actions might otherwise be subject to regulation, could decide on its own volition whether to submit to the ICA and the Commission’s jurisdiction without notifying the agency of its views.” *SFPP, L.P.*, 112 FERC ¶ 63,020 at 65,053 (P 17) (2005).

58. SFPP elected at its peril not to file the Watson Station charges with the Commission. Instead, SFPP relied upon privately negotiated contracts between it and the

Shippers Parties. The Commission is charged with ensuring that rates for interstate jurisdictional service are just and reasonable and these contracts cannot operate to frustrate the Commission's regulatory responsibilities under the ICA. As Staff noted in its brief, "...while parties may contract for individual rates, the protection of the public interest is assured by the Commission's supervision of these individual contracts." Staff IB at 7-8. I agree.

59. SFPP asks that the requirements of the ICA be relaxed and that reparations be denied because the Shippers actively solicited the contracts at issue, were sophisticated parties to the contract negotiations, and freely chose to be bound by the terms of the contract. This argument is without merit. SFPP espoused the same argument in the Sepulveda proceedings and it was rejected. *See SFPP, L.P.*, 112 FERC ¶ 63,020 at 65,068-69 (P169-170); *SFPP, L.P.*, 117 FERC ¶ 61,285 at P 83 (2006).

60. Furthermore, SFPP's argument that equitable considerations bar Shippers from receiving reparations is also rejected. At first glance one might be swayed by SFPP's equitable arguments. It is true that SFPP incurred considerable costs to install the drain-dry system in response to the Shipper Parties' request for an alternative to meeting higher pumping rates. SFPP does not allege bad faith on behalf of the Shippers with respect to their decision to circumvent SFPP's higher pumping rate requirements by privately contracting with SFPP for the drain dry services. Rather, it seems that SFPP takes issue with the fact that Shippers did not challenge the contractual charges until after SFPP had incurred considerable costs to install the drain-dry system. SFPP believes it would be inequitable to deny SFPP the benefits of their bargain in these circumstances. I disagree.

61. Equity cannot work to blur the responsibilities of the Commission in maintaining the regulatory framework established by the ICA. SFPP had the obligation under the ICA to submit the Watson drain-dry contracts to the Commission so that it could carry out its statutory responsibility of ensuring the reasonableness of the charges therein. Failing to do so, for whatever reason, was unlawful and the equitable arguments that SFPP implores me to consider on this issue are not convincing. Furthermore, if I were to accept SFPP's equitable arguments and deny reparations because of them, the end result would be inequitable: SFPP, the violator of the ICA, would retain its ill-gotten gains and, thus, be unjustly enriched at the expense of both the Shipper Parties and the Commission's responsibilities under the ICA.

62. SFPP argues that reparations must be denied because the Complainants cannot establish damages with regard to the Watson drain-dry charges. SFPP IB at 19. This argument is also without merit. As the Shipper Parties correctly argue on brief, damages are established by operation of the Settlement Agreement. Shipper Parties' RB at 17. The parties to the Settlement Agreement expressly agreed upon, and the Commission approved, the fair and reasonable rates for each year from the beginning of operations in 1991 through the implementation of the filed tariff in 1999 for purposes of establishing

the appropriate level of reparations. Settlement Agreement at 3-4; *SFPP, L.P.*, 116 FERC ¶ 61,116 at 61,570 (P 14). Section 8 of the ICA states that if a common carrier is found to have engaged in unlawful conduct, that common carrier “shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter...” 49 U.S.C. app. § 8. SFPP’s failure to file the Watson charge is unlawful conduct under the ICA and the damages sustained equal the difference between the original contract charge levels and the fair and reasonable rates for the years in question, which were agreed to in the Settlement and approved by the Commission.

63. SFPP’s related argument that Complainants cannot credibly claim they were “damaged” by a charge they themselves sought as an alternative to satisfying the increased pumping rates is also rejected. SFPP would have us believe that the realization of benefits under the contracts forecloses the possibility of any claim for damages. But SFPP’s reasoning on this point fails to recognize that the damage suffered is not the result of the Shippers having not fully realized the benefits of the bargained for exchange. Rather, damages are established by SFPP’s failure to file a tariff with the Commission. By not filing, the Shippers were denied the benefit of paying a Commission-approved charge. Whether or not the Shippers benefited under the contracts is irrelevant and SFPP’s argument to the contrary is unconvincing on the record as made.

Issue Two: Whether the payment of any reparations that may be held to be owed should start on November 1, 1991 or upon the dates two years before the filing of each individual complaint?

64. The payment of reparations should start upon the dates two years before the filing of each individual complaint. Section 16(3)(b) of the ICA states:

All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues...

Complainants seek reparations based upon complaints challenging the fact that SFPP charged them for service at the Watson Station drain-dry facility without having a tariff on file with the Commission. JS at P 15. Staff correctly noted that for statute of limitations purposes, such complaints are governed by section 16(3)(b) of the ICA as they concerned the failure of SFPP to have a tariff on file for the provision of jurisdictional service, and were not about “overcharges” as that term is defined in section 16. Staff IB at 10. Section 16(3)(g) of the ICA defines “overcharges” as charges collected in excess of the lawfully filed tariff rate for transportation service. SFPP did not have a tariff on file for the Watson drain-dry service, so the complaints could not have been filed to recoup “overcharges”. It has also been established that these are non-grandfathered rates.

SFPP, L.P., 111 FERC ¶ 61,334 at 62,465-66 (2005).

65. In the Commission's Order on Sepulveda Initial Decision, the Commission stated that, "[r]eparations will be due for the Complaint proceeding for two years before the complaints for the shippers that filed those complaints and were billed the contract five cents per barrel rate from late 1993 through the effective date of the Sepulveda common carrier rate in October 1997." *SFPP, L.P.*, 117 FERC ¶ 61,285 at P 77. As previously noted, the Sepulveda proceeding is similar to the circumstances in this case in that the Sepulveda proceedings also involved charges collected under unpublished rates. The Commission stated that reparations would be calculated in this manner because "[t]he ICA has a strict two year statute of limitations that places [the unpublished rates for the years before the two-year statute of limitations period] outside the reparation provisions on the Interstate Commerce Act." *Id.* at P 82.

66. The statute of limitations clearly applies to the Watson Station drain-dry charges. Under the plain language of the statute, the Complainants' claims based on the unreasonableness of the unpublished rates are subject to and limited by the two year limitation period. Therefore, reparations are recoverable beginning the two years before each individual complaint is filed and should be distributed in accordance with the terms of the Settlement Agreement that was submitted to and approved by the Commission.

67. Issues raised but not discussed, were considered and found to be without merit.

ORDER

68. SFPP shall calculate and distribute reparations according to both the terms of the Settlement agreement and the findings of this Initial Decision.


Karen V. Johnson
Presiding Administrative Law Judge