

Sinclair Oil Corp. v. BP Pipelines (North America), Inc.
Order on Certified Question
107 FERC ¶ 61,006 (2004)

The Presiding ALJ certified this question to the Commission:

Should BP Pipelines (North America), Inc. (BP), under the circumstances of this proceeding, be required to calculate actual costs and design rates that should have been in effect during the reparations period for the Western Corridor pipeline utilizing the Opinion 154-B trended-original-cost oil pipeline rate method. (at 61,017).

In determining that the ALJ may require BP to prepare a cost-of-service study, the Commission evaluated the following issues: (1) BP was the respondent and, as such, did not have the burden of proof on the “just and reasonable” issue and (2) BP was defending the reasonableness of its transportation charges under the provisions of 18 C.F.R. § 342.2 (b), not under the theory that its cost calculations supported the reasonableness of its charges. (*Id.* at 61,018).

The Commission concluded that BP's status as respondent did not exempt it from supplying evidence that was obviously under its exclusive control, *i.e.* the records necessary to calculate BP's costs. The Commission recognized that though “Sinclair ha[d] the ultimate burden”, it could not be expected to “produce all material supporting its claim when it is not in possession of certain information necessary to its claim.” (at 61,018). With regard to BP's claim that it did not have the cost records to prepare a cost-based calculation, the Commission agreed with the ALJ's statement that “oil pipelines can be required to perform analyses based on the 154-B methodology for retrospective rate examination where reparations are required in case-specific situations.” (at 61,018). The ultimate need for the cost study was dependent upon Sinclair's showing of eligibility for reparations.

With regard to the second issue, the Commission found that a rate “could be challenged under section 13(1) of the Interstate Commerce Act as to whether it is not just and reasonable, without regard to how the rate was established initially.” (at 61,018). The Commission stated that developing a cost of service for a particular pipeline is the first step in determining whether a rate is the proper one. (at 61,019).

In addition to answering the certified question, the Commission also recommended that the ALJ deny BP's motion to dismiss. BP filed the motion claiming that Sinclair was unable to seek reparations because it was not the shipper of the oil it purchased, and therefore, not in privity with BP. BP relied on the Commission's decision in Big West Oil Co. v. Frontier Pipeline Co., 106 FERC ¶ 61,171 (2004). (at 61,019). The Commission found that it was the ALJ's responsibility to determine if Sinclair met the “shipper” requirement or, in the alternative, if BP's refusal to allow companies other than its own marketing affiliates to use the pipeline constituted a “discriminatory denial of Sinclair's access to the Western Corridor.” (at 61,019).

COMM-OPINION-ORDER, 107 FERC ¶61,006, Sinclair Oil Corporation v. BP Pipelines (North America), Inc., Docket No. OR02-6-002, (April 7, 2004)

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Sinclair Oil Corporation v. BP Pipelines (North America), Inc., Docket No. OR02-6-002

[61,017]

[¶61,006]

Sinclair Oil Corporation v. BP Pipelines (North America), Inc., Docket No. OR02-6-002

Order on Certified Question

(Issued April 7, 2004)

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Sudeen G. Kelly.

1. On March 8, 2004, the Presiding Administrative Law Judge (ALJ) certified a question to the Commission pursuant to Rule 714 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.714.¹ The question certified to the Commission was:

Should BP Pipelines (North America), Inc., under the circumstances of this proceeding, be required to calculate actual costs and design rates that should have been in effect during the reparations period for the Western Corridor pipeline utilizing the Opinion No. 154-B trended-original-cost oil pipeline rate method.

2. For the reasons discussed below, the ALJ may require BP Pipelines (North America), Inc. (BP) to calculate a cost of service to determine the proper rate level for the relevant period, if the ALJ determines that reparations may be available to Sinclair Oil Corporation (Sinclair) as relief in this proceeding.

Background

3. Sinclair is a purchaser and independent refiner of crude oil, and it uses common carrier pipelines, such as the Western Corridor system, to transport crude oil to its refineries. The Western Corridor pipeline system transports crude oil from the Canadian border to destinations in Wyoming, Montana and Colorado. Sinclair asserted that, for more than two years, it had purchased, at a delivered price at the destination point, in excess of 100,000 barrels per month of crude oil that was produced in Canada, and the purchased oil was transported by others on the Western Corridor system for delivery to Sinclair at the destination point.

4. BP had an interest in the Western Corridor system until March 1, 2002, when Rocky Mountain Pipeline System, LLC (Rocky Mountain) acquired BP's interest in the Western Corridor system, adopted BP's tariffs, and later filed its own tariff.

5. On April 15, 2002, after Rocky Mountain acquired BP's interest in the Western Corridor, Sinclair filed its Complaint in this proceeding against both BP and Rocky Mountain. The Complaint included allegations that the transportation charges to Sinclair for transportation on the Western Corridor of the crude oil it had purchased were unjust and unreasonable and discriminatory in violation of Section 13(1) of the Interstate Commerce Act (ICA). Sinclair also claimed injury resulting from allegedly being blocked from access to the Western Corridor system for transporting Canadian sweet crude at the Canadian border as a shipper.

6. Sinclair asserted that a cost-of-service analysis has never been filed for the Western Corridor system. Sinclair stated that when the first tariff was published in 1996 by Amoco, a predecessor of BP, Amoco filed an

affidavit indicating that the rate was agreed to by an unaffiliated shipper who intended to use the rate, and thus the initial rate was established pursuant to §342(b) of the Commission's regulations, without a cost-of-service analysis. Since that time, the rate has been continued without a cost-of-service analysis.

7. Sinclair also contended that BP and its predecessor Amoco, operated the Western Corridor System to effectively foreclose independent shippers from using that line. As a result, claimed Sinclair, the only way in which an independent shipper such as Sinclair could obtain Canadian crude that had to be transported on the Western Corridor was by purchasing it on a delivered basis at the destination point from affiliates of Amoco and BP in Canada. Sinclair asserted that it suffered substantial monetary loss, damage, and injury as a result of BP and Amoco's precluding it from using the Western Corridor as a direct shipper, and being forced to pay unjust and unreasonable rates for crude oil shipped to it on the Western Corridor line.

8. The Commission issued an order setting the complaint for hearing.² Thereafter, Sinclair and Rocky Mountain reached a settlement, and Sinclair withdrew its Complaint as to Rocky Mountain. Sinclair did not withdraw the claim against BP for reparations for the portion of the two-year period prior to the filing of the complaint when BP had an ownership interest in the Western Corridor.

Discussion

9. In setting the complaint for hearing, the Commission stated that the core issue presented was Sinclair's contention that the rates charged on the Western Corridor are not just and reasonable. In the Order on Rehearing, the Commission stated that although Sinclair had withdrawn its

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complaint against Rocky Mountain, Sinclair's claims against BP remain to be addressed, including its claim for reparations assuming "Sinclair has presented any basis for the proceeding to go forward solely against BP."³ The answer to that in turn depends upon whether Sinclair can be considered a shipper on the Western Corridor system and thus eligible for reparations from having paid unjust and unreasonable rates, and in the alternative, whether Sinclair is eligible for reparations for injury resulting from having been denied access as a shipper to the Western Corridor system.

10. Under 18 C.F.R. §342.2, a pipeline may justify an initial rate for new service using one of two methods. A pipeline may either: (1) file cost, revenue, and throughput data supporting the proposed rate pursuant to §342.2(a); or (2) pursuant to §342.2(b), file a sworn statement that the proposed rate is agreed to by at least one non-affiliated person who intends to use the service. However, if a protest to an initial rate proposed under §342.2(b) is filed, the carrier must seek justification under §342.2(a). Moreover, if a rate initially established under §342.2(b) is challenged as not just and reasonable and a lower rate is found appropriate, the pipeline may have to pay reparations for the amount overcharged. In contrast, if a cost-supported rate approved as just and reasonable under §342.2(a) is challenged and a reduction is required to a new level found to be just and reasonable, that reduction is given only prospective effect, and there are no reparations.

11. In the Memorandum accompanying the certification, the ALJ stated that it was undisputed that BP has never performed a cost-based calculation for transportation charges on the Western Corridor since it has relied on §342.2(b) as a basis for its rate. The ALJ also recognized that in SFPP, L.P., Opinion No. 435, 86 FERC ¶61,022, at p. 61,113 (1999), reh'g denied, Opinion No. 435-A, 91 FERC ¶61,135, at p. 61,516 (2000) (SFPP), the Commission had concluded that just and reasonable rates for a reparations period should be calculated in accordance with the Opinion No. 154-B method and compared with the pipeline's rates in effect at that time. The difference would be the principal amount of the reparations owing.

12. Nevertheless, the ALJ had a concern that it might not be appropriate to order BP to perform the cost-of-service study because:

(1) BP is the respondent –it does not have the burden of proof on the "just and reasonable" issue; (2) BP was defending the reasonableness of its transportation charges under the provisions of Section 342.2(b) of the oil pipeline regulations –not under the theory that its cost calculations supported the reasonableness of its charges; (3) Sinclair did not establish in its Direct Testimony and Exhibits that BP's invocation of Section 342.2(b) was

unlawful or unreasonable.⁴

13. Given these concerns, the ALJ questioned whether it "was within my authority to require ... BP to—in essence—create evidence to support Sinclair's allegation."⁵

14. That BP was the respondent and did not have the burden of proof on the "just and reasonable" issue does not exempt it from supplying, during the discovery stage of the proceeding, information that only it has. While Sinclair has the ultimate burden of proof, this does not mean that it must produce all the material to support its claim when it is not in possession of certain information necessary to its claim. Sinclair obviously does not have the records to calculate BP's costs. Moreover, Sinclair asserted that when Rocky Mountain adopted BP's rates in 2002, "it [Sinclair] requested cost-of-service data from Rocky Mountain but Rocky Mountain denied its request."⁶ BP has maintained that it does not have the cost records to prepare a cost-based calculation. However, as the ALJ states, oil pipelines can be required to perform "analyses based on the 154-B methodology for retrospective rate examination where reparations are required in case-specific situations." (Memo at P 31). Such a situation can exist here if it is established that Sinclair is eligible for reparations.⁷ BP is in the best position to provide the necessary information, since the annual report information filed with the Commission in FERC Form No. 6 would not be sufficient to enable Sinclair to make the necessary calculations.⁸ In this situation, discovery can be utilized to obtain information for Sinclair to use to make the necessary evidentiary record.⁹

15. The ALJ stated that another factor in questioning whether to require BP to prepare a cost study was that BP was "defending the reasonableness of its transportation charges under the provisions of Section 342.2(b)... not under the theory that its cost calculations supported the reasonableness of its charges." A rate, however, can be challenged under Section 13(1) of the Interstate Commerce Act as to whether it is not just and reasonable, as Sinclair has done here, without regard to how the rate was established initially. The first step in determining whether a rate in

[61,019]

effect was the proper one is to develop a cost of service for the pipeline.¹⁰

16. Intertwined with the certified question is BP's pending motion to dismiss. The ALJ noted in the Memorandum that BP has moved to dismiss the complaint on the grounds that Sinclair was not the shipper of the oil it purchased. BP argues that as a result, Sinclair was not in privity with BP, and under Commission precedent may not seek reparations, citing a recent Commission order, *Big West Oil Co. v. Frontier Pipeline Co.*, 106 FERC ¶61,171 (2004). Both Sinclair and Commission staff urge the ALJ to deny BP's motion.

17. In its complaint, Sinclair contended that the rate charged by BP when Sinclair purchased and was transported on the Western Corridor was not a just and reasonable rate. Sinclair also included other allegations which the Commission noted in both the Hearing Order and the Order on Rehearing. Thus, in the *Hearing Order*, 102 FERC ¶61,117 at P 31, the Commission stated that Sinclair's complaint raised an issue as to whether "the pipeline companies' actions with respect to transportation on the Western Corridor system unlawfully conferred undue preferences on the other shippers or purchasers of crude oil transported through the Western Corridor system." In the *Order on Rehearing*, 104 FERC ¶61,290 at P 17 (2003), the Commission referred to Sinclair's contention that "it was not a shipper of record because BP Pipeline refused to permit any company other than its own marketing affiliates to use the pipeline."

18. BP's motion raises the question whether in the circumstances of this case, Sinclair somehow meets the "shipper" requirement which would entitle it to seek reparations from BP. If the ALJ were to find that Sinclair meets that requirement, then the cost study would be necessary to determine whether the rate Sinclair paid was just and reasonable. If the ALJ were to conclude that Sinclair does not satisfy this requirement, there remains the question whether there is merit to Sinclair's claim that BP's actions, including those of its affiliates, may have deprived Sinclair of the ability to become a shipper on the Western Corridor. Should the ALJ find in Sinclair's favor on this issue, Sinclair might be entitled to damages, possibly in the form of reparations, and the cost study would be necessary.

19. A cost study thus may be relevant in this case depending on Sinclair's showing regarding its eligibility for reparations as either a shipper on the Western Corridor system, or as a party injured by BP's discriminatory denial of Sinclair's access to the Western Corridor system. If a showing is made, the matter could then proceed to a

determination as to whether the rates charged by BP on the Western Corridor system were not just and reasonable, what the just and reasonable rate should have been, and whether that difference should be the basis for an award of reparations. At this point in the procedural schedule, the ALJ can proceed to a determination as to Sinclair's eligibility for reparations and then order a cost study of BP if necessary. On the other hand, the ALJ can proceed now as to all questions, even if contingent, that could affect the outcome of the proceeding, thereby enabling continuing hearings so that if the first step, determining Sinclair's eligibility for reparations, has been fulfilled, the existing record will allow a decision to be reached on the second step, determining whether Sinclair is entitled to an award of reparations.

The Commission orders:

The answer to the certified question is that the ALJ may require BP to prepare a cost-of-service study as discussed in the body of this order.

¹ 106 FERC ¶63,025 (2004).

² 102 FERC ¶61,117 (2003), *reh'g denied*, 104 FERC ¶61,290 (2003).

³ 104 FERC at p. 61,991 at P 19.

⁴ Memorandum at P 33.

⁵ Memorandum at P 34.

⁶ 102 FERC at p. 61,313 at P 9.

⁷ Prospective rates for BP are not at issue since Rocky Mountain has acquired BP's interest in the Western Corridor system.

⁸ The Commission concluded that Sinclair's complaint alleged reasonable grounds for asserting violations of the Interstate Commerce Act, met the threshold requirements of Section 385.206 of the Commission's regulations, and appropriately raised issues regarding the justness and reasonableness of rates on the Western Corridor system and whether BP's actions unlawfully conferred undue preferences on others. 102 FERC ¶61,117 at P 31 (2003).

⁹ See *ARCO Products*, 93 FERC ¶83,013, at p. 65,043 (2000).

¹⁰ We need not consider the third factor noted by the ALJ, namely whether use of Section 342.2(b) to establish the initial rate was appropriate since it does not bear on the issue presented.