STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
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F I L E D
11-20-12
02:02 PM

November 20, 2012

Agenda ID #11753
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 08-09-024 ET AL.

This is the proposed decision of Administrative Law Judge (ALJ) Karl J. Bemesderfer, previously designated as the presiding officer in this proceeding. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Upon the request of any Commissioner, a Ratesetting Deliberative Meeting (RDM) may be held. If that occurs, the Commission will prepare and publish an agenda for the RDM 10 days beforehand. When the RDM is held, there is a related ex parte communications prohibition period. (See Rule 8.3(c)(4).)

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Bemesderfer at kjb@cpuc.ca.gov and assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:rs6

Attachment

Decision **PROPOSED DECISION OF ALJ BEMESDERFER**
(Mailed 11/20/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline.	Application 08-09-024 (Filed September 30, 2008)
And Related Matters.	Case 08-03-021 Case 09-02-007 Case 09-03-027

(See Appendix A for List of Appearances)

DECISION ORDERING REFUNDS OF OVERCHARGES

Summary

This decision (a) orders Equilon Enterprises LLC (Equilon) and Shell Trading (US) Company (STUSCO) (collectively Shell Entities) to refund to Chevron Products Company (Chevron), Tesoro Refining and Marketing Company (Tesoro) and Valero Marketing and Supply Company (Valero) (collectively, Independent Shippers) the sum of $104,291,585, allocated among Independent Shippers in the amounts determined herein; (b) tolls applicable statutes of limitation otherwise applicable to the refund claims of Tesoro and Valero; and (c) establishes April 1, 2005, as the first date of the refund period for all shippers on the pipeline. This proceeding is closed.

Background

A. Procedural History before Rehearing

The refunds at issue result from the Complaints filed by Independent Shippers against the Shell Entities for overcharges from April 1, 2005 through June 30, 2011, the effective date of the Commission-approved tariff for San Pablo Bay Pipeline Company (SPBPC), which is the successor to the Shell Entities. The complaint proceedings were consolidated with SPBPC's Application for market-based rates, to establish tariff rules, and for the transfer of the Shell pipeline and its assets from Equilon and STUSCO to SPBPC. Evidentiary hearings were held, and on November 19, 2010, the Commission denied SPBPC's request for market-based rates, finding that the Shell Entities exercised market power over the Independent Shippers.

On May 26, 2011, the Commission issued Decision (D.) 11-05-026, which set just and reasonable rates for the Shell pipeline, now owned by SPBPC, to charge for its transportation service, and ordered Equilon and STUSCO to pay refunds to the Independent Shippers for overcharges from April 1, 2005, to June 30, 2011. On July 5, 2011, SPBPC and STUSCO filed applications for rehearing of D.11-05-026. The Independent Shippers filed oppositions on July 20, 2011, and submitted reports on their refund calculations on July 25, 2011. SPBPC and STUSCO then filed motions to partially stay the payment of refunds, which the Commission granted pending resolution of the rehearing applications.

On October 11, 2011, SPBPC made a refund filing setting forth its review of the Independent Shippers' refund claims, which the Independent Shippers accepted. On February 17, 2012, the Commission issued D.12-02-038, which denied rehearing as to every issue except the methodology for determining the refund amount due to the Independent Shippers. The Commission granted

limited rehearing as to the refund calculation, accepting the method argued for by the Shell Entities, and extended the partial stay pending the outcome of the limited rehearing. SPBPC and STUSCO filed a petition for writ of review of D.12-02-038 with the California Court of Appeal on March 16, 2012, as to, inter alia, the effective statute of limitations for any refund period earlier than July 26, 2007. That petition is pending before the Court of Appeal and is the subject of two motions to dismiss.

B. Rehearing Phase of Proceeding

On March 19, 2012, Independent Shippers filed a joint application for rehearing of D.12-02-038 as to the revised methodology for determining the amount of refunds. The Commission issued D.12-04-050 on April 20, 2012, which granted a limited rehearing of the issues of the methodology and calculations of refunds. D.12-04-050 also vacated the Commission's determinations in D.11-05- 026 and D.12-02-038 as to the applicable statutes of limitations for Independent Shippers' refund claims, consolidated these issues for reconsideration in this limited rehearing proceeding, and extended the stay on the payment of refunds pending the limited rehearing. A prehearing conference was held on the rehearing proceeding on May 15, 2012. On May 21, 2012, SPBPC filed a rehearing application of D.12-04-050, which the Commission denied on August 3, 2012.

On June 7, 2012, the assigned Commissioner issued a Scoping Memo that denied SPBPC's request to stay the rehearing. The Scoping Memo also set forth the two issues to be determined on rehearing: (1) the statute of limitations to apply to Independent Shippers' refund claims (refund period), and (2) the correct methodology for calculating refunds (refund methodology). The parties served concurrent opening testimony on July 13, 2012, reply testimony on August 20,

2012, and evidentiary hearings occurred on September 20, 2012. The case was submitted on October 29, 2012.

Discussion

A. The Three Year Statute of Limitations Applies to the Refund Claims of Chevron and Tesoro; the Two Year Statute of Limitations Applies to the Refund Claim of Valero.

The Chevron and Tesoro complaints allege violations of Section 494(a)[1] of the Public Utilities Code. The Valero complaint alleges violation of Section 451[2] of the Public Utilities Code. The Public Utilities Code contains two separate statutes of limitation applicable to these complaints Sections 735[3] and 736.[4]

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[1] Section 494: (a) No common carrier shall charge, demand, collect or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons.

[2] Section 451: All charges demanded or received by any public utility, or by any two or more public utilities for any…service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such…service is unlawful.

[3] Section 735: All complaints for damages resulting from a violation of any of the provisions of this part, except for Sections 494 and 532, shall…be filed…within two years from the time the cause of action accrues and not after.

[4] Section 736: All complaints for damages resulting from the violation of any of the provisions Sections 494 or 532 shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this state, any court of competent jurisdiction within three years from the time the cause of action accrues and not after….

Section 735 applies to complaints that allege violations of sections of the Public Utilities Code other than Sections 494 and 532, while Section 736 limits actions alleging violations of one or the other of those sections. Accordingly, the Chevron and Tesoro complaints are subject to the three-year limitation period established by Public Utility Code Section 736 while the Valero complaint, which does not allege violation of either Section 494 or Section 532, is subject to the two-year limitation period established by Public Utility Code Section 735.

Based solely on the foregoing analysis:

- Chevron's claim for refunds, filed March 27, 2008, dates back to April 1, 2005.
- Tesoro's claim for refunds, filed February 13, 2009, dates back to March 1, 2006.
- Valero's claim for refunds, filed March 23, 2009, dates back to April 1, 2007.

B. The Refund Period for All Shippers Begins April 1, 2005

As noted above, Chevron's complaint for refund of overcharges (C.08-03-021) was filed under Public Utility Code § 494 in March of 2008. Although Tesoro and Valero filed refund claims later than Chevron, when the assigned Administrative Law Judge (ALJ) consolidated the refund cases with the SPBPC rate case, all parties including SFPBC agreed that April 1, 2005, is the earliest date from which Independent Shippers may seek refunds.

While we might rest the finding that the refund period for all shippers begins on April 1, 2005, solely on SPBPC's failure to object, we prefer to reach that conclusion by tolling the applicable statutes of limitation for Tesoro and Valero. There is no significant factual distinction between their refund claims and the Chevron refund claims. All three shippers were subject to the same illegal transportation charges for the same period of years. It would work an

injustice to Tesoro and Valero to limit their reparations simply because they took slightly longer than Chevron to file their refund claims.

Our authority to toll the statutes to prevent an unjust and inconsistent outcome derives from our powers to supervise and regulate public utilities under Section 701 of the Public Utilities Code.[5] This authority has been broadly construed by the California Supreme Court which held, as early as 1931, that the Commission could impose a greater or lesser limitation period on a matter than the period imposed by a Superior Court having concurrent jurisdiction.[6] We have applied equitable considerations to toll statutes of limitations in a variety of proceedings involving electric and telecommunications utilities, where declining to do so would result in unfairness to a party.[7] There is good reason to adopt a similar approach in this situation. Accordingly, we toll the applicable statutes of limitation for Tesoro and Valero and affirm our earlier determination that the refund period for all shippers begins April 1, 2005.

C. The Correct Methodology for Calculating Refunds Is the One Proposed by Independent Shippers

The respective experts differ sharply in their estimates of the total refund due. The differences derive from two sources. First, shipper witness O'Loughlin calculates the refund for the period from April 1, 2005, forward while pipeline witness Petersen calculates the refund for the period July 27, 2007, forward.

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[5] Section 701: The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

[6] *Atchison,* Topeka *& Santa Fe Railway Co. v. Railroad Commission* (1931) 212 Cal. 370, 379

[7] *See In Re MCI WORLDCOM, Inc. and Sprint Corp.*, D.02-07-030

Second, while both witnesses use O'Loughlin's 2006 test year cost of service[8] to develop a base rate, Petersen proposes to adjust the base rate for actual volumes and the variable value of line fill based on fluctuating crude oil market prices while O'Loughlin does not.

Since we have already determined that the refund period for all shippers begins April 1, 2005, and the parties agree on the calculation of the base rate using 2006 data supplied by SPBPC, the only remaining issue is whether it is appropriate to adjust the base rate to take account of post-2006 price changes.

For the reasons set out below, we conclude that such changes are inappropriate and that the refund methodology proposed by O'Loughlin is the correct way to calculate the refund.

A fundamental principle of ratemaking is that rates once approved by the Commission and adopted by the utility remain in place until the Commission has approved new rates. The approval of new rates includes consideration of changes in the utility's revenue and cost of service that have occurred since the adoption of prior rates. Under SPBPC's proposal, the pipeline cost of service would use 2006 historical data adjusted for the actual volumes the pipeline delivered in 2007–2010 and January–June 2011. That would alter the fundamental elements of utility ratemaking. A utility must obtain Commission

[8] In his reply testimony at 4, SPBPC witness Petersen states that he "has been advised by counsel to accept O'Loughlin's 2006 cost-of-service to limit the number of contested issues." O'Loughlin derived the base rate from the 2006 volumes and costs provided by SPBPC. Exh. 1, O'Loughlin Opening at 8-9.

approval to collect rates from its customers under Sections 451 and 454.[9] When a utility files an application or advice letter to obtain such approval, the Commission determines whether the proposed rates are just and reasonable.[10] That is the utility's filed rate, which is not adjusted based on actual costs or volumes until the utility obtains Commission approval for a different rate. The entire evidentiary focus of the rate case is to develop a test year and just and reasonable rates for that time period. A regulated entity assumes the risk that the rates it is allowed to charge will diverge from its costs, and has the opportunity to file an application later to adjust its rates accordingly.[11]

The same regulatory concepts apply to a complaint case. If a utility collects excessive charges not authorized by the Commission, a customer may file a complaint for refunds under Section 734. When a customer files such a complaint, the Commission determines whether the charges are unjust and unreasonable. Under Section 734, the Commission will order refunds of unjust and unreasonable charges the utility collected from its customers.[12]

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[9] Section 454 (a): "No public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

[10] Section 451: "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable."

[11] Lesser and Giacchino, Fundamentals of Energy Regulation (2007), Public Utilities Reports, Inc. ("Fundamentals of Energy Regulation") at 67.

[12] Section 734: "When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found … that the public utility has charged an unreasonable, excessive, or discriminatory amount …, the commission may order that the public

Footnote continued on next page

We determined that the Shell Entities exercised market power over the Independent Shippers, overcharged them for transportation of crude oil from April 2005, and owe refunds. Under ratemaking principles, the refunds must be calculated based on the complaint period, which is at least since 2005. The actual volumes that the pipeline delivered thereafter have no bearing on the calculation of the referenced rate. Otherwise, SPBPC would benefit from its market manipulation, as it would receive "automatic, unrequested (at the time) rate increases that shift the burden onto shippers."[13]

As required by Public Utility Code Section 454, a complaint-determined just and reasonable rate must remain in effect until changed by a Commission decision on rehearing or in a subsequent complaint case, Commission approval of a subsequent rate change application, or a Commission-specified procedure for rate changes (e.g., advice letter process or percentage rate increase permissible under statutory law). None of these events took place with regard to the pipeline between April 1, 2005, and July 1, 2011. Accordingly, the 2006 base rate remained in effect for the entire refund period.

We turn now to the actual refund calculation employing the principles just discussed. O'Loughlin's refund testimony uses the same methodology and information from SPBPC that he used to determine the pipeline's going-forward rate, namely, a cost-of-service refund rate of $1.2450 per barrel using a 2006 Base Year, and 2006 historical data from SPBPC from April 1, 2005, through June 30,

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utility make due reparation to the complainant therefore, with interest from the date of collection if no discrimination will result from such reparation."

[13] IS Exh. 1, O'Loughlin Opening at 6.

2011.[14] He calculates the pipeline's total cost of service ($66,459,777) based on the pipeline's rate base, capital structure, cost of capital, and operating expenses for the relevant test year period. That approach uses the traditional elements of cost of service ratemaking, which the Commission also used to determine the going forward rate of $1.34/bbl for the pipeline. O'Loughlin uses the same approach set forth in D.11-05-026 to calculate the amount of refunds owed. In that decision, the Commission determined that the following formula should be used to calculate refunds:

> Actual Rate Charged during the Past Period minus Just and Reasonable Rate for the Past Period times Number of Barrels shipped during the Past Period equals Refund.[15]

That formula remains undisputed on rehearing. Accordingly, O'Loughlin calculates the transportation refund as the product of net barrels shipped each month and the difference between the actual location differential per net barrel and his proposed cost-of-service-based refund rate per net barrel. He uses the data on volumes shipped from monthly invoices provided by SPBPC for his refund calculations, and the same cost-of-service methodology and inputs to calculate this refund rate as he did to calculate the Commission-adopted $1.34 per barrel going-forward rate. In his calculations, O'Loughlin includes a pipeline loss allowance (PLA) amount based on the data provided by SPBPC, at 0.15% as the Commission determined in D.11-05-026.

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[14] IS Exh. 1, O'Loughlin Opening at 2. O'Loughlin attempted to calculate a 2005 Test Year cost of service to correspond with the 2005 complaint period, but SPBPC was unwilling to provide 2005 cost of service information on the grounds that it was unrepresentative. Thus, O'Loughlin used the next nearest period in proximity, 2006, for his cost of service analysis.

[15] D.11-05-026, 2011 Cal. PUC LEXIS 280, **19-20.

The following table illustrates his cost of service calculation and the amount of refunds owed to the Independent Shippers based on an April 1, 2005, through June 30, 2011 refund period:

Refund and Interest Based on STUSCO Invoices from April 2005 Through June 2011 Using Cost of Service-Based Just and Reasonable (J&R) Refund Rate (With Interest Through Dec. 31, 2012)

Shipper		Transportation	PLA	Transportation Interest	PLA Interest	Total
[I]		[2]	[3]	[4]	[5]	[6]
Chevron	[a]	$1 ,361,220	$131,707	$1 13,287	$10,456	$1 ,616,670
Chevron/Tesoro	[b]	$47,302,630	$4,798,270	$2,370,822	$215,896	$54,687,618
Tesoro	[c]	$l0,249,739	$1,010,101	$58,494	$5,294	$1 1,323,627
Valero	[d]	$31.948,619	$2.758.370	$1.809.582	$147,098	$36.663.669
Total	[e]	$90,862,208	$8,698,448	$4,352,184	$378,745	$l04,291,585

In summary, using SPBPC invoice data and a just and reasonable refund rate based on the pipeline's 2006 cost of service, O'Loughlin calculates a total of $104.3 million in refunds, including interest (through December 31, 2012) for the April 1, 2005, to June 30, 2011, refund period. For the reasons given above, we adopt both his methodology and his calculation of the total amount of refund due to Independent Shippers.

Comments on Proposed Decision

The proposed decision of the ALJ Bemesderfer in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____by _____.

Assignment of Proceeding

Michael Peevey is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ.

Findings of Fact

1. The 20″ heated crude oil pipeline from the San Joaquin Valley to the San Francisco Bay area currently owned and operated by SPBPC has been dedicated to public service since at least 2002.

2. The owners of the pipeline charged all shippers on the pipeline unjust and unreasonable transportation rates from at least 2002 through June 30, 2011.

Conclusions of Law

1. The three-year statute of limitations in Public Utility Code Section 736 applies to the refund complaints filed by Chevron and Tesoro.

2. The two-year statute of limitations in Public Utility Code Section 735 applies to the refund complaint filed by Valero.

3. Chevron's refund complaint dates back to April 1, 2005.

4. Tesoro's refund complaint dates back to March 1, 2006.

5. Valero's refund claim dates back to April 1, 2007.

6. The refund period for all shippers is April 1, 2005 through June 30, 2011.

7. The applicable statutes of limitation should be tolled to permit all three complainants to recover refunds for the entire refund period.

8. The refund rate should be calculated using 2006 actual historical data.

9. The just and reasonable refund rate is $1.2450 per barrel.

10. The pipeline loss allowance for the refund period is 0.15%.

11. The total amount including interest due Chevron alone is $1,616,670.

12. The total amount including interest due Chevron and Tesoro together is $54,687,618.

13. The total amount including interest due Tesoro alone is $11,323,627.
14. The total amount including interest due Valero alone is $36, 663,339.

O R D E R

IT IS ORDERED that:

1. The statutes of limitation contained in Public Utility Code Sections 735 and 736 are tolled for the period from April 1, 2005, to April 1, 2007.
2. No later than thirty (30) days from the date hereof, Equilon Enterprises, LLC and Shell Trading (US) Company and any successor in interest to either of them shall refund to Chevron Products Company, Tesoro Refining and Marketing Company and Valero Marketing and Supply Company the sums listed in Conclusions of Law 11 through 14 above.
3. Application 08-09-024, Case 08-03-02, Case 09-02-007, and Case 09-03-027 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

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(END OF APPENDIX A)