BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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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)
Chevron Products Company, Complainant, vs. Equilon Enterprises LLC, doing business as Shell Oil Products US; and Shell Trading (US) Company, Defendants.	Case 08-03-021 (Filed March 27, 2008)
Tesoro Refining and Marketing Company, Complainant, vs. Equilon Enterprises, L.L.C., doing business as Shell Oil Products (US); Shell Trading (US) Company; and San Pablo Bay Pipeline Company LLC, Defendants.	Case 09-02-007 (Filed February 13, 2009)
Valero Marketing and Supply Company, Complainant, vs. Equilon Enterprises, LLC, doing business as Shell Oil Products (US); Shell Trading (US) Company; and San Pablo Bay Pipeline Company LLC, Defendants.	Case 09-03-027 (Filed March 23, 2009)

RESPONSE OF VALERO MARKETING AND SUPPLY COMPANY TO REPLY OF SAN PABLO BAY PIPELINE COMPANY LLC'S TO OPPOSITION TO ITS MOTION TO COMPEL RESPONSES TO ITS DATA REQUESTS

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Pursuant to Rule 11 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure and consistent with the presiding Administrative Law Judge's e-mail dated January 15, 2010, Valero Marketing and Supply Company ("Valero") respectfully submits its reply in support of its opposition to the "Motion of San Pablo Bay Pipeline Company LLC to Compel Tesoro Refining and Marketing Company ("Tesoro") to Respond to Data Requests" (the "Motion to Compel").

I. Introduction.

In both its Motion to Compel and reply brief, SPBPC fails to meet its burden to demonstrate why it is entitled to explore whether SJVH, the product that all of the shippers on the San Pablo Bay Pipeline have relied on for decades, may be substituted by other petroleum products available anywhere in the world. This issue is simply not appropriate as a matter of law. Permitting such discovery would hijack this proceeding and lead it into irrelevant areas in which this Commission has neither a mandate nor expertise.

This is a case about setting the appropriate rate for *transportation service* on an oil pipeline that shippers have used for decades. Neither the Scoping Ruling nor legal precedent permit SPBPC to change the focus of this proceeding to involve the substitutability of other *crude products*. Having no toehold on its theory to justify expanded discovery, SPBPC makes an inferential leap (from interchangeability of transportation services to interchangeability of commodities) that is not borne out by the law of this case or pertinent authorities. For these reasons, among others, SPBPC's Motion to Compel should be denied.

II. Argument.

A. SPBPC Again Mischaracterizes the Critical Issues.

San Pablo Bay Pipeline Company LLC ("SPBPC") again clings to the misplaced belief that this proceeding is about "whether there are other crude oils that provide a *reasonably close* substitute to the San Joaquin Valley Heavy ('SJVH') crude oil." SPBPC Reply at p. 1 (emphasis added). SPBPC is wrong – this case is about transportation service, not products or commodities; the Scoping Ruling issued on April 27, 2009 makes this point clear.

The scope of issues repeatedly focuses on the *transportation service* and *shipping*; not one of the ten identified issues concerns the substitutability of unique SJVH crude. Unsurprisingly, SPBPC grasps at straws by citing Issue No. 3 to conjure up a nonexistent "core issue" that it needs to support its Motion to Compel. This proceeding's focus is and always has been on transportation service, not products, which is apparent from reading Issue No. 3 in full:

> Is SPBPC entitled to charge market-based rates for transporting crude oil on the Pipeline? More specifically,
>
> a. Does SPBPC exercise significant market power over shippers by virtue of its control over the only heated crude oil pipeline between the San Joaquin Valley and the San Francisco Bay area?
>
> b. In particular, is SPBPC able to damage competitors of its affiliates by denying them access to the Pipeline or charging them an exorbitant rate to use it?
>
> c. Do shippers of crude oil from the San Joaquin Valley to the San Francisco Bay area have reasonable competitive alternatives to the Pipeline?
>
> d. In particular, does Tesoro have reasonable competitive alternatives to supply the crude oil requirements of its refinery in Martinez?

See "Scoping Memo and Ruling of Assigned Commissioner," issued April 27, 2009.

The issue is SPBPC's entitlement to charge market-based rates for *transportation*. A sub-issue is whether shippers like Valero have reasonable competitive alternatives to *transportation* on the San Pablo Bay Pipeline. The Scoping Ruling contains no express or

implied issue relating to the substitutability of SJVH, or whether other crude oils are "reasonably close" to SJVH. Valero has never read Issue No. 3(d), which SPBPC construes to include absurdly broad issues, to open the door to analyze what worldwide crudes are "reasonably close" to SJVH. Instead, it is sensible to read Issue No. 3(d) as a subset of the main issue with specific regard to the transportation options that are available to the Tesoro Refinery. Moreover, Issue No. 3(d) does not expressly mention the Valero Benicia Refinery and, to the extent that it applies to Tesoro, it should not apply to Valero, the supplier of SJVH to the Valero Benicia Refinery.

B. The Market Analysis Should Consider Substitutability of SJVH Transportation Service, Not Alternate Crudes.

Under the *UNOCAP* factors used to evaluate whether market-based rates are appropriate,[1] it is improper for SPBPC to compare the transportation services it offers for the unique SJVH crude oil in the San Joaquin Valley to the possible *worldwide* availability of alternative crudes. The *UNOCAP* cases indisputably show the Commission correctly analyzing alternative modes of transportation, but SPBPC audaciously contends that the cases "indicate[] implicitly that the Commission was properly considering and analyzing alternative crude types to those transported on the Unocap pipeline." SPBPC Reply at pp. 9-10.

SPBPC does not, and cannot, explain this implication because the *UNOCAP* cases *explicitly* considered whether market-based rates were "reasonable in view of the *type of utility service*" and whether there were "sufficient practical alternatives to the *pipeline service*." *UNOCAP II* at p. 12 (emphasis added).[2] Indeed, in its rehearing decision, the Commission

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[1] D. 93-12-015 (*UNOCAP I)* 52 CPUC 2d 317; D. 94-05-022 (*UNOCAP II*) 54 CPUC 2d 422; D. 96-04-056 (*Pacific Pipeline*); and D. 96-04-061 (*UNOCAP III*) 66 CPUC 2d 28.

[2] SPBPC's citations to the *UNOCAP* cases undermine its argument by clearly demonstrating the Commission's consideration of alternative modes of transportation services. SPBPC Reply at pp. 9-10. The Commission's discussion of proprietary pipelines is in the context of alternative transportation services, not a hidden code for

clarified a Finding of Fact that there were "realistic alternatives to users of Unocap's pipelines, including trucks, water transportation, and proprietary pipelines . . . ." *UNOCAP III* at p. 12. The *UNOCAP* analysis did not in any way include consideration of alternative *commodities*.

For the same reason, it is improper for SPBPC to compare the transportation of SJVH from the San Joaquin Valley to the Bay Area refiners to *worldwide* alternative crudes when the real issue is determining proper pipeline transportation rates or whether there are other competitive forms of transportation (*i.e.*, trucks, rail cars, other pipelines or a combination of alternative routes and modalities) to move SJVH from the San Joaquin Valley to the Bay Area refineries that would justify this Commission granting market-based rate authority to SPBPC.

SPBPC also fails to respond to the weight of authority holding that the focus in an oil pipeline market-based rate case should be the market of transportation *services* and competitive alternative modes of transport.[3] Instead, SPBPC points to only FERC's *Buckeye* decision, where the "relevant product market was the transportation of refined pipeline petroleum products,"[4] to argue that alternative products should be considered. SPBPC's reliance on *Buckeye* in this instance is misplaced and inaccurately reflects the actual issues in *Buckeye* for at least three reasons.

First, the *Buckeye* decision involved the pipeline transportation of refined petroleum products, not crude oil. SPBPC selectively quotes from the *Buckeye* decision, and its quotation mixes FERC's findings with regard to (1) the relevant market and (2) measuring market power.[5]

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evaluating alternative crude products. Moreover, SPBPC's first citation to *UNOCAP II* is a mere reference to Unocap's witness testimony.

[3] For instance, in a comparable pipeline market-based rate proceeding, the FERC recently found the product market should be limited to *transportation* of crude oil. *Mobil Pipe Line Co.*, 128 FERC ¶63,008 (2009).

[4] *Buckeye Pipe Line Co.*, 53 FERC ¶ 61,473, 62,663 (1990) ("Buckeye"). Moreover, the FERC affirmed, in part, its Initial Decision that noted "the relevant product is a service — transportation." *Buckeye Pipe Line Co.*, 50 FERC ¶ 63,011, 65,046 (1990).

[5] *C.f.*, *Buckeye* at 62,663-66 and SPBPC Reply at pp. 10-11.

FERC's analysis with regard to the relevant market, including all refined products that could be shipped on the Buckeye system, is predicated on the "ease of product substitution" among refined petroleum products that Buckeye could transport. FERC explained that this ease of product substitution of different refined products on the pipeline:

> is an important reason why the relevant product market should be *the transportation of refined petroleum products* rather than the transportation of a specific petroleum product …. Thus, the record shows that *the relevant product market is the transportation of refined petroleum products from all origins to a particular destination.*[6]

This is an important distinction because, in this case, the same standard would require this Commission to find that the relevant product market is the transportation of all SJV crude oil from all origination points on the San Pablo Bay Pipeline to the particular destination point in the Bay Area. *Buckeye* cannot reasonably be read to ignore that FERC's basis for the relevant market analysis is linked to the transportation *service* being offered to a particular destination, like the Bay Area refineries.

FERC next looked at measuring Buckeye's market power in the destination markets.[7] If the *Buckeye* quotation in SPBPC's reply brief is read in context of FERC's market power analysis, it becomes very clear that FERC based its finding on the fact that, in the destination market, potential shippers could buy the same product that they could have shipped on the Buckeye system, and the same products in the destination market could be an alternative.[8]

Buckeye is also distinguishable from the San Pablo Bay Pipeline's transportation of crude products because refined products are fungible commodities with the same specifications and characteristics within a given product class. One source of 87 octane gasoline shipped on a

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[6] *Buckeye,* at 62,664.
[7] *Id.* at 62,666
[8] *Id.*

pipeline is substitutable with any other source of 87 octane gasoline, which makes it very easy to buy the same product from an alternative supplier in the destination market. However, in this case, the only place one can acquire SJVH or any other form of SJV crude is in the San Joaquin Valley. By its very nature, SJV crude is not produced in the Bay Area or anywhere else outside the SJV. Therefore, comparing unique forms of crude oil to fungible petroleum products lacks merit and has no basis in law. This reading of *Buckeye* is even more obvious in light of the relevant market analysis that FERC considered.

Moreover, as Valero has made clear in its testimony and responses to discovery (and as SPBPC knows from the experience of its affiliate refinery), SJVH crude is not interchangeable with other crudes. SJVH is not even interchangeable with blended light and heavy SJV crude, which for example can be shipped on other pipelines to the Bay Area. Rather, SJVH can only be shipped on the San Pablo Bay Pipeline because that crude is so heavy it has to be heated before it can be transported. In short, SPBPC incorrectly compares standardized refined petroleum products (*i.e.*, gasoline, fuel oil or jet fuel) to a unique form of crude oil, SJVH, that is produced in only one location in the world.

Second, in *Buckeye*, FERC noted that "Buckeye is solely a common carrier pipeline that neither owns nor controls the petroleum products that it transports," and was one of the largest *independent* oil pipelines, with over 3,400 miles of pipeline serving 10 states."[9] Buckeye did not have affiliated shippers transporting products on its system. As a result, FERC found that "inter-dependent pricing, or collusion, had very little relevance" to that case, but also noted that in "highly concentrated markets, pricing behavior of one firm will likely have a direct impact on the

[9] *Buckeye,* at 62,659 (emphasis added).

market positions of its competitors" and the commission would consider interdependent pricing or collusion in highly concentrated markets.[10]

Subsequently, in a natural gas proceeding, *KN Interstate Gas Transmission Company ("KNI")*,[11] FERC had the opportunity to consider how a pipeline's market power and affiliate relationships could affect a market-based rate application. In *KNI*, FERC considered the transportation of natural gas on the Buffalo Wallow system, which had several captive customers (*i.e.*, producers that could only move product on the pipeline) and other major customers on the Buffalo Wallow system were KNI affiliates.[12] KNI proposed to protect captive shippers from anti-competitive prices by providing them with rates that would "not exceed the average of rates charged to all other shippers . . . ."[13] FERC found that:

> KNI's situation is very different and does not lend itself to the type of protection approved in Buckeye. As discussed more fully below, the major customers on the Buffalo Wallow System will be affiliates of KNI, and the rates negotiated with the affiliates would be used to calculate the rates for the captive customers. Negotiations between affiliates presumptively are not arms-length transactions. ***
>
> In its initial filing, KNI only proposed a method to determine the rates for captive customers, even though KNI also proposes to have negotiated terms and conditions of service. In response to a staff data request, KNI proposed that a solely-connected shipper could choose either to be subject to the posted Daily Variance and Monthly Imbalance tolerances and charges, in conjunction with the average rate, or to match the rate, tolerances, and charges contracted for by any other shipper if the shipper's tolerances and charges differ from the posted ones.
>
> The Commission finds this to be equally ineffective to protect captive shippers. These shippers would be subjected to important terms and conditions that would change monthly without prior Commission review. In addition, it is not clear how the captive shippers would obtain sufficient information to make an informed choice or have the ability to protect themselves from frequent changes in tolerance levels that KNI might impose.[14]

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[10] *Buckeye,* at 62,668-69.

[11] 68 FERC ¶ 61,401 (1994) ("KNI").

[12] *KNI* at 62,590-62,591.

[13] *Id.* at 62,590.

[14] *Id.* at 62.590-62,591.

Moreover, in further considering the problems associated with regulating affiliated pipelines and shippers, FERC found that:

> In addition to its marketing affiliates, KNI has affiliates that operate gathering systems, pipeline systems, and storage facilities, all of which connect directly or indirectly to the Buffalo Wallow System. […] These extensive business arrangements between KNI and its affiliates are cause for concern.
>
> Given these facts and the existence of captive customers in the operating environment with KNI's affiliates, this case does not easily lend itself to light-handed regulation . . . , and could provide opportunities for undue discrimination in the terms and conditions of service. KNI has not proposed measures which effectively eliminate the potential for affiliate abuse.[15]

In this case, it is undisputed that SPBPC and Shell Trading are affiliated. Also, within the overall Shell corporate structure, there are several other affiliates that could benefit from how SPBPC chooses to operate its pipeline, including both the Shell entity that produces crude oil in the SJV and the Shell Martinez Refinery. Thus, to the extent that *Buckeye* lends any support to SPBPC's request for market-based rate authority or the scope of discovery (which Valero believes it does not), that support is clearly eliminated by the findings in *KNI*. This case is also exactly the kind of case where a pipeline should not be subjected to light-handed regulation and should not be granted broad rights to pursue irrelevant avenues of discovery that could further harm competitors to SPBPC's affiliates.

Third, unlike the Buckeye pipeline system, which transported a variety of products from a multiple refineries to over one hundred customers, the San Pablo Bay Pipeline was built to transport oil from only *one* source, the San Joaquin Valley (mostly heavy and blended SJV crude), to *three* refineries in the Bay Area, one of which is an affiliate with both SPBPC and Shell Trading.

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[15] *Id.* at 62,591.

In *Buckeye*, FERC also found that the Buckeye pipeline did have significant market power in several markets where its market share was over 68%,[16] and in one of those markets it handled "100 percent of the airport deliveries and has no competitors for this traffic."[17] Thus, FERC found that Buckeye did have significant market power in all of these markets.[18] Similarly, as the only pipeline that can ship SJVH to the Bay Area, SPBPC's San Pablo Bay Pipeline will *still* have the power to elevate prices unless adequate alternative pipelines or other reasonable and economic means of transportation that serve that production area exist. *See, e.g., Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 933 (6th Cir. 2005) (antitrust case recognizing that relevant geographic markets were city-pair air transport routes, *i.e.*, the product was transportation service from point A to point B).

Even when considering SPBPC's mischaracterized product market of alternative crude oils, its own argument in support of its application for market-based rates demonstrates that the San Pablo Bay Pipeline would still have market power. For example, it appears that SPBPC's actual goal in this proceeding is to exploit the discovery process to determine the point at which it would become uneconomical for any of the independent SJVH shippers to use the pipeline.[19] What SPBPC fails to note, however, is that unlike independent shippers such as Valero and Tesoro, SPBPC's own affiliates produce SJVH crude and then transport it to another affiliated refinery in the Bay Area. Thus, any higher "market" rate that SPBPC would impose on its affiliated shipper is really just one part of the Shell organization paying another part – the money

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[16] *Buckeye*, at 62,671-73.

[17] *Id.* at 62,673.

[18] *Buckeye*, at 62,671-73, *affirmed*, Opinion No. 360-A, Opinion and Order on Rehearing, 55 FERC ¶ 61,084, 61,257-59 (1991).

[19] As SPBPC noted in its Reply Brief, "Similarly, if San Pablo Bay sought to exercise market power, Valero could avoid transportation entirely by purchasing an alternative crude oil." *See* SPBPC Reply at p. 12.

never leaves the Shell organization. Other shippers would not be similarly situated, and this is exactly the kind of affiliate abuse that FERC was concerned about in *KNI*.

Thus, in light of the discovery requests, if SPBPC were granted authority to charge market-based rates, it would know exactly what rates to charge independent shippers to ensure that only SPBPC's affiliated shippers could economically transport SJVH. Such a result would ensure that SPBPC's affiliates would once again have an exclusive option to run SJVH in the Bay Area. To allow SPBPC and the Shell organization to corrupt the entire market-based rate concept (by potentially forcing their competitors to stop buying SJVH and using a less attractive form of crude oil) would only serve to enhance SPBPC's existing monopoly, rather than (a) allowing this proceeding to focus on an analysis of actual transportation alternatives (be they truck, rail, pipeline or barge) for SJVH to reach the Bay Area refineries, or (b) simply allowing for normal cost-of-service regulation which will enable SPBPC to make a reasonable and authorized rate of return on the services it renders to shippers like Valero.

Finally, SPBPC mistakenly argues that *Brown Shoe* requires the consideration of alternative crude products in this case. As Valero noted before, even assuming the applicability of *Brown Shoe*, SJVH should be considered a product submarket.[20] In its response to this point, SPBPC relies on the unsupported assumption that there is a "range of competing products (in this case, crude supplies that are interchangeable with SJVH)" in order to conclude that the relevant product market in this proceeding should be broadly drawn. Valero has made it clear that SJVH is not an interchangeable commodity—in the parlance of *Brown Shoe*, SJVH "has characteristics peculiar to itself rendering it generally noncompetitive with the others." *Id.* at 326.

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[20] In *Brown Shoe*, the Court noted that submarkets "may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962).

SPBPC's allegation that "Valero's criticism of San Pablo Bay's reliance on the *Brown Shoe* case because the case predates the Justice Department Guidelines is misplaced" also misses the mark. In *Buckeye*, FERC found that, in determining that the correct market was the transportation of refined products, it was proper to rely on the DOJ Merger Guidelines, as well as the over one hundred years of antitrust case law.[21] Thus, the evolution of the law over time should be considered by this Commission.

Valero should not be required to purchase alternative, non-economic crudes to SJVH simply because the San Pablo Bay Pipeline is now a common carrier.[22] Rather, Valero is entitled to continue purchasing significant amounts of SJVH for processing at its Benicia Refinery and Asphalt Plant, as it has done for decades. This proceeding should not enable SPBPC, Shell Trading or any other affiliates within the Shell organization to continue to exercise monopoly pricing power on the San Pablo Bay Pipeline to the disadvantage of Shell's competitors.

III. Conclusion.

In its reply brief, SPBPC makes an argument that reveals its true efforts to circumvent the CPUC's determination that the San Pablo Bay Pipeline is a common carrier. SPBPC continues to pretend that this Commission has not found that its pipeline is a public utility with monopoly power. Its attempt to widen the scope of this proceeding and further burden the customers who have already suffered from its monopoly power should be rejected. This remains a case about transportation service, not world oil markets, and the applicant, not the customers, bears the burden of proof.

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[21] *Buckeye*, at 62,663.

[22] As Tesoro noted in its opposition to SPBPC's Motion, *Brown Shoe* does not require a victim of antitrust violations to alter its business operations to create product alternatives, as SPBPC suggests Valero and other shippers should do.

For all of the foregoing reasons, Valero respectfully requests that SPBPC's Motion to Compel be denied. Valero also respectfully requests that oral argument be permitted in deciding SPBPC's Motion to Compel.

Respectfully submitted,

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Certificate of Service

I, Thomas E. Morgan, hereby certify that I have this day served a copy of the document titled:

RESPONSE OF VALERO MARKETING AND SUPPLY COMPANY TO REPLY OF SAN PABLO BAY PIPELINE COMPANY LLC'S TO OPPOSITION TO ITS MOTION TO COMPEL RESPONSES TO ITS DATA REQUESTS

On all parties on the most recent official service lists in proceeding C09-03-027 and in consolidated proceedings A.08-09-024, C08-03-021 and C09-02-007 via electronic mail and U.S. Mail.

Executed this 9th day of February, 2010 at San Francisco, CA

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