

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**

04-13-11  
04:59 PM

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,

Case 08-03-021  
(Filed March 27, 2008)

vs.

Equilon Enterprises LLC, doing business as Shell  
Oil Products US; and Shell Trading (US) Company,  
Defendants.

Tesoro Refining and Marketing Company,  
Complainant,

Case 09-02-007  
(Filed February 13, 2009)

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.

Valero Marketing and Supply Company,  
Complainant,

Case 09-03-027  
(Filed March 23, 2009)

vs.

Equilon Enterprises, LLC, doing business as Shell  
Oil Products (US); Shell Trading (US) Company;  
and San Pablo Bay Pipeline Company LLC,  
Defendants.

**VALERO MARKETING AND SUPPLY COMPANY'S REPLY COMMENTS  
ON PROPOSED DECISION OF ALJ BEMESDERFER**

PILLSBURY WINTHROP SHAW PITTMAN LLP  
MICHAEL S. HINDUS  
WESLEY M. SPOWHN  
50 Fremont Street  
San Francisco, CA 94105  
Tel.: 415-983-1000  
Fax: 415-983-1200  
E-mail: michael.hindus@pillsburylaw.com  
E-mail: wesley.spowhn@pillsburylaw.com

*Attorneys for Valero Marketing and Supply  
Company*

Dated: April 13, 2011

**TABLE OF CONTENTS**

	<u>Page</u>
I. ARGUMENT.....	1
A. Contrary to the Shell Parties’ Claims, the Independent Shippers’ Tariff Guarantees That All Shippers Are Treated Equally. ....	1
1. SPBPC Invokes, But Ultimately Ignores, the Public Interest.....	1
2. The Independent Shippers’ Tariff Is Not Discriminatory And, In Fact, Guarantees That All Shippers Are Treated Equally.....	2
B. The Shell Parties Owe Refunds to Valero, and the Refund Period Correctly Extends Back to At Least April 1, 2005.....	4
II. CONCLUSION.....	5

## **VALERO MARKETING AND SUPPLY COMPANY'S REPLY COMMENTS ON PROPOSED DECISION OF ALJ BEMESDERFER**

Pursuant to Rule 14.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Valero Marketing and Supply Company ("Valero") hereby respectfully submits these Reply Comments on ALJ Bemederfer's March 9, 2011 Proposed Decision ("Proposed Decision"), which respond to the comments filed on April 8, 2011 by San Pablo Bay Pipeline Company LLC ("SPBPC") and Shell Trading (US) Company ("STUSCO").<sup>1</sup>

### **I. ARGUMENT.**

SPBPC and its corporate affiliate STUSCO challenge the Proposed Decision's adoption of the Independent Shipper's tariff ("IS Tariff") for a number of reasons, including that the Administrative Law Judge ("ALJ") adopted the tariff "without analysis." SPBPC Comments at pg. 13; STUSCO Comments at pg. 4. To the contrary, the ALJ founded the Proposed Decision on record evidence supporting the adoption of the IS Tariff.

SPBPC also challenges the Proposed Decision's findings and conclusions concerning the payment of refunds to Independent Shippers, including Valero, for overcharges made by the Pipeline during the period from April 1, 2005 to the effective date of the decision. These assertions should be rejected by the Commission.

#### **A. Contrary to the Shell Parties' Claims, the Independent Shippers' Tariff Guarantees That All Shippers Are Treated Equally.**

The Proposed Decision considers the comprehensive evidentiary record and adopts the IS Tariff to ensure that the Pipeline remains in heated service at reasonable rates and under fair terms and conditions of service. The IS Tariff best preserves public utility service and guarantees that Valero and the other Independent Shippers will be able to continue to rely on the Pipeline, as they have done for decades, even as San Joaquin Valley crude oil production declines. The IS Tariff is also the only tariff that fairly resolves the market power concerns recognized by this Commission in D.10-11-010.

##### **1. SPBPC Invokes, But Ultimately Ignores, the Public Interest.**

Earlier in these proceedings, SPBPC's primary witness asserted that "there is no obvious 'public interest' in this case." SP-2C at 8:14-15. In its opening comments, SPBPC now concedes that "[t]he role of the Commission is to ensure that every public utility company which

---

<sup>1</sup> Equilon Enterprises LLC ("Equilon") does business as Shell Oil Products US ("SOP US"). SOP US, by itself and through its affiliates and subsidiaries, is in the business of operating pipelines and product terminals in California, including the Pipeline. STUSCO is an affiliate of SOP US and serves as its supply and trading unit. Equilon, SOP US, STUSCO, and SPBPC are referred to collectively herein as the Shell Parties and/or SPBPC.

is subject to the Commission's jurisdiction performs its authorized services in a manner which best serves the public interest." SPBPC Comments at pgs. 12-13. While SPBPC spent no time at the hearing on the public interests affected by its application, Valero submitted a significant amount of record evidence on this issue throughout the proceedings, noting that "the public interest should be the defining factor in this proceeding." Valero-8 at 13:22. Although SPBPC now finally recognizes the public interest is an important consideration in this case, SPBPC fails to address the numerous public interest factors identified by Valero at the hearings and in its briefs. Valero respectfully directs the Commission to section II.D of its comments filed April 8, 2011 ("Valero Comments") for a summary of how the public interest is advanced by adopting the IS Tariff.

**2. The Independent Shippers' Tariff Is Not Discriminatory And, In Fact, Guarantees That All Shippers Are Treated Equally.**

SPBPC argues that IS Tariff Item 55 (governing nominations) "penalizes and discriminates against the Pipeline's shippers by prohibiting the Pipeline from shipping SJVH Blend." SPBPC Comments at pg. 14. Similarly, STUSCO asserts that the IS Tariff would disadvantage STUSCO because the tariff would prevent it from delivering SJVH Blend until the minimum operation requirement is met. STUSCO Comments at pg. 14.<sup>2</sup> SPBPC then goes on to call the IS Tariff Item 55.1 a "recipe for chaos" that would be more effectively addressed "via the cooperative efforts of the Pipeline and its shippers." SPBPC Comments at pgs. 15-16.

However, the record shows that neither SPBPC nor STUSCO have demonstrated any level of cooperation with the Independent Shippers. In October 2008, SPBPC threatened to shut down the Station 31 to Olig segment of the Pipeline, which ships only SJVH, for at least three months because SPBPC had not received sufficient nominations to meet the Pipeline's minimum throughput requirements. Tesoro-27 at 13. After the Independent Shippers sought relief from the Commission, STUSCO increased its nomination from Station 31 to Olig, and the threatened costly shutdown of heated service was averted. *Id.*; *see also* Chevron-51 at 69-70; RT Vol. 8 at 1406:13-1407:8. Given the Commission's recognition of the market power of the Shell Parties in this case, actual past affiliate abuse<sup>3</sup> and the potential for future affiliate abuse, the IS Tariff is the only reasonable way to ensure equal and fair treatment of all shippers.

The record evidence shows that the IS Tariff reflects industry norms as to times and processes, and removes provisions that penalize shippers or confer advantages on an affiliate

---

<sup>2</sup> STUSCO's comments make a number of factual assertions, some entirely new, without citation to the record.

<sup>3</sup> *See, e.g.*, Valero Comments at pgs. 14-17.

shipper.<sup>4</sup> Specifically, the IS Tariff provides that all supplies nominated into the Pipeline be of either SJVH, SJVL, or segregated batches.<sup>5</sup> The purpose of the three categories is to allow the Pipeline to determine the extent to which it can move SJVH consistent with its minimum operating requirements.<sup>6</sup> The IS Tariff's nomination process will make the system more reliable and remove much of the uncertainty of shutdown of operations included in SPBPC's proposed tariff, and appropriately mitigates the market power of the Shell Parties.

As more fully explained in the IS Reply Brief filed last year, SPBPC's assertions concerning the penalty provisions in the IS Tariff are wrong and taken out of context. *See* IS Reply Brief at pgs. 27-28. This penalty simply ensures that all shippers provide realistic nominations to the Pipeline for adequate planning and scheduling in providing service to all shippers. Any shipper that accurately nominates and ships up to 110% of the shipper's desired nomination will never be subject to the penalty. Shippers that make good faith nominations will not be negatively impacted by the penalty provision in the IS Tariff. Given the actual past affiliate abuses and the potential for future affiliate abuse, the penalties charged under the IS Tariff would be credited to all shippers not subject to the penalty, rather than to SPBPC. Otherwise the penalty provision would not deter STUSCO from gaming the nominations since any penalty it paid would simply go to its affiliate.<sup>7</sup> However, as the largest shipper on the Pipeline, STUSCO would receive the greatest compensation if penalties were assessed against another shipper.

Finally, the IS Tariff permits the cost of improvements to be included in the rate base. This will preserve public utility service and guarantee that the Independent Shippers will be able to rely on the Pipeline. More importantly, this solution aligns the interests of SPBPC and its customers, encouraging them to work together to ensure that the Pipeline will continue to serve its customers and remain a successful business. *See* IS-1 at 14:26-15:18; *id.*, Att. B at 18-20.

The ALJ actively participated in the eight days of hearings and considered hundreds of exhibits admitted into evidence. Relying on the record, the Proposed Decision correctly adopts the better tariff and recognizes that "in keeping with the balance of this decision, a tariff that responds to the legitimate concerns of Independent Shippers is to be preferred to one that does not." Proposed Decision at pgs. 27-28. The Commission should also adopt the IS Tariff.

---

<sup>4</sup> IS Exh. 1, Independent Shipper Testimony, pp. 4, 13-14, and Attachment B, pp. 14-21.

<sup>5</sup> RT 1411 (Miller/Independent Shippers).

<sup>6</sup> IS Exh. 1, Independent Shipper Testimony, pp. 3-4, 5-9, 13-14, and Attachment B.

<sup>7</sup> RT 210:26-211:51 (Webb/San Pablo Bay).

**B. The Shell Parties Owe Refunds to Valero, and the Refund Period Correctly Extends Back to At Least April 1, 2005.**

SPBPC primarily argues that no refunds are allowed prior to August 1, 2007, when the Commission first declared the Pipeline to be a public utility. But SPBPC's assertion is not supported by law because the definition of "public utility" depends on the actions of an entity, not the declaration of the Commission.

The Commission cannot force public utility status upon an entity. Rather, the Commission has jurisdiction, and exercised that jurisdiction in Decisions 07-07-040 and 07-12-021, to adjudicate facts and determine whether or not a company, by its own actions, dedicated its assets to public use and thus is a public utility. In this case, the Commission found the Pipeline had been providing service to the public for compensation, and thus was a public utility, at least as early as 1996. *Chevron Products Company vs. Equilon Enterprises, LLC*, D.07-12-021, at \*35. The Pipeline was a public utility, and subject to the requirements of Public Utilities Code section 451, the moment it began providing public utility service. Thus, refunds are not time barred by the 2007 decision.

SPBPC incorrectly claims that Valero's complaint was not brought under Public Utilities Code section 494. SPBPC Comments at 10. In fact, Valero's complaint alleges that "[n]either the proposed rates . . . nor any other rates that Defendants have charged in the past for the shipment of crude petroleum on the Shell Pipeline have been in accordance with Public Utilities Code §§ 455.3, 486(a), 493(a) and 494(a), and General Order 96-A." Valero Amended Complaint at ¶ 6. Accordingly, the three-year statute of limitations under section 736 applies to Valero's complaint. Moreover, Public Utilities Code section 734 also would entitle Valero to refunds for the unreasonable rates it has paid since at least April 1, 2005.

The statute of limitations under section 736 should be calculated to extend to three years before the Commission ordered SPBPC to file tariffs for its third-party contracts on December 6, 2007. *See* D.07-12-021, 2007 Cal. PUC LEXIS 631, at \*19. Otherwise, SPBPC would benefit from its long delay in filing a tariff that precipitated Valero's complaint. This Commission should not reward SPBPC for its dilatory tariff filing and then claim that its filing had the effect of cutting off Valero's remedy. Thus, for purposes of calculating the refund period, SPBPC should be equitably estopped from asserting any statute of limitations as a defense. The refund period properly extends back to at least April 1, 2005.

Moreover, SPBPC fails to respond to the Proposed Decision's correct observation that "all parties including Applicant treated April 1, 2005 as the earliest date for which refunds could

be sought.” Proposed Decision at pgs. 13-14. Indeed, SPBPC consented to a refund period extending back to April 1, 2005. On February 13, 2009, Chevron and SPBPC filed a joint motion to consolidate proceedings and agreed that the issues would be: “(a) whether the rates Defendants charged from April 1, 2005 until the effective date of their approved tariff were unjust and unreasonable, and (b) if so the amount of any refund Defendants should pay shippers” (emphasis added). The joint motion refers to shippers in the plural, anticipating the eventual consolidation with the complaint cases filed by Valero and Tesoro. Indeed, Valero’s subsequent motion to consolidate – which was stipulated to by SPBPC – notes that the claims in the Valero complaint case “directly relate to the rate case proceedings, to wit: pipeline demands for retroactive rate increases and appropriate refunds for past periods of utility service.” Thus, SPBPC consented to the April 1, 2005 date as the refund period for Valero’s complaint case. Similarly, SPBPC did not object to the Scoping Ruling issued in the consolidated proceedings on April 27, 2009 which defined the “Past Period” for refunds as extending to April 1, 2005.

Valero concurs with Chevron and Tesoro that the Proposed Decision should be modified to specify that Equilon and STUSCO owe the refunds. In D.07-07-040, the Commission held that Equilon and STUSCO were operating the Pipeline as a public utility. SPBPC is an entity with no employees and no demonstrated financial resources. Valero also agrees with Chevron and Tesoro that, in order to avoid any uncertainty about the calculation of refunds, the approved tariff rate should be effective on the first day of the month following the Commission decision.

## **II. CONCLUSION.**

In conclusion, Valero respectfully submits that the Commission should adopt the Proposed Decision’s Findings of Fact and Conclusions of Law.

Respectfully submitted,  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
MICHAEL S. HINDUS  
WESLEY M. SPOWHN  
50 Fremont Street  
San Francisco, CA 94105  
michael.hindus@pillsburylaw.com  
wesley.spowhn@pillsburylaw.com  
Tel.: 415-983-1851  
Fax: 415-983-1200

Dated: April 13, 2011

By /s/ Michael S. Hindus  
Michael S. Hindus  
Attorneys for Valero Marketing and Supply Company

**CERTIFICATE OF SERVICE**

I, Thomas E. Morgan, hereby certify that I have this day served a copy of the document titled **VALERO MARKETING AND SUPPLY COMPANY'S REPLY COMMENTS ON PROPOSED DECISION OF ALJ BEMESDERFER** 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 13<sup>th</sup> day of April, 2011 at San Francisco, CA

/s/ Thomas E. Morgan  
Thomas E. Morgan  
Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street  
San Francisco, CA 94105  
[thomas.morgan@pillsburylaw.com](mailto:thomas.morgan@pillsburylaw.com)

## Service List

Barbara.hickl@shell.com	BARBARA C. HICKL	
jleslie@luce.com	JOHN W. LESLIE, ESQ.	
elichtblau@orrick.com	ERICH LICHTBLAU	
plecourciere@thelen.com	PAUL C LECOURCIERE	
JMalkin@Orrick.com	JOSEPH M. MALKIN	
nrapkin@orrick.com	NIKKA N. RAPKIN	
epoole@adplaw.com	EDWARD G. POOLE	
jsqueri@goodinmacbride.com	JAMES D. SQUERI, ESQ.	
mgo@goodinmacbride.com	MARLO A. GO	
dhuard@manatt.com	DAVID L. HUARD	
mcorcoran@goldstein-law.com	MATTHEW A. CORCORAN	
mgoldstein@goldstein-law.com	MELVIN GOLDSTEIN	
Kris.mira@shell.com	KRIS R. MIRA	
Robbie.ralph@shell.com	ROBBIE L. RALPH	
Tim.Gehl@shell.com	TIMOTHY GEHL	
Barron.W.Dowling@tsocorp.com	BARRON DOWLING	
andrew.dalton@valero.com	ANDREW J. DALTON	
Darren.Stroud@valero.com	DARREN STROUD	
marcie.milner@shell.com	MARCIE MILNER	
jpmosher@aeraenergy.com	JAMES P. MOSHER	
majidm@sjr.com	MAJID MOJIBI	
ddonabedian@luce.com	DIANA DONABEDIAN	
bcragg@goodinmacbride.com	BRIAN T. CRAGG	
cassandra.sweet@dowjones.com	CASSANDRA SWEET	
tkaushik@manatt.com	TARA S. KAUSHIK	
mday@goodinmacbride.com	MICHAEL B. DAY	
jkarp@winston.com	JOSEPH M. KARP	
tsolomon@winston.com	THOMAS W. SOLOMON	
judypau@dwt.com	JUDY PAU	
vidhyaprabhakaran@dwt.com	VIDHYA PRABHAKARAN	
cem@newsdata.com	CALIFORNIA ENERGY MARKET	
dcoh@chevron.com	DAVID A. COHEN	
rock@cipa.org	ROCK ZIERMAN	
pvalen@thelen.com	PETER V. ALLEN	
alf@cpuc.ca.gov	JOYCE ALFTON	
kjb@cpuc.ca.gov	KARL BEMESDERFER	
<b>BY U.S. MAIL</b>		
MARIA CARBONE DAVIS WRIGHT TREMAINE, LLP 505 MONTGOMERY STREET SUITE 800 SAN FRANCISCO, CA 94111	LISA C. MCCURDY THELEN, LLP 101 SECOND STREET, SUITE 1800 SAN FRANCISCO, CA 94105	NIKKA N. RAPKIN ORRICK HERRINGTON & SUTCLIFFE LLP 405 HOWARD STREET SAN FRANCISCO, CA
CPUC CONSUMER AFFAIRS 505 VAN NESS AVENUE SAN FRANCISCO, CA 94102-3214		