

134 FERC ¶ 61,202
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

March 15, 2011

In Reply Refer To:

SFPP, L.P.

Docket Nos. OR92-8-033
OR93-5-020
OR94-4-021
OR96-2-021,
OR98-1-017
OR00-4-008
IS98-1-008
IS06-215-003
IS06-220-002
OR96-2-018
IS98-1-006

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Dear Counsel:

1. On February 10, 2011, SFPP, L.P. (SFPP) filed the “Report of SFPP, L.P. on Pending Compliance Filings and Request for Order to Pay Refunds and Recover Overpaid Refunds,” (Refund Report) requesting that the Commission issue an order directing it, upon effectiveness of Chevron’s notice of withdrawal of its protests, to proceed with payment of refunds and recovery of overpaid refunds as set forth in pending compliance filings in Docket Nos. OR92-8-033, *et al.* proceedings (OR92-8/OR96-2 Proceedings) and OR96-2-018, *et al.* proceedings (Sepulveda Proceeding). The February 10, 2011 Refund Report filing was made in connection with the February 2, 2011 Offer of Settlement jointly filed by SFPP and Chevron Products Company (a

Chevron U.S.A. Inc. division),¹ by itself and as successor in interest to the claims of Texaco Refining and Marketing Inc. (collectively, Chevron), in the captioned proceedings (Chevron-SFPP Historical Cases Settlement).² The SFPP Refund Report filing was noticed on February 15, 2011 with comments due by February 25, 2011. No comments were filed.

2. SFPP states that as a result of the Chevron-SFPP Historical Cases Settlement, compliance filings pending in the OR92-8/OR96-2 Proceedings and the Sepulveda Proceeding³ are no longer contested and therefore the pending compliance filings in those dockets are ripe for implementation by SFPP. To that end, the Refund Report filing seeks permission to implement the compliance filings in the OR92-8/OR96-2 Proceedings and Sepulveda Proceeding, which implementation requires payment of refunds to certain non-litigant shippers and recovery of overpaid refunds from certain non-litigant shippers.⁴ Specifically, SFPP requests that the Commission issue an order approving the Refund Report and directing SFPP to implement the pending compliance filings in the manner described in its Refund Report filing. SFPP also requests that an expedited order be issued concurrently with the Commission's approval of the Chevron-SFPP Historical Cases Settlement.

¹ Chevron Products Company was formerly known as "Chevron U.S.A. Products Company" and for a time "ChevronTexaco Products Company;" the current name of the entity is "Chevron Products Company." The Settlement between Chevron and SFPP was approved March 15, 2010, 134 FERC ¶ 61,201 (2011).

² The Chevron-SFPP Historical Cases Settlement resolves the remaining historical cases, with certain noted exceptions, that are currently pending before the Commission and the United States Court of Appeals for the District of Columbia. On May 28, 2010, the Commission approved a settlement between SFPP and eleven of twelve litigant shippers (May 28th Settlement) that resolved all pending proceedings, with certain noted exceptions, in which Chevron was neither a protestant nor a complainant. *See SFPP, L.P.*, 131 FERC ¶ 61,180 (2010). With respect to those proceedings in which Chevron was a protestant or a complainant, the May 28th Settlement settled all claims as to the parties to the May 28th Settlement, while leaving untouched the claims of Chevron.

³ *See SFPP, L.P.'s Compliance Filing Implementing December 2006* filed in Docket No. IS98-1-000, *et al.* pursuant to *Texaco Refining and Marketing, Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (December 2006 Order).

⁴ Attached to the Refund Report as Appendix B is a schedule specifying, by non-litigant shipper, the amount of refunds owed to the shipper and the amount of overpaid refunds owed to SFPP. Appendix B was filed under seal, pursuant to 18 C.F.R. § 388.112 (2010).

3. SFPP states that it initially overpaid refunds to certain East Line shippers through the payment of the August 2003 refunds (including interest) when complying with earlier Commission orders in OR92-8/OR96-2 Proceedings and the Sepulveda Proceeding because those refunds were calculated on the basis of the Commission's *Lakehead* methodology⁵ for calculating an income tax allowance. Thereafter the refund amounts initially due and paid were subsequently reduced upon the implementation of the Commission's 2005 Income Tax Allowance Policy Statement.⁶ As a result, SFPP had been ordered to pay excessive refunds based on rates that were lower than revised interim just and reasonable rates later required in December 2006, December 2007, and February 2008 Orders.⁷ Under *United Gas Improvement Co. v. Callery Properties, Inc. (Callery)*, 382 U.S. 223, 229 (1965), "an agency, like a court, can undo what is wrongfully done by virtue of its order." Following the *Callery* principle, the D.C. Circuit has forced shippers to make recoupment payments to pipelines, finding that the Commission has the authority to make retroactive corrections of its errors.⁸ According to the D.C. Circuit, "without such corrective power, pipelines would be substantially and irreparably injured by FERC errors, and judicial review would be powerless to protect them from much of the losses so incurred."⁹ In addition, the Commission has held that a pipeline should be able to recoup interest in order "to put [the pipeline] in the position it would have been in had the error not been made."¹⁰ The Commission therefore concludes that SFPP should be permitted to use a reasonable approach to return SFPP to the same position it would have been in had it not paid the higher-than-needed initial refunds in the captioned dockets.

4. SFPP explains in the Refund Report filing that a significant fraction of the overpaid refunds are owed back by entities that are no longer shippers on SFPP, so there is a substantial risk that SFPP will be unable to recover a sizable portion of the overpaid refunds. SFPP, therefore, proposes to create an Overpaid Refunds Reserve (ORR) to mitigate this risk. This ORR would be funded by a uniform pro rata withholding from

⁵ *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338 (1995), *reh'g denied and modified*, *Lakehead Pipe Line Co.*, 75 FERC ¶ 61,181 (1996) (*Lakehead*).

⁶ *Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139 (2005) (Income Tax Allowance Policy Statement).

⁷ *Texaco Refining and Marketing Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (December 2006 Order); *SFPP, L.P.*, 121 FERC ¶ 61,240 (2007) (December 2007 Order); and *SFPP, L.P.*, 122 FERC ¶ 61,133 (2008) (February 2008 Order).

⁸ *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992).

⁹ *Id.* at 1074-75.

¹⁰ *Tarpon Transmission Co.*, 53 FERC ¶ 61,033, at 61,132 (1990).

the refund amounts owed to SFPP's non-litigant shippers. SFPP notes that, since about 30 percent of the refund amounts that would be withheld are owed to affiliates of SFPP, the funding mechanism is balanced and causes SFPP and its affiliates to share a significant portion of the burden of mitigation.

5. Uniformly withholding approximately 29.78 percent of the refund amounts would create a reserve of approximately \$684,000, equal to SFPP's net exposure to overpaid refunds owed by former shippers. SFPP proposes to assess after two sequential 90-day periods how much of the overpaid refund amount has been recovered and release and distribute to the applicable shippers a corresponding amount following SFPP's initial distribution of the 70.22 percent of the total refunds due at this time.

6. To avoid any windfall to SFPP from unclaimed refunds, at the end of the second 90-day period, SFPP would determine if any refunds have not been claimed by non-litigant shippers and credit that amount to the ORR, distributing pro rata to the applicable shippers an equivalent amount. After the ORR has been reduced by the amount of unclaimed refunds, the non-litigant shippers who failed to claim their refunds after 180 days have elapsed would be foreclosed from doing so thereafter. At that point, any remainder in the ORR would be retained by SFPP to compensate it for the overpaid refund amounts it was unable to recoup. SFPP must explain the procedure described in this paragraph to all shippers receiving any distribution of refunds due under this order.

7. The Commission finds that SFPP's proposed implementation of the compliance filings is reasonable and that its proposed creation and operation of the Overpaid Refunds Reserve is justified in light of the circumstances, and returns SFPP to the same position it would have been in absent the erroneous application of the *Lakehead* approach. The Commission therefore directs SFPP, upon effectiveness of Chevron's notice of withdrawal of its protests, to implement the compliance filings in the OR92-8/OR96-2 Proceedings and the Sepulveda Proceeding, and to pay the refunds owed non-litigant shippers and collect the overpaid refunds owed SFPP by non-litigant shippers in the manner proposed in the Refund Report filing. No later than 30 days after the completion of the refund distribution authorized by this order SFPP must file a certification that it has complied with the refund procedures authorized by this order, together with a report of the refund amounts as actually paid.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.