

166 FERC ¶ 61,197
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

March 21, 2019

In Reply Refer To:
BP Products North America
Inc. v. Sunoco Pipeline L.P.
Docket No. OR15-25-002

Steven H. Brose, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036

Attention: Steven H. Brose, Esq.

Dear Mr. Brose:

1. On December 11, 2018, pursuant to Rules 206(j), 216 and 602 of the Commission's Rules of Practice and Procedure,¹ Sunoco Pipeline L.P. (Sunoco), BP Products North America Inc. (BP), Marathon Petroleum Company LP (Marathon), and PBF Holding Company LLC and Toledo Refining Company LLC (PBF) (each individually, a Party, and collectively, the Parties) filed a joint Offer of Settlement (Settlement) to resolve all issues in BP's complaint against Sunoco in Docket No. OR15-25-000 (Complaint) and its related dockets.

2. On April 30, 2015, BP filed the Complaint, alleging that Sunoco violated section 3(1) of the Interstate Commerce Act (ICA)² by negotiating, entering into, and implementing throughput and deficiency agreements (T&D agreements) with certain shippers, excluding BP, and implementing a revised proration policy, which provided undue preference to certain shippers and resulted in undue discrimination to BP. The Commission set the Complaint for hearing on July 31, 2015,³ and the Presiding Judge

¹ 18 C.F.R. §§ 385.206(j), 385.216, and 385.602 (2018).

² 49 U.S.C. § 3(1) (1988).

³ *BP Products North America Inc. v. Sunoco Pipeline L.P.*, 152 FERC ¶ 61,102 (2015).

issued an Initial Decision on May 26, 2017.⁴ The Initial Decision voided Sunoco's T&D agreements with Marathon and PBF as discriminatory and unenforceable; adjusted each shipper's history on the Marysville Pipeline; recommended that the Commission investigate Sunoco's proration policy; and awarded BP damages for the two-year period prior to the filing of the Complaint.⁵

3. The Parties state that, following the submission of briefs on and opposing exceptions, they reengaged in settlement discussions and after extensive and protracted negotiations, those discussions resulted in the instant Settlement, which resolves all outstanding issues in this proceeding. The Parties request that the Commission promptly approve the Settlement without modification, as the Settlement reflects the resolution of a lengthy proceeding by the carrier and all of the shippers on the system. The terms of the Settlement are summarized below.

4. Section I of the Settlement describes each of the parties. Section II describes the background of the Settlement and states that, upon Commission approval and compliance by the Parties of their obligations, the Settlement will fully satisfy the Complaint. It also states that upon satisfaction of the Parties' obligations, the Parties will jointly seek to withdraw the Complaint.

5. Section III documents the Parties' desire to settle all of the issues raised in the Complaint and their agreement that they shall take all steps necessary to support the Settlement and shall not file, or encourage, or assist in the filing by others, comments opposing the Settlement. Section III.A defines the Effective Date of the Settlement to be the later of (a) the date upon which the Commission issues an order approving the Settlement without modification or condition; or (b) if an objection to the Settlement is submitted to the Commission, the date on which the Commission issues a final order that approves the Settlement without modification or condition and which is no longer subject to rehearing or judicial review. It further provides that the Settlement Period will commence on the Effective Date and continue until four years after the effective date of the revised proration policy that is discussed and provided for in Section III.D.1 of the Settlement.

6. Section III.A.3 notes that the Complaint is fully satisfied by the Settlement based upon the covenants and consideration set forth in the Settlement. It states that such consideration is BP's, Marathon's and PBF's full, exclusive and complete compensation and relief as to those claims stated in the Complaint, or substantially related claims, through the Effective Date, subject to limited exception provided in Section III.A.3.c.

⁴ See *BP Products North America Inc. v. Sunoco Pipeline L.P.*, 159 FERC ¶ 63,020 (2017) (Initial Decision).

⁵ *Id.* P 130.

Further, Section III.A.3 provides that BP, Marathon, and PBF agree that they will not file a protest or complaint challenging any matters agreed upon in the Settlement.

7. Section III.A.3.c provides that the Settlement will constitute BP's, Marathon's, and PBF's sole remedy against Sunoco and will supersede any right of those Parties may otherwise have to seek reparations or damages regarding the matters raised in the Complaint relating to any date through the Settlement Period. However, it also provides that both during and after the Settlement Period, nothing in the Settlement shall restrict or prohibit BP, Marathon or PBF from filing a complaint, protest or taking any other action against Sunoco's rates, tariffs, services or operating practices or other matters that were not the subject of the Complaint or otherwise covered by the Settlement.

8. Section III.B provides that BP and Sunoco incorporate into the Settlement a Joint Notice of Conditional Withdrawal of Complaint (Joint Notice) that documents BP's withdrawal of the Complaint, with prejudice, conditioned on satisfaction of certain conditions. According to Section III.B, withdrawal of the Complaint will become effective upon the Effective Date of the Settlement and the Commission's receipt of written certification from BP and Sunoco that Sunoco has filed and placed in effect the revised proration policy identified in Section III.D.1 and made the applicable payment required in Section III.D.2. Upon satisfaction of these conditions, the Complaint by BP will be deemed withdrawn.

9. Section III.C provides that the Parties urge and request the Commission to approve the Settlement expeditiously without condition or modification as fair, reasonable, and in the public interest. Section III.C also provides that:

Once approved the standard for any review for any modifications to the [Settlement] whether by the Commission, acting sua sponte, or the Parties acting unanimously, shall be the ordinary just and reasonable standard. The standard of review for any modification of the [Settlement] at the request of one or more but less than all settling Parties, or a third party, shall be the most stringent standard permissible under applicable law.⁶

Section III.C also notes that in the event the Commission rejects the Settlement or approves it subject to material condition or modification, any Party shall have the right to withdraw from the Settlement.

10. Section III.D sets forth the consideration agreed to by the Parties. It provides that Sunoco shall file a revised proration policy for the Marysville Pipeline, Sunoco will make a settlement payment to BP, and other miscellaneous provisions, as follows. The Parties agree that the current and expired throughput and deficiency agreements for

⁶ Settlement, § III.C.1.

transportation on the Marysville Pipeline are deemed null and void. Additionally, for as long as the Marysville Pipeline remains in crude oil service, the Settlement provides that Sunoco will use commercially reasonable efforts to maintain the availability of heavy crude service on the Marysville Pipeline through February 28, 2030, will allow total monthly tenders of Heavy Crude Petroleum of up to 1,350,000 barrels per month through that same date, and will also make available enough working storage at Sunoco's Marysville, Michigan station for the receipt of up to 45,000 barrels per day of heavy crude from the Enbridge Pipeline.⁷ Last, Section III.D notes that the differential between the tariff rate for light crude shipments and the tariff rate for heavy crude shipments shall not be considered by Sunoco when determining whether it is commercially reasonable to perform its obligations with respect to the heavy crude service.⁸

11. Section IV sets forth various reservations and stipulations to which the Parties have agreed. Section V sets forth the representations of each of the Parties. The Parties represent that the Settlement may not be altered or amended except by agreement in writing signed by all the Parties hereto. However, under Section V.G, the Parties agree that the Commission retains the right to review any changes to the Settlement under the just and reasonable standard of the ICA, although the Commission may approve the changes as fair and reasonable and in the public interest if the changes are uncontested.

12. Section VI describes the four appendices that are attached to the Settlement. Section VII notes that the Settlement may be executed in counterparts.

13. Public notice of the filing was issued on December 14, 2018.⁹ Interventions and protests were due as provided in section 154.210 of the Commission's regulations.¹⁰ Pursuant to Rule 214,¹¹ all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On December 20, 2018, Commission Trial Staff filed initial comments supporting the Settlement. No other comments were filed.

⁷ *Id.* § III.D.3.b-c.

⁸ *Id.* § III.D.3.d.

⁹ A shortened comment period was granted with initial comments due December 20, 2018 and reply comments due December 28, 2018.

¹⁰ 18 C.F.R. § 154.210 (2018).

¹¹ *Id.* § 385.214.

14. Because the Settlement provides that the standard of review for changes to the Settlement at the request of any non-Parties to the Settlement is “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement.

15. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption.¹² In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,¹³ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

16. The Settlement appears to be fair and reasonable and in the public interest and is therefore approved. In addition, the Joint Notice is granted, thereby terminating Docket Nos. OR15-25-000, OR15-25-001, and OR15-25-002 pursuant to the Settlement upon fulfillment of the conditions specified in the Joint Notice. The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

¹³ *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).