

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
100 FERC ¶ 61,252

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Sunoco, Inc.(R&M)

Docket No. RP02-309-000

v.

Transcontinental Gas Pipe Line
Corporation

ORDER ON COMPLAINT

(Issued September 5, 2002)

1. On May 2, 2002, Sunoco, Inc. (R&M) (Sunoco) filed a complaint¹ against Transcontinental Gas Pipe Line Corporation (Transco). The complaint involves Transco's comprehensive gathering spindown proceeding in Docket No. CP01-34-000,² wherein Transco was authorized to abandon by sale to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP) certain facilities, which the Commission determined to be non-jurisdictional gathering facilities. Transco filed an answer opposing the complaint.

2. The complaint presents the issue of whether the Commission's June 4, 1992 order³ approving a 1992 Settlement bars Transco from terminating service for Sunoco at seven specific receipt points on a part of Transco's system that the Commission recently authorized to be spun off by sale to Transco's gathering affiliate, WGP. Under the June 4, 1992 order, which, among other things, resolved take-or-pay issues, Transco became obligated to provide firm transportation service to Sunoco for twenty years via the receipt

¹Sunoco filed its complaint pursuant to 18 C.F.R. § § 385.206 and 1b.8. (2001).

²Transcontinental Gas Pipe Line Corporation, 96 FERC ¶ 61,115 (2001), reh'g, 97 FERC ¶ 61,296 (2001).

³Transcontinental Gas Pipe Line Corporation, 59 FERC ¶ 61,279 (1992).

points that are the subject of Sunoco's complaint. Despite its obligation, Transco sought and obtained authorization to transfer the facilities containing those receipt points to its affiliate, who would continue to provide service to Sunoco, but potentially at a higher rate. For the reasons discussed below, although the Commission will not grant the various remedies Sunoco requests in its complaint, the Commission will grant relief to the extent that we will require Transco to obtain the subject upstream capacity from its affiliate and reassign it to Sunoco at rates, terms, and conditions that are consistent with their 1992 Settlement, as approved by the June 4, 1992 order. This order benefits customers by ensuring that customers receive the full benefits of settlements approved by the Commission.

Background

3. As recounted in the complaint, on June 4, 1992, the Commission issued an order which, among other things, approved a February 14, 1992 Settlement (1992 Settlement) between Transco and Sunoco resolving all outstanding issues between them, including terms and conditions for Rate Schedule FT service for Sunoco, and embodying Sunoco's agreement to join the relevant provisions of Transco settlements regarding take-or-pay cost recovery, rates, and restructuring of services. Article II, Section A.3. of the 1992 Settlement provided for Transco to provide service from specific receipt and delivery points, including the seven receipt points at issue here, for FT service. Among other things, Article II, Section A.1. of the 1992 Settlement provided for an initial contract term of twenty years⁴ for Rate Schedule FT service for Sunoco, and stated the following, in part:

Unless [Sunoco] provides the appropriate notice to terminate service, Transco shall not take action to terminate service to [Sunoco] so long as [Sunoco] has agreed to pay rates no less favorable than Transco is otherwise able to collect from any other third-party shipper for such service."⁵

⁴Under the 1992 Settlement, the service that Transco had been providing to Sunoco pursuant to an individual NGA section 7(c) certificate was converted to service pursuant to Part 284 of the Commission's regulations. As such, Transco and Sunoco entered into a Part 284 firm transportation agreement, dated August 1, 1992, for service with an initial term of 20 years.

⁵See Article II. Section A.1. of the 1992 Settlement.

4. The 1992 Settlement also stated that the parties agreed that the various parts of the settlement were not severable without upsetting the balance of consideration achieved between Transco and Sunoco.⁶ One such consideration included Sunoco's agreement to pay certain take-or-pay surcharges as a settling party in Transco's proceeding in Docket Nos. RP88-68, et al.⁷

5. On July 25, 2001, the Commission issued an order⁸ approving Transco's comprehensive gathering spindown proposal, wherein the Commission authorized Transco to abandon by sale to its gathering affiliate, WGP, certain facilities and declared the facilities to be non-jurisdictional gathering facilities.⁹ That order explained that since the facilities were no longer subject to the Commission's jurisdiction, the Commission had no authority to regulate the gathering rates or the terms and conditions of service. The order noted that the subject facilities were located on the Outer Continental Shelf (OCS), and were thus subject to the Outer Continental Shelf Lands Act (OCSLA). The order stated that the shippers whose services were abandoned would still desire to receive service via the subject facilities, and thus would renegotiate service agreements with the new owner, WGP.

6. Sunoco, and others, protested Transco's gathering spindown proposal. In its protest, Sunoco advised the Commission of its twenty-year Part 284 service agreement with Transco. However, Sunoco did not point out that the agreement was entered into as part of its 1992 Settlement, and that Transco had agreed to provide the service for twenty years, in part, to resolve its prior take-or-pay dispute with Sunoco. The July 25, 2001 order denied Sunoco's protest and granted abandonment. Sunoco did not seek rehearing of that order. To date, however, Transco has not informed the Commission that it has, in fact, sold the subject facilities to WGP. Accordingly, the abandonment has not yet occurred and Transco continues to provide service to Sunoco from the subject seven receipt points.

⁶See Article IV. Section A.2. of the 1992 Settlement.

⁷See Article II. Section D. of the 1992 Settlement.

⁸Supra, n. 2.

⁹The facilities affected were portions of Transco's North Padre Island Gathering System and the Central Texas Gathering System.

The Complaint

7. The gist of Sunoco's complaint is that Transco's action in transferring the offshore facilities containing the subject receipt points to its affiliate violates Article II, Section A.1. of the 1992 Settlement, which, as set forth above, prohibits Transco from terminating service at the subject receipt points. As a result, Sunoco asserts that it will most likely have to pay a higher rate to the affiliate to continue to receive service through those receipt points. Specifically, Sunoco estimates that obtaining service from WGP to replace the service abandoned by Transco will cost Sunoco an additional \$15 million to \$28 million.¹⁰ In addition, Sunoco claims that it paid millions of dollars in take-or-pay cost-recovery charges to Transco as provided for under the June 4, 1992 order approving the 1992 Settlement. However, Sunoco states that it has not been able to locate information pertaining to the precise amount of these payments.

8. To remedy the above situation, Sunoco suggests various approaches for the Commission to take, pursuant to sections 5 and 16 of the Natural Gas Act (NGA). These include: (1) issuing an order to Transco to show cause why the Commission should not revoke the abandonment authority granted in the July 25, 2001 order and require Transco to continue providing service to Sunoco; (2) instituting a formal investigation to scrutinize and remedy Transco's abrogation of the June 4, 1992 order approving the 1992 Settlement; (3) issuing an order requiring Transco to continue to provide service to Sunoco at the subject receipt points; (4) modifying the 1992 Settlement to restore the status quo ante and to require Transco to refund, with interest, certain take-or-pay cost-recovery charges paid by Sunoco; and (5) issuing an order clarifying that the July 25, 2001 order did not affect any contractual obligations of Transco to provide service to Sunoco at the subject receipt points consistent with the rates, terms and conditions specified in the 1992 Settlement, as approved by the June 4, 1992 order.

¹⁰Sunoco states that, for illustrative purposes, if Transco's proposed gathering rate of 19 cents per dth reflected in proposed tariff sheets included in the April 12, 2002 Stipulation and Agreement filed in Docket No. RP01-245-000 were to apply to transportation along the Central Texas facilities after the spindown, Sunoco estimates that it would have to pay an additional \$2.8 million per year, or \$28 million over the remaining ten-year term of the service agreement for firm transportation service from the Central Texas System to Zone 6. Alternatively, if the 16 cents per dth rate proposed in Docket Nos. RP02-99-000 and RP02-144-000 were used, the impact on Sunoco would be \$23 million over ten years. Sunoco states that even if a more conservative estimate of 10 cents per dth were used, the impact would be \$15 million over ten years.

9. Sunoco argues that the gathering spindown proceeding which culminated in the July 25, 2001 order was fatally flawed because Transco did not advise the Commission of the terms of the 1992 Settlement. Specifically, Sunoco complains that Transco did not explain to the Commission that the 1992 Settlement obligated it to provide service to Sunoco for twenty years as part of a comprehensive settlement which resolved Transco's take-or-pay dispute with Sunoco. Sunoco argues that Transco's action in seeking to sell the subject receipt points to its gathering affiliate amounts to a violation of the 1992 Settlement because it rendered Transco incapable of providing the service to Sunoco which the 1992 Settlement obligated it to provide.

Notice of Filing and Responsive Pleadings

10. Notice of Sunoco's complaint was published in the Federal Register (67 Fed. Reg. 31293 (2002)) with interventions, comments, and protests due on or before May 22, 2002. Timely motions to intervene were filed by: BP America Production Company and BP Energy Company, jointly; Shell Offshore Inc.; Texaco Exploration Inc. and Chevron U.S.A., Inc., jointly; Exxon Mobil Corporation; Delmarva Power & Light Company; Conoco, Inc.; KeySpan Delivery Companies; PSEG Energy Resources and Trade LLC; Consolidated Edison Company of New York, Inc.; and Phillips Petroleum Company and Phillips Gas Marketing Company, jointly.¹¹ Transco filed an answer to the complaint.¹²

Transco's Answer

11. In its answer, Transco argues that Sunoco's complaint should be dismissed as an unlawful collateral attack upon the Commission's July 25, 2001 abandonment order. Transco does not respond directly to Sunoco's argument with respect to the provision of the 1992 Settlement, Article II, Section A.1., that bars action on its part to terminate service from the subject receipt points. Rather, Transco contends that Sunoco's

¹¹Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2001).

¹²Sunoco filed an answer to Transco's answer. Transco filed an answer to Sunoco's answer. Rule 213 of the Commission's Rules of Practice and Procedure does not permit the filing of answers to answers, 18 C.F.R. § 385.213 (2001), and good cause has not been shown to grant waiver of Rule 213 as the answers add no new information that would aid the Commission in resolving the issues raised here. As such, the Commission will not accept these pleadings.

complaint amounts to a restating of its protest regarding its contract rights, which the Commission rejected, in the gathering spindown proceeding. In this regard, Transco equates Sunoco's 1992 Settlement argument as being essentially the same argument as its contract argument, upon which its protest was based. Further, Transco asserts that the service contract with Sunoco remains in effect, as it covers service from numerous other receipt and delivery points and, therefore, the contract is not being terminated. Transco claims that since Sunoco did not seek rehearing of the July 25, 2001 order, it is procedurally barred from raising the same issues here.

12. Transco also argues that since the subject receipt point facilities are non-jurisdictional gathering facilities, there is no lawful basis for the Commission to re-assert jurisdiction over those facilities based simply on Sunoco's contractual claims. It asserts that the 1992 Settlement only was intended to govern jurisdictional transmission service. Accordingly, it asserts, by reforming the contract to delete the subject receipt points, the Commission did not modify the contract contrary to the intent of the contracting parties. Further, it asserts, that contract reformation was accomplished using its full panoply of powers under sections 1(b), 5, and 7 of the NGA. Further, Transco contends that its Part 284 service agreement with Sunoco was never intended to apply to services on non-jurisdictional facilities.

13. With respect to Sunoco's alternative request that the Commission restore Sunoco and Transco to their status quo ante by requiring Transco to refund, with interest, take-or-pay cost recovery charges paid by Sunoco, Transco states that under Order No. 500, as affirmed by the courts,¹³ the Commission required all customers, including transporters such as Sunoco, benefitting from the opening of access to the interstate pipeline systems to pay a share of the take-or-pay buy-out and buy-down costs then afflicting the industry. For this reason, Transco contends that Sunoco's contention that it agreed to pay take-or-pay cost recovery charges only as part of a quid pro quo in the 1992 settlement is problematic. Transco contends that to put the parties in their prior positions, Sunoco would have to litigate its prior position that it should not be responsible for its fair share of take-or-pay costs under Order No. 500 and section 2.104(a) of the Commission's regulations. In addition, Sunoco would have to pay Transco the additional charges that a non-settling party would have paid. Finally, Transco states that Sunoco received a rate reduction under the order approving the 1992 settlement, not a rate increase.

¹³See, e.g. KN Energy, Inc. V. FERC, 968 F.2d 1295 (D.C. Cir. 1992); see also Williston Basin Interstate Pipeline Co., 66 FERC ¶ 61,283, at pp. 61,807-8 (1994).

14. With respect to Sunoco's claim that replacement service from WGP will cost it an additional \$15 million to \$28 million over a ten-year period, Transco states that this claim is speculative. Further, Transco asserts, even if Sunoco experiences a rate increase as a result of the abandonment, the Commission has previously acknowledged that such rate increases could occur, but that they are neither inequitable nor unwarranted.¹⁴

15. Finally, Transco argues that to the extent Sunoco may retain residual contractual rights for service at the subject receipt points from either Transco or its affiliate, such rights would be associated with what are now non-jurisdictional gathering facilities. As such, it asserts, the dispute over what those rights might be would be governed by state contract law. Accordingly, Transco contends that such a dispute falls within the jurisdiction of the Texas courts, not the Commission.¹⁵

Discussion

The 1992 Settlement

16. Upon review of the record, the Commission concludes that Transco's action in transferring the subject facilities to its affiliate will cause Transco to terminate service at the subject seven receipt points, in violation of Article II, Sections A.1. and A.3. of the 1992 Settlement. Thus, Sunoco will be deprived of a part of the bargain it struck with Transco when it entered into the 1992 Settlement. Accordingly, the Commission finds that Transco's action violates the June 4, 1992 order approving the 1992 Settlement. While Sunoco should have noted this issue in the abandonment proceeding (as should Transco), our concern about Sunoco's tardiness is outweighed by Transco's breach of a settlement approved by the Commission. Thus, Sunoco is entitled to an equitable remedy under the June 4, 1992 order approving the 1992 Settlement, with respect to service at the seven receipt points. Sunoco's entitlement to an equitable remedy would begin as of the date on which Sunoco begins receiving service from the affiliate at a rate and/or terms and conditions that are different than those provided by Transco pursuant to the 1992 Settlement, and corresponding August 1, 1992 Part 284 contract, which was entered into as a result of the order approving the 1992 Settlement.

¹⁴Citing Transcontinental Gas Pipeline Line Corp., 97 FERC ¶ 61,296 at p. 62,382 (2001).

¹⁵Citing Conoco Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996).

17. The Commission is not persuaded by Transco's argument that its dispute here with Sunoco is merely a contract dispute that falls under the jurisdiction of the state courts. Instead, the Commission finds that this proceeding relates directly to the 1992 Settlement, which the Commission approved in its June 4, 1992 order. The Commission's approval of the 1992 Settlement made it binding on the parties, and the provisions thereunder became part of Transco's tariff. The Commission has jurisdiction over matters that relate to the interpretation of jurisdictional settlements and tariffs of the companies which the Commission regulates. The Commission here is interpreting its prior order and the 1992 Settlement which was the subject of that order. Accordingly, Transco's argument that the Commission lacks jurisdiction to impose a remedy in this proceeding is rejected.

Remedies

18. We now consider what an appropriate equitable remedy for Sunoco would be. We turn first to Sunoco's request that we revoke, or issue some type of show cause order, with respect to the July 25, 2001 order approving abandonment. We reject this request as too drastic and unnecessary. The abandonment has already been authorized on otherwise reasonable grounds, and the narrow issue raised by Sunoco can be resolved by a remedy more carefully tailored to fit Sunoco's problem, as discussed below.

19. Similarly, we are not persuaded to revoke the abandonment authorization issued in our July 25, 2001 order simply because Transco did not point out that its Part 284 contract with Sunoco stemmed from the June 4, 1992 order approving the 1992 Settlement. While Transco did not point this out, neither did Sunoco in its protest to the abandonment application. In any event, since the Commission is granting Sunoco equitable relief here, the fact that Transco did not point out the 1992 Settlement in the spindown proceeding does not constitute a fatal flaw in that proceeding. Accordingly, the Commission declines to institute an investigation with respect to Transco's failure to raise the 1992 Settlement in the abandonment proceeding.

20. Next, we consider Sunoco's request that we modify the 1992 Settlement to restore the status quo ante and to require Transco to refund, with interest, take-or-pay cost-recovery charges paid by Sunoco. However, Sunoco and Transco disagree as to what the 1992 Settlement provides, and the document does not specify on its face what

consideration actually changed hands as a result of the Settlement.¹⁶ While Sunoco claims that it paid Transco millions of dollars in take-or-pay cost-recovery charges pursuant to the 1992 Settlement, the 1992 Settlement indicates that Transco paid moneys to Sunoco for Sunoco's agreement to be a settling party to the proceeding.¹⁷ Further, Sunoco's complaint does not demonstrate that Sunoco paid the millions of dollars that it alleges. Specifically, Sunoco states that it has not been able to locate information pertaining to the precise amount of these payments. In contrast, Transco claims that Sunoco received a rate reduction under the 1992 Settlement, and that to put the parties in their prior positions would require Sunoco to pay Transco the additional charges that a non-settling party would have paid. In light of these allegations, the Commission finds that the record in the instant proceeding is insufficient to determine what monetary remedy, if any, Sunoco may be entitled to. Accordingly, we will not grant this relief.

21. Further, we reject Sunoco's request that we issue an order clarifying that our July 25, 2001 order did not affect any contractual obligations of Transco to provide service to Sunoco at the subject receipt points consistent with the rates, terms and conditions specified in the 1992 Settlement, as approved by our June 4, 1992 order. The July 25, 2001 order clearly affected Transco's contractual obligation to provide service from the subject seven receipt points. Since our July 25, 2001 order did not even mention the June 4, 1992 order or the 1992 Settlement, clearly the July 25, 2001 order was not intended to address the effect of the 1992 Settlement or the June 4, 1992 order. However, since Transco will no longer own the facilities upon their transfer to WGP, Transco will not be able to provide the service required by the 1992 Settlement to Sunoco, which we find requires an equitable remedy to be ordered.

22. Finally, we consider Sunoco's request that we require Transco to continue to provide service to Sunoco at the subject receipt points. Since Transco will no longer own the facilities, the Commission cannot order Transco to provide service at facilities it does not own. However, we will direct that Transco take action to remedy its violation

¹⁶For example, Article II, Paragraph E of the 1992 Settlement indicates that Transco had to wire transferred funds to Sunoco to resolve matters described in the 1992 Settlement, but does not indicate the amount of such funds or the specific matters which such funds resolved.

¹⁷See Article II, Paragraph D (Take-or-Pay Surcharges) of the 1992 Settlement, which provides that Sunoco will pay the Producer Settlement Payment and Litigating Producer Settlement Payment surcharges, but that Transco shall refund to Sunoco the difference between these surcharges for non-settling parties and settling parties.

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of the 1992 Settlement in a way to provide Sunoco with the benefits of the Settlement. Accordingly, the Commission finds that the equitable remedy in the instant proceeding is for the Commission to modify the 1992 Settlement under Section 5 of the NGA to the extent that, upon sale of the subject facilities, Transco must acquire the subject capacity at the seven subject receipt points from its gathering affiliate, WGP, and assign it to Sunoco at rates, terms, and conditions consistent with their 1992 Settlement, as approved by the June 4, 1992 order.

The Commission orders:

(A) The Complaint is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) Transco must acquire the subject capacity from its gathering affiliate, WGP, and assign it to Sunoco at rates, terms and conditions consistent with their 1992 Settlement, as approved by the June 4, 1992 order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.