103 FERC ¶ 61,177

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing - Gulf Coast Company, L.P., Williams Field Services Company, and Williams Gulf Coast Gathering Company, L.L.C. Docket No. RP02-99-006

ORDER ON REHEARING

(Issued May 15, 2003)

1. In this order, the Commission denies requests for rehearing by Transcontinental Gas Pipe Line Corporation (Transco), Williams Field Services Company, Williams Gas Processing - Gulf Coast Co., L.P., and Williams Gulf Coast Gathering Co., L.L.C. (collectively, WFS), and Keyspan Delivery Companies (Keyspan) of the Commission's Order on Initial Decision, issued on September 5, 2002 (September 5, 2002 Order).[1] This order is in the public interest because it ensures that the Commission's unbundling and gathering policies are not used to circumvent the Commission's effective regulation of interstate transportation of natural gas.

I. Background

2. In the September 5, 2002 Order, the Commission generally affirmed the findings of the Administrative Law Judge (ALJ) in an Initial Decision (I.D.) issued on June 4, 2002.[2] Based on the record and the ALJ's findings, the Commission reasserted Natural Gas Act (NGA) jurisdiction over the gathering rates and services provided on the subject

[1]Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al., 100 FERC ¶ 61,254 (2002).

[2]Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al., 99 FERC ¶ 63,034 (2002).

spundown North Padre Island (NPI) system facilities.[3] Specifically, the Commission affirmed the ALJ's finding that the Commission's test established in Arkla Gathering Services Co. (Arkla)[4] for reasserting NGA jurisdiction was met because Transco and its gathering affiliate, WFS, acted in concert in planning for and offering offshore gathering service to Shell Offshore Inc. (Shell) on the NPI system facilities in a manner that frustrates the Commission's effective regulation of Transco.[5] In addition, the Commission found that, on the basis of the record and the circumstances presented in this case, Transco and WFS had violated Section 5 of the Outer Continental Shelf Lands Act (OCSLA)[6] and the Commission's implementing regulations[7] by effectively denying open access. As the remedy, the Commission reasserted NGA jurisdiction and, finding that an unbundled gathering rate for the subject services of 1.69 cents per Dth falls within the zone of reasonableness, ordered Transco to file to establish such rate, as well as a rate schedule and pro forma service agreement, pursuant to Section 5 of the NGA. The Commission also affirmed the ALJ's decision to dismiss a complaint grounded in the same facts filed by Superior Natural Gas Corporation and Walter Oil & Gas Corporation (collectively, Walter) against WFS, in Docket No. RP02-144-000, based on a settlement of the parties.

3. On rehearing, Transco and WFS contest the Commission's reassertion of jurisdiction and numerous aspects of the September 5, 2002 Order. They variously argue that the Commission outright lacks any jurisdiction under the NGA to regulate gathering rates or services and that the Commission misapplied its Arkla test, asserting that they did not act in concert to frustrate regulation of Transco. Further, they claim that the Commission's action conflicts with its spin-down policies. Regarding the application of

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[3]The NPI system facilities are described in the I.D., 99 FERC at 65,238-39.

[4]67 FERC ¶ 61,257 at 61,871 (1994), order on reh'g 69 FERC ¶ 61,280 (1994), reh'g denied, 70 FERC ¶ 61,079 (1995), reconsideration denied, 71 FERC ¶ 61,297 (1995).

[5]September 5, 2002 Order, 100 FERC ¶ 61,254 at P 1.

[6]43 U.S.C. §§ 1301-1356 (1994).

[7]Regulations Under the OCSLA Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, Order No. 639, FERC Stats. & Regs. ¶ 31,097 (2000), order on reh'g, Order No. 639-A, FERC Stats. & Regs. ¶ 31,103 (2000), enforcement enjoined, Chevron U.S.A., Inc., et al. v. FERC, 193 F. Supp. 2d 54 (D.D.C. 2002), appeal docketed, No. 02-5056 (D.C. Cir. Feb. 5, 2002).

the Arkla test, based on their various interpretations of that test, they assert that they did not act in concert to frustrate regulation of Transco. Finally, they assert that the Commission erred in finding a violation of the OCSLA and in setting a rate remedy. Transco and WFS have raised no new arguments that support a grant of rehearing.

II. Discussion

A. Jurisdiction

4. On rehearing, Transco and WFS question the Commission's authority under the NGA to reassert jurisdiction over the gathering rates and services provided over the subject facilities. Their arguments fail, in large part, because they rest on an incorrect understanding of the jurisdictional foundation of the September 5, 2002 Order. NGA Section 1(b) gives the Commission jurisdiction over natural gas companies engaged in jurisdictional interstate transportation,[8] and NGA Sections 4 and 5 provide that the Commission has authority to regulate the rates charged by natural gas companies "in connection with" interstate transportation.[9] Our ruling is based on Northern Natural Gas Co. v. FERC (Northern Natural), where the Eighth Circuit Court of Appeals concluded that the Commission "may regulate rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional interstate transportation."[10] Accordingly, the Court upheld the Commission's jurisdiction to set unbundled gathering rates for gathering services performed by interstate pipelines in connection with their own jurisdictional open access transportation services. It is on this basis that the Commission regulates Transco's gathering rates and services under Part 284 of its open access regulations[11] for gathering Transco performs in connection with its interstate Part 284 transmission services such as its IT-Feeder services in the OCS.[12]

5. In Arkla, the Commission held that if an affiliated gatherer acts in concert with its pipeline affiliate and in a manner that frustrates the Commission's regulation of the

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[8] 15 U.S.C. § 717(b) (1997).

[9] 15 U.S.C. §§ 717c, 717d (1997).

[10] 929 F.2d 1261, 1263 (8th Cir. 1991), cert. denied, 502 U.S. 856 (1991).

[11] 18 C.F.R. Part 284 (2002).

[12] See Transcontinental Gas Pipe Line Corp., FERC Gas Tariff, Third Revised Volume No. 1, Ninth Revised Sheet No. 33.

interstate pipeline, the Commission may disregard the separate corporate structures and treat the pipeline and gatherer as a single natural gas company.[13] The Commission would thereby regulate the gathering activities as if the gathering facilities were owned directly by an interstate pipeline.[14]

6. On appeal of the Commission's Arkla orders in Conoco, Inc. v. FERC (Conoco), the Court summarized the Commission's position as follows:

> [W]hile the Commission believes it has no jurisdiction over gathering provided by a truly independent affiliate, it also holds that its jurisdiction over interstate transportation obligates it to ensure that there is no collusion between the interstate pipeline and the gatherers to manipulate the interstate market by determining who will have access to it.[15]

While the Court was not presented with an actual reassertion of jurisdiction in Conoco,[16] it found that: "we have no reason to doubt the Commission's conclusion that a nonjurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering, the precise concern of Northern Natural, 929 F.2d at 1270."[17]

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[13] Arkla, 67 FERC at 61,871.

[14] Id.

[15] 90 F.3d 536, 549 (D.C. Cir. 1996) (emphasis added), cert. denied sub nom. Amoco Energy Trading Corp. v. FERC, 519 U.S. 1142 (1997).

[16] The Court, however, rejected the Commission's claim that it had jurisdiction to require an "independently operated affiliated gatherer" to execute a "default contract" as a condition of abandonment. Conoco, 90 F. 3d at 551.

[17] Conoco, 90 F.3d at 549. The Court quoted with approval the following general rule applied by the Commission: "[a]n agency may disregard the corporate form in the interest of public convenience, fairness, or equity. This principle of allowing agencies to disregard corporate forms is flexible and practical in nature. Corporations may be regarded as one entity for the purposes with which the agency immediately concerned even though they are legitimately distinct for other purposes." Id.

7. In this case, as a result of what was, in essence, a sham spin-down transaction designed to circumvent the Commission's regulation, Transco, or The Williams Companies (TWC)[18] corporate family, is attempting to extract substantially higher charges from the same services previously provided by Transco. But for the "spin-down" and concerted action by Transco/WFS, the Commission would continue to exercise jurisdiction over Transco's jurisdictional transportation, along with the gathering services provided in connection with it, to ensure just and reasonable rates. As the ALJ found, however, the parties' concerted action and abuse of market power frustrates the Commission's regulation by permitting the TWC corporate family to benefit from what Transco alone could not accomplish, creating the opportunity for undue discrimination and other anti-competitive actions in the provision of gathering services in connection with transportation.[19] It is on this basis that the Commission treated both entities as one entity and resumed jurisdiction over the gathering rates and services as if the spin-down had not occurred and Transco still owned and controlled the subject facilities.

8. Further, as the ALJ also recognized,[20] in addition to circumventing our NGA rate regulation, the Commission policies that were frustrated by Transco/WFS's concerted actions ultimately were the Commission's open access policies. As we stated in Order No. 636:

> The first goal is to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible. As the House Committee Report to the Decontrol Act stated: 'All sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies.' [citation omitted][21]

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[18] TWC is the corporate parent of both Transco and WFS, holding 100 percent of the interest in both affiliates.

[19] See I.D., 99 FERC at 65,254-60.

[20] I.D., 99 FERC at 65,259.

[21] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,393, order on

(continued...)

9. Here, by demanding egregiously high rates for gathering, Transco/WFS effectively barred access to the interstate grid of reasonably-priced supplies of natural gas. Indeed, Shell shut-in its production in the face of prohibitively high rates demanded by Transco/WFS. Thus, Transco/WFS's concerted actions in exacting unreasonable rates and conditions of service resulted in natural gas supply physically being denied access to the interstate market. Moreover, the public would suffer from reduced competition in the interstate transportation and sale of natural gas because, as the ALJ found, "[d]istortions of price signals by monopoly abuse of rate-payer producers, on a long-term cumulative basis, cause distortions of production and development decisions that ultimately cause bad economic results."[22] The Commission sought to prevent the kind of manipulation of both physical access and costs (in the form of rates) of gathering in connection with interstate transportation addressed in Northern Natural and Conoco.

10. On rehearing, Transco and WFS argue that the Commission's reassertion of jurisdiction in the September 5, 2002 Order conflicts with Conoco's ruling rejecting the Commission's claim that it had ongoing NGA jurisdiction to require an "independently operated affiliated gatherer" to execute a default contract as a condition of abandonment.[23] The Court, however, distinguished between "a truly independent gatherer," which it recognized would not be subject to a reassertion of jurisdiction under Arkla, and a gatherer like WFS acting in "collusion" with its affiliate pipeline such that the corporate structure could be ignored.

11. Transco and WFS assume in their arguments that, pursuant to NGA Section 1(b),[24] the Commission can never regulate gathering. These arguments overlook that the Commission has "in connection with" NGA jurisdiction, acknowledged in Northern Natural, if the pipeline owns the facilities. On that basis, the Commission does, in fact,

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[21](...continued)
reh'g, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, order on reh'g, Order No. 636-B, 61 FERC ¶ 61,272 (1992), aff'd in part and remanded in part sub nom., United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997), order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997), order on reh'g, 83 FERC ¶ 61,210 (1998).

[22]See I.D., 99 FERC 65,252.

[23]Conoco, 90 F.3d at 551.

[24]NGA Section 1(b) states that "the provisions of this Act . . . shall not apply to . . . the facilities used for . . . the production or gathering of natural gas."

regulate Transco's own gathering rates and services.[25] The only basis for the temporary absence of rate and service jurisdiction here was Transco's claimed "sale" of the NPI system facilities to WFS in a spin-down transaction which had the appearance of placing the gathering facilities in the hands of an "independent" entity that performed no transportation of gas and which, therefore, could not be classified as a jurisdictional natural gas company subject to the NGA. In light of the record evidence of concerted action, the ALJ found that Transco/WFS did not act as independent entities. Accordingly, the Commission found it appropriate to pierce what the record reflected was a tissue-paper thin corporate veil established by Transco and WFS through an internal reorganization amounting to nothing more than accounting entries. Moreover, it should be emphasized that the September 5, 2002 Order does not assert NGA certificate jurisdiction under NGA Section 7 over the gathering facilities themselves but only reclaims jurisdiction over the gathering rates and services just as the Commission currently regulates gathering rates and services on Transco's system.

12. Transco argues that the concern addressed by the Courts in Conoco and Northern Natural as to manipulation of access and costs of gathering related to a bundled, merchant pipeline using its own gathering facilities to discriminate in favor of its own gas to the disadvantage of third-party shippers and that such concern does not apply here because Transco has unbundled its transportation and sales.[26] Transco is incorrect. Northern Natural also dealt with a transportation pipeline, not a merchant pipeline, with unbundled gathering rates. In any event, as the Commission recognized in Northern Natural Gas Co., "excessive rates for gathering services provided in connection with open-access transportation could be used as a barrier to open-access transportation and would also defeat the goal of lower prices to consumers."[27] The Commission recognizes that Transco does not produce gas in competition with shipper gas supplies, but that fact is irrelevant since the impact of Transco's and WFS's actions with respect to gathering is to effectively cut off the market from potential suppliers at the wellhead, thereby contravening the Commission's, and, indeed, Congress's open-access goals. As the Court

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[25]Transcontinental Gas Pipe Line Corp., FERC Gas Tariff, Third Revised Volume No. 1, Ninth Revised Sheet No. 33; see also Sea Robin Pipeline Co., 93 FERC ¶ 61,287 (2000), reh'g denied, 94 FERC ¶ 61,137 (2001) (requiring Sea Robin Pipeline Co. to file separately stated rates for transportation and gathering services in its rate schedules).

[26]Citing Northern Natural, 929 F.2d at 1270.

[27]43 FERC ¶ 61,473 at 62,161 (1988), reh'g denied, 44 FERC ¶ 61,384 (1988), aff'd, Northern Natural, 929 F.2d 1261 (8th Cir. 1991), cert. denied, 502 U.S. 856 (1991).

in Conoco recognized, the Commission believes "that its jurisdiction over interstate transportation obligates it to ensure that there is no collusion between the interstate pipeline and gatherers to manipulate the interstate market by determining who will have access to it."[28]

B. Consistency With Spin-down and Unbundling Policies

13. Transco and WFS argue that the September 5, 2002 Order reverses the Commission's unbundling policy on offshore gathering by pipeline affiliates and contradicts the Spin-down Orders.[29] Transco and WFS argue that the Commission contradicted findings in the Spin-down Orders that: Transco did not need to retain ownership of its NPI gathering facilities to ensure the orderly flow of gas into its downstream transmission mainlines; the spin-down is consistent with the unbundling policies of Order No. 636 and should promote competition within the gathering industry in the long-run; and the issue of competition is not relevant to whether the Commission will regulate an affiliate gatherer's rates or terms and conditions of service after it acquires abandoned facilities.[30] Further, Transco and WFS argue that the Commission knew the level of the gathering rate WFS proposed to Shell because the Commission's order on rehearing in the spin-down proceeding was issued after Shell had filed its complaint.

14. First, the September 5, 2002 Order does not revoke the transfer to WFS, and does not reassert NGA Section 7 jurisdiction over the subject facilities, but rather reinstates the Commission’s "in connection with" rate and service NGA jurisdiction under NGA Sections 4 and 5 in the same manner as if Transco still owned the facilities. Further, the Commission's Spin-down Orders focused on the physical characteristics of the facilities

[28] Conoco, 90 F.3d at 549.

[29] On July 25, 2001, the Commission issued an order approving Transco's application to abandon certain facilities, including the NPI system facilities, to WGP, WFS's parent company. In addition, the Commission granted WGP's request to declare that the facilities, upon transfer to WGP, would function primarily as gathering. In an order denying rehearing, issued on December 19, 2001, the Commission upheld its rulings. These orders are referred to in this order as the Spin-down Orders. Transcontinental Gas Pipeline Corp., 96 FERC ¶ 61,115 (2001), reh'g denied, 97 FERC ¶ 61,296 (2001), review pending, Williams Gas Processing-Gulf Coast Co., L.P., et al. v. FERC, Case No. 02-1053, et al. (filed Feb. 11, 2002).

[30] Citing 96 FERC at 61,434-35; 97 FERC at 62,381.

to resolve the issue of whether the NPI system facilities should be classified as gathering by applying the Commission's modified primary function test as applicable to OCS facilities. The issue of competition following the spin-down, therefore, was not relevant particularly to that inquiry. Moreover, the Spin-down Orders predate the record established in this complaint case of Transco's and WFS's concerted actions that circumvented the Commission's regulation. The record here reflects that Shell was not even apprised of WFS's demand for a 12-cent rate and the dedication of reserves and jurisdictional impact clauses until just before the date of transfer of the facilities to WFS, which does not reflect good-faith negotiations with Shell.

15. Further, as the ALJ observed in the Initial Decision, the finding in the July 25, 2001 Spin-down Order that the Commission would approve the spin-down of gathering facilities regardless of the competitive circumstances on the facilities, "is not free license for the pipeline and its affiliate to abuse their market power once the spin-down is implemented."[31] Shell has no competitive alternatives. Transco's facilities are the only means to get production from the NPI area to onshore markets. The resulting increase in Shell's case would double the pre-existing 8-cent IT-feeder rate, which covered service for approximately 230 miles of facilities, simply for the right to use a 3.08-mile segment of the same facilities now declared to be gathering. Thus, WFS and Transco seek to gain revenues, not from enhanced efficiency or added service, but simply from the opportunity afforded from regulatory change.

16. In short, the Spin-down Orders regarding classification of these facilities do not stand for the proposition that the Commission expected or endorsed the imposition of anticompetitive rates, and terms and conditions of service following the spin-down by an affiliate acting in concert with Transco. Moreover, as set forth in Arkla, the Commission's spin-down policies include the opportunity for aggrieved parties to file a complaint and to seek our reassertion of NGA jurisdiction.

C. Application of the Arkla Test

17. In their requests for rehearing, Transco and WFS have attempted to twist the Commission's application of the Arkla test into knots by arguing about the proper sequence of looking for "concerted action" and "frustration of Commission regulation." Transco and WFS argue that the proper application of the Arkla test first involves an inquiry into whether frustration of regulation of the pipeline has occurred before turning to the issue of whether the pipeline and its affiliate were acting in concert with one

[31] I.D., 99 FERC at 65,237.

another. The Commission's description of the Arkla test as having two "prongs" (concerted action and frustration of the Commission's regulation) was not meant to convey the notion that the test involved a complicated timing sequence. The proper application of the test involves nothing more complicated than the common-sense notion that the behavior here that gives cause for us to reassert jurisdiction consists of creating the illusion of a separate gathering entity to evade the Commission's regulation. Prior to the spin-down, the Commission was regulating Transco's gathering "in connection with" Transco's transportation. But for the sham spin-down of the NPI system facilities, the Commission would continue its jurisdiction over Transco's transportation and gathering. The sham spin-down along with the concerted action between Transco and WFS allowed them to evade the "in connection with" link to our jurisdiction and permitted WFS to extract money that Transco, as a natural gas company, providing both services alone could not. If WFS, the Transco-affiliated gatherer, were truly independent, or if it had been sold to a truly independent gatherer, we would not have the "in connection with" jurisdiction, which, under Northern Natural and Conoco, is premised on gathering being provided by the natural gas pipeline subject to our NGA Section 1(b) jurisdiction.

1. Concerted Action

18. Transco and WFS contest the Commission's finding that they acted in concert with one another. Their arguments in this regard repeat in substance the same arguments that were correctly rejected by the ALJ.[32]

19. In addition, WFS asserts that the concerted action part of the Arkla test requires proof that "the pipeline would benefit by certain actions taken by the affiliate in conjunction with its affiliated pipeline,"[33] but that, here, the only benefit to Transco which the Initial Decision finds is the indirect benefit of the parent company's profits. According to WFS, if benefitting the corporate parent is relevant, then every spin-down in which costs are reduced, or earnings are enhanced, will satisfy the concerted activity standard, so that jurisdiction will reaffix to virtually every spin-down.

20. We disagree. First, Arkla does not provide an exclusive list of concerted actions that would trigger the Commission's authority to disregard the corporate form. Specifically, in Arkla, after the Commission set forth examples of such concerted actions,

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[32]See I.D., 99 FERC 65,239-43.

[33]Quoting Arkla, 67 FERC at 61,871.

it added that: "[a]lthough an affiliate could undertake other types of anti-competitive activities, the Commission's jurisdiction would be implicated only where the abuse is directly related to the affiliate's unique relationship with an interstate pipeline."[34] Thus, Arkla does not restrict the Commission from considering other types of anti-competitive activities, as long as they are directly related to the affiliate's unique relationship with an interstate pipeline. Indeed, the record in this proceeding shows that this standard is met because the frustration of the Commission's regulation of Transco arose from WFS's unique relationship to Transco. Second, the Commission did, in fact, find a benefit to Transco in the form of increased profits to the parent company, TWC, as a result of the spin-down. However, that was not the only factor upon which the Commission based its decision. Finally, profits to the corporate parent as a result of the spin-down show that there is a continuing connection between the pipeline and the gathering affiliate, unlike what would be the case with an unaffiliated third party.

2. Frustration of Regulation

21. In the September 5, 2002 Order, the Commission found that Transco and WFS possessed monopoly market power with respect to the gathering and transportation of natural gas on the NPI system because producers like Shell have no reasonable alternative to flowing their gas through WFS's gathering pipeline and into Transco's NGA-jurisdictional IT-feeder transmission pipeline to access downstream gas markets.[35] By doubling Transco's previous combined rate for providing gathering and transmission service from 8 cents to 16 cents per Dth within the relevant market of gathering on the NPI system facilities and by demanding anticompetitive, unduly discriminatory terms and conditions of service, Transco and WFS abused their monopoly market power in circumvention of our regulation of Transco. For example, as part of its offer to Shell, WFS demanded a dedication of reserves condition, which would effectively lock in Shell as a captive customer and discourage possible future competitive alternatives for Shell's production. Further, the Commission reasoned that, if WFS demands such a dedication of reserves condition from all of its NPI producers, it would protect its monopoly leverage to demand egregious rates in the future. If all NPI producers are prevented cumulatively from having their production gathered by a new entrant, then all future NPI production would never be able to avoid the Transco/WFS monopoly, absent regulation. Such a condition frustrates the Commission's goal of fostering open-access competition in the OCS in the Gulf of Mexico. In addition, the "jurisdictional impact" clause in the

[34] Arkla, 67 FERC at 61,871.

[35] September 5, 2002 Order, 100 FERC ¶ 61,254 at P 50.

proposed gathering agreement, whereby WFS sought to condition access to the gathering service by requiring Shell to agree not to take action that would result in the Commission's reassertion of NGA jurisdiction, would impede lowering the rate to a just and reasonable level. In sum, by demanding a monopolistically excessive rate and anti-competitive terms and conditions of service resulting in the shut-in of the subject gas supplies, the Commission's open access regulation was frustrated. Thus, the single entity, Transco/WFS, frustrated the Commission's regulation over the rates and access to services provided by Transco.[36]

22. The Commission agreed with the ALJ that, if such abuse of market power happens repeatedly, it may have a significant cumulative effect on downstream markets by distorting producers' price signals.[37] The Commission explained that the public would thereby suffer from the reduced competition in the interstate transportation and sale of natural gas and that these distortions of production and development decisions could also have a negative economic impact.[38]

23. In general, Transco and WFS oppose the Commission's finding that their concerted actions frustrated the Commission's effective regulation of Transco. Transco and WFS allege that the Commission both misinterpreted and misapplied the test that the Commission set forth in Arkla as a basis for reasserting NGA jurisdiction. Their principal claim essentially amounts to this: the Commission is using the just and reasonable standard applicable to cost-based rates to evaluate whether the rate being charged is so high as to warrant a reassertion of jurisdiction, which they assert is a standard the Commission can only apply if it has jurisdiction.

24. With respect to the finding that the 8-cent gathering rate demanded for service on the NPI system facilities frustrated the Commission's effective regulation of Transco, WFS argues that it is exempt from NGA regulation pursuant to the Spin-down Orders, so it does not frustrate NGA regulation for WFS to charge a non-NGA rate. In the alternative, WFS argues that the 8-cent gathering rate is not egregious because it is below what it asserts is a "market-based rate" at NPI. Transco states that the relevant market in this case encompasses the larger market centers downstream, such as Station 30, instead of being limited to the NPI system facilities. Further, Transco states that it does not possess market power with respect to transportation or gathering services at NPI, and

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[36] See id. at P 51.

[37] Id. at P 53.

[38] Id.

there has been no abuse of any such power because it is offset by Shell's monopsony power and because the market should encompass the larger market centers downstream.

25. Transco's and WFS's claim that the Commission applied the Arkla test in a circular fashion misconstrues the Commission's order. At issue is whether the 8-cent rate resulted in a circumvention of our rate regulation of Transco. To determine if that occurred, the 8-cent rate must be compared to the rate that Transco would otherwise be limited to under our rate regulation, i.e. a just and reasonable rate. In evaluating the proposed rate under the Arkla test, a just and reasonable rate can be either cost-based or market-based, but the record did not support a finding that Transco/WFS lacked market power so that the 8-cent rate could be classified as a just and reasonable market-based rate. To find that a rate for a service is a reasonable market-based rate, there must be a determination that the provider of the service lacks market power. The Commission's standard for determining whether to authorize market-based rates requires a showing that the customers have "good alternatives" in the relevant geographic market that are "available" to the customers.[39] Here, the record shows that there were no alternatives to Transco/WFS's gathering services that were available to Shell and the other customers. Thus, the record shows that Transco/WFS have market power such that any rate they demand would not be constrained by a competitive market.[40]

26. Accordingly, as we explained earlier, the evaluation of the 8-cent per Dth rate Transco/WFS demanded could only be accomplished by comparing it to what an unbundled gathering rate that recovers the costs of providing the service, including a

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[39] See, e.g., Copiah County Storage Co., 99 FERC ¶ 61,316 (2002) (authorizing market-based rates for storage and hub services based upon a finding that the applicant lacks market power because it has a small market share in a highly competitive production area where numerous storage and interruptible hub service alternatives exist); Mississippi River Transmission Corp., 95 FERC ¶ 61,141, reh'g denied, 95 FERC ¶ 61,460 (2001) (rejecting proposal for market-based transmission rate because applicant did not have any alternatives in the relevant geographic market).

[40] The record indicates that there are no available alternative pipelines to Transco's transmission and affiliated gathering pipeline network. According to Commission Staff witness Sullivan, Transco's transmission and affiliated gathering pipeline network currently have a 100 percent share of the market for transportation of offshore natural gas supplies in the NPI production area to onshore markets, resulting in a Herfindahl-Hirschman Index (HHI) of 10,000. Therefore, Commission Staff witness Sullivan concludes that Transco and its gathering affiliates are a monopoly and have market power. See Exh. S-1 at 14-18.

reasonable profit, would be for the subject services. Having found that Transco/WFS's rate greatly exceeded a rate calculated on a cost basis, and that certain terms and conditions of service in the Transco/WFS service agreement were anti-competitive, the Commission found that the frustration of regulation requirement of the Arkla test also was met thereby justifying a reassertion of its NGA rate and service jurisdiction.

27. Transco and WFS argue that our decision with respect to the relevant market is inconsistent with the Commission's Order Denying Rehearing in Mid Louisiana Gas Co., 69 FERC ¶ 61,303 (1994) (Mid-La III),[41] in which the Commission stated that, with respect to terminating default contracts, it will look at gathering rates in the region to assess the reasonableness of pipeline-affiliate gathering rates. The Commission did not intend its comment in Mid-La III related to its rejected default contract policy that rates, terms and conditions offered by gatherers "in the region" would be looked at, to overturn the Commission's well-established policies on market-based rate analysis. Analyzing market-based rates includes a determination of whether customers have good alternative services available. In the current proceeding, the Commission looked at other market rates for gathering in the region, but concluded that such gathering rates have no relevance because they are from different, unconnected geographic markets that are not available as an alternative market for Shell to acquire gathering services at competitive prices.

28. WFS also claims that Commission precedent shows the 8-cent rate is reasonable because it asserts that, in Tennessee Gas Pipeline Co. (Tennessee Gas),[42] the Commission "approved" a 17.67-cent rate for a 2.44-mile haul in a spin-down from the Tennessee Gas Pipeline system. WFS's claim is inaccurate and irrelevant. In Tennessee Gas, the Commission never "approved" such a rate and, instead, considered allegations that a 17.67-cent gathering rate would be charged for service on facilities that were to be spun down and that such rate was anti-competitive and would violate the OCSLA's open and nondiscriminatory access provisions. The Commission found these allegations speculative and stated that the offshore producers could file a complaint with the

[41] Mid Louisiana Gas Co., et al., 65 FERC ¶ 61,166 (1993) (Mid-La I), reh'g denied, 67 FERC ¶ 61,255 (1994) (Mid-La II), reh'g denied, 69 FERC ¶ 61,303 (1994) (Mid-La III).

[42] 81 FERC ¶ 61,352 (1997), order denying reh'g, 93 FERC ¶ 61,080 (2000).

Commission based on evidence that the rate being charged denied them access to the spun-down facilities.[43]

29. WFS also argues that Shell charges a 12.2-cent gathering rate at NPI for the same gas reserves which WFS would charge 8 cents for gathering. We agree with the ALJ that the Shell rate, which is a non-jurisdictional rate Shell charges itself and a co-owner in unknown and possibly substantially different circumstances over different-sized facilities upstream of the subject facilities, provides no support for WFS's argument.[44]

30. WFS argues that the Commission erred in claiming that the actions of WFS, an affiliated gatherer, should not be compared to the actions of an unaffiliated, third-party gatherer, which presumably could charge 8 cents, without invoking the Commission's NGA jurisdiction. WFS claims that, since a third-party gatherer could act in the same manner as WFS, this case does not meet the Arkla criteria relied on in the Initial Decision. WFS also claims that, because the September 5, 2002 Order does not dispute that a third-party gatherer could have acted the same as WFS, WFS did nothing directly related to its unique affiliated relationship with Transco.

31. In Arkla, the Commission held that the possibility for reassertion of NGA jurisdiction is limited to behavior "directly related to the affiliate [gatherer's] unique relationship with an interstate pipeline."[45] Accordingly, the Commission sets a different standard with respect to affiliated gatherers rather than unaffiliated gatherers because affiliated gatherers pose a greater potential risk of concerted action that could circumvent or frustrate the Commission's regulation of interstate pipelines. Whereas an affiliated gatherer acting in concert with its affiliated interstate pipeline has an incentive to maximize profits for the corporate parent, an unaffiliated gatherer has no such incentive. Moreover, when regulated monopolies are vertically integrated, such arrangements are "more likely to involve adverse net economic effects. Integration may enable [the regulated entity] to obtain from an unregulated activity the monopoly profits which effective regulation of the franchised monopoly precludes."[46] By spinning off gathering facilities to its affiliates, Transco (as a firm) is in a better position to obtain the monopoly profits that the Commission's regulation of its transportation function is intended to

[43]Tennessee Gas, 81 FERC at 62,650; 93 FERC at 61,218.

[44]See I.D., 99 FERC at 65,250.

[45]Arkla, 67 FERC at 61,871.

[46]III Areeda & Turner, Antitrust Law ¶ 726(e) (1978).

prevent. The continued regulation of Transco may also help to protect the combined entity against the adverse consequences of raising rates. Also, an independent gatherer that raised rates would have a loss in throughput resulting from such an increase.

32. Finally, WFS claims that Shell was not subject to unduly discriminatory rates and contract provisions in violation of the NGA because Shell never paid for gathering on WFS's NPI system facilities before the NPI spin-down, whereas the "always gathering" shippers did. WFS asserts that Houston Exploration and Apache were already paying for full NPI gathering service, whereas Shell was receiving a "free ride" prior to spin-down because Shell was not paying for NPI gathering service in what it refers to as WFS's "NPI zone." WFS states that it is "totally consistent with the zone rate concept for Houston Exploration and Apache to pay nothing extra to ship farther in an expanded 'NPI zone' and for Shell, who was paying no gathering charge in WFS's 'NPI zone,' to incur a new gathering charge in its new contract to begin gathering service in the 'NPI zone.'"[47] WFS also curiously claims that it is not discriminating against Shell in comparison to the "always gathering" shippers because the "always gathering" shippers now pay nothing extra to ship farther in an expanded "NPI zone," whereas WFS wants to charge an additional 8 cents for service on the 20-inch diameter line.

33. WFS's references to rates charged or not charged on what it confusingly refers to as the "NPI zone" (which apparently combines the NPI system with the "always gathering" upstream system) are inaccurate. In fact, these references show that WFS's behavior discriminates against Shell. Houston Exploration and Apache flow gas through the "always gathering" 16-inch diameter line into the subject NPI system's 20-inch diameter line. At all times prior to the spin-down of the 20-inch diameter line, service provided on that line to the "always gathering" line shippers, Houston Exploration and Apache, was subject to Transco's IT-Feeder rate and WFS could not lawfully charge them anything extra for that service on that line since it was Transco's jurisdictional facilities and not part of their "always gathering" facilities. Like Shell, they paid Transco the IT-Feeder rate to have their gas transported from the receipt point on the 20-inch diameter line to Transco's mainline, approximately 230 miles away. The IT-Feeder rate recovered the cost of the NPI system facilities. Thus, it is discriminatory to permit Houston Exploration and Apache to pay "nothing extra" to ship their gas on the same 20-inch diameter line that Transco/WFS have now demanded an additional 8-cent rate from Shell. Further, and for the same reasons, WFS's arguments about proper "NPI zone" rates make no sense.

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[47]WFS's Rehearing Request at 41.

34. In addition, as discussed above, the record does not support the foregoing claims regarding "free" service on the subject NPI system facilities. At all times addressed by Transco and WFS, the cost of the NPI system facilities was rolled into and recovered by Transco's IT-Feeder rates, which Shell and the other shippers on the NPI system paid to Transco. As a result, no other charge could lawfully be exacted for such services and, in particular, WFS had no authority to charge anything for service on those facilities that it did not own. Accordingly, the foregoing rate comparisons are unsupportable.

35. WFS takes issue with the Commission's adoption of the ALJ's finding that Transco's failure to sell the subject facilities on the open market is evidence of concerted action.[48] It contends that it was lawful for Transco to sell the facilities to its affiliate in that manner. WFS also contends that the Commission's finding would give the Commission de facto authority over the sale of assets of natural gas companies, although the Commission has held that it does not have authority over the sale of assets of natural gas companies. WFS also claims that, if a transfer to a third party were to occur, the sales price would be a market price above net book value and would yield an NPI gathering rate that would exceed the Commission's 1.69-cent rate and would not be NGA-regulated.

36. While it may have been lawful for Transco to sell the subject facilities to its affiliates, its failure to seek other buyers who may have offered more for the facilities is conduct consistent with what the record reflects were its private, concerted actions with its affiliate designed to capture monopoly profits in circumvention of our regulation. Further, contrary to Transco's argument, the Commission has exercised its authority in another case to revoke Transco's abandonment by sale of natural gas transmission facilities.[49] However, our reliance on Transco's conduct does not, in any way, implicate our jurisdiction regarding the sale of facilities. Finally, WFS's claim regarding a rate it might have received from a third party is speculative and, in any event, irrelevant since rates charged by unaffiliated third parties do not raise questions of circumvention of our NGA regulation of the pipeline.

D. OCSLA Issues

[48] I.D., 99 FERC at 65,241.

[49] Transcontinental Gas Pipe Line Corp., 102 FERC ¶ 61,074, order on reh'g, 103 FERC ¶ 61,118 (2003).

37. The September 5, 2002 Order found that Transco violated the OCSLA because "the gathering rates, terms and conditions of service [offered by WFS] constitute a barrier to open and nondiscriminatory access under OCSLA Section 5."[50] Transco and WFS dispute this finding, arguing that the "open and nondiscriminatory access" requirement applies only to denial of physical access, not "economic access,"[51] and that Shell was offered the same contract clauses as the other NPI spin-down producers, so there has been no discrimination. WFS also argues that the Commission should look at the rates charged by an OCS provider, not the contract terms, and that the 8-cent gathering rate for Shell is a reasonable gathering rate in the region and for the NPI system specifically. Finally, WFS argues that WFS did not discriminate against Shell because the ban on discrimination under the OCSLA does not prohibit different rates or conditions of service for different shippers if the shippers are not similarly situated.[52]

38. Transco/WFS were unduly discriminatory in increasing the rates for Shell while not increasing the rates for other similarly-situated shippers, such as Houston, for services provided them on the same NPI system facilities. Moreover, even an OCS service provider offering uniform rates and conditions of service is not immunized from charges of discrimination or a denial of access.[53] The OCSLA's "open and nondiscriminatory access" requirement is not limited to customers being denied physical access. Charging high rates may have the effect of violating the OCSLA's open access requirement, particularly if the service provider's customers lack any transportation alternatives.[54] While the Commission recognizes that it has stated that it will consider rates charged by regional competitors for comparable service in making such a

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[50]September 5, 2002 Order, 100 FERC ¶ 61,254 at P 43.

[51]In support of its claim, WFS refers to an excerpt from the legislative history of the OCSLA in which Congress stated that the OCSLA is meant to “prevent bottleneck monopolies and other anticompetitive situations involving OCS pipelines” and to “promote efficiency and sound planning involving pipeline sizing.” WFS's Rehearing Request at 54-55, citing House Conf. Rept. No. 1474, 95th Cong. 2d Sess. 115, reprinted in 1978 U.S.C.C.A.N. 1674, 1714 at 1686. Contrary to WFS's claim, this excerpt supports the Commission's action in light of the Commission's finding that Transco/WFS have a monopoly on gathering services available to Shell.

[52]Citing Order No. 639 at 31,538; Order No. 639-A at 31,686.

[53]See Order No. 639 at 31,539.

[54]Id.

determination,[55] as discussed above, there is no competition within the relevant market here. Moreover, the rates, terms and conditions of service offered to Shell were so uneconomic and anticompetitive that they compelled Shell to shut-in its gas and therefore acted as a barrier to Shell's access to the NPI system facilities. That was sufficient, in our opinion, to violate Section 5 of the OCSLA.

39. WFS asserts that it was a denial of due process for the Commission to initiate expedited hearing procedures when WFS offered to make Shell revenue neutral regardless of the timing of the Commission's decision in this case. WFS states that, because the Initial Decision did not consider the OCSLA or conclude the OCSLA had been violated, the Commission failed to give notice that the Commission might assert jurisdiction under the OCSLA in the Shell complaint in Docket No. RP02-99. We disagree. The ALJ was specifically instructed by the March 6, 2002 Order establishing hearing procedures to develop a factual record to determine whether the open and nondiscriminatory access requirements of OCSLA Section 5 have been or will be violated, and if so, what the appropriate remedies should be under the OCSLA.[56] While the ALJ adopted the agreement of the parties and did not render an initial decision on those issues, we found that the factual record the ALJ developed sufficed to render OCSLA rulings.[57] Thus, the parties were on notice that OCSLA issues were to be addressed, our September 5, 2002 Order addressed them based on the record evidence, and now, on rehearing, the parties have had their due process opportunity to respond to the Commission's decision thereon. No error was committed.

40. Finally, WFS claims that, assuming the Commission has the authority to assert a violation of the OCSLA against WFS in Docket No. RP02-99, the Commission's OCSLA finding is in error because Section 5(f) of the OCSLA refers to an offshore pipeline providing "open and nondiscriminatory access to both owner and nonowner shippers."[58] WFS argues that there are no owner shippers on the NPI system; therefore, OCSLA Section 5(f) does not apply in this case. This argument is groundless. Section 5(f) of the OCSLA mandates "open and nondiscriminatory access" to the transportation of gas shipped by all shippers, regardless of whether they are owner shippers or nonowner shippers.

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[55]Id.

[56]March 6, 2002 Order, 98 FERC at 62,014.

[57]September 5, 2002 Order, 100 FERC ¶ 61,254 at P 56.

[58]Quoting 43 U.S.C. 1334(f)(1)(A) (1986) (emphasis added).

E. The Commission's Remedy

41. In the September 5, 2002 Order, having reasserted NGA jurisdiction over the subject gathering rates and services, the Commission found that Transco/WFS's proposed 8-cent gathering rate was unjust and unreasonable, and otherwise unlawful under the NGA. Based on the record, and Transco's calculation of the cost of service and rates for the NPI system facilities filed in its related general NGA Section 4 rate case, the Commission found a just and reasonable rate for gathering service on the NPI system facilities to be 1.69 cents per Dth.[59]

42. WFS claims that the Commission's rate remedy violated NGA Section 5 because the Commission's focus on WFS's 8-cent gathering rate in determining that the current rate being charged is unjust and unreasonable only established whether the NGA should apply and that Transco should now be the provider of the NPI gathering services. WFS argues that, to determine the NGA rate for Transco to charge would require an analysis of whether Transco's systemwide rate design for gathering services is just and reasonable at NPI, and if it is shown not to be just and reasonable, the Commission must then show that the facility-specific 1.69-cent gathering rate for the NPI system is just and reasonable.

43. We disagree that the Commission did not meet the standards of NGA Section 5. The Commission, in fact, met the standards of NGA Section 5 by finding that the 8-cent gathering rate offered to Shell was unjust and unreasonable, and otherwise unlawful under the NGA. The Commission then took official notice of Transco's compliance filing in its general NGA Section 4 rate case, in Docket No. RP01-245-007, and used Transco's own figures for the cost of service of the NPI system facilities to calculate the 1.69-cent rate as a just and reasonable replacement rate.[60]

44. The September 5, 2002 Order stated that "[s]ince Transco does not currently have an unbundled gathering rate in its tariff, it must file revised tariff sheets to reflect the approved unbundled gathering rate of 1.69 cents per Dth for service on the subject gathering facilities, effective as of the date of this order."[61] WFS states that the Commission erred in setting an incremental 1.69-cent gathering rate rather than

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[59] September 5, 2002 Order, 100 FERC ¶ 61,254 at P 57-58.

[60] See Id. at Appendix.

[61] Id. at P 58.

redesigning Transco's systemwide 19.61-cent gathering rate, adjusted for NPI costs and billing determinants. Keyspan argues that what it characterizes as Transco's current systemwide 19.61-cent gathering rate should be applied to the NPI system facilities unless the Commission finds, under Section 5 of the NGA, that applying the rate would be unjust and unreasonable. Keyspan argues that there has been no showing that it is inappropriate for Transco to charge NPI gathering shippers a rate for gathering service that is equivalent to the rates charged to other Transco gathering service shippers.

45. The Commission clarifies that its statement regarding Transco not currently having an unbundled gathering rate in its tariff referred specifically to the absence of an unbundled gathering rate for service on the subject NPI gathering facilities, not to Transco's maximum lawful unbundled gathering rate approved in the settlement in Docket No. RP01-245-008. The maximum lawful gathering rate was not designed to recover the cost of the NPI system facilities and applies to gas delivered at certain specified points on Transco's system, which do not include points on the NPI system facilities. The Commission's reassertion of jurisdiction in this proceeding is narrowly confined to gathering rates and services on the subject NPI gathering facilities rather than to Transco's systemwide gathering services. In our judgment, it is inappropriate to unravel Transco's existing, settled maximum lawful gathering rate and evaluate that rate on a cost-of-service basis due to the Commission's reassertion of jurisdiction with respect to the rates and services on the NPI system facilities. Based on the unique facts of this case, we find it the least intrusive and the most consistent with the Commission's unbundling policies for Transco to reflect the rate impact on an incremental basis for providing service on the NPI system facilities. Accordingly, we do not find that the reassertion of jurisdiction over the rates and services on the NPI system facilities necessitates a change in Transco's existing settled gathering rate.

46. Transco argues that the Commission's imposition of an NGA rate remedy of the Commission's own making is contrary to the basic scheme of the NGA because it does not presume a company-made rate in the first instance, and is based on data outside the record, given the absence of any hearing record addressing the issue of potential rate remedy.

47. Transco/WFS proposed a rate, 8 cents per Dth, which the Commission rejected as unjust and unreasonable. NGA Section 5 permits the Commission to replace such a rejected rate with a just and reasonable rate. In this case, the Commission found a just and reasonable rate to be 1.69 cents per Dth. Moreover, the Commission did not bar Transco from filing a limited NGA Section 4 filing to propose a different rate. In addition, the cost data upon which the Commission based its rate calculation was

supplied by Transco itself in the compliance filing in its related general NGA Section 4 rate case in Docket No. RP01-245. Thus, there was no error.

48. Transco also argues that it should have been afforded its right to make rates that will fully recover all capital investment costs, including a "push down" (or good will) premium, defined as the premium that TWC paid over book value to acquire Transco.[62] Specifically, Transco states that, in addition to the net book cost (original cost net of accumulated depreciation) being transferred to WFS from Transco's FERC accounting books, WFS also incurred in the spin-down transaction a "push-down" premium of $4 million transferred to WFS from Transco's corporate accounting books, which represents that portion of the total goodwill premium paid in acquiring Transco which, in turn, was allocated to the NPI spin-down facilities.[63] Transco argues that the $4 million "push down" premium resulted from Transco's transfer of the NPI assets to a nonjurisdictional entity, WFS, constitutes a "gain" above the net book value of the NPI assets that should inure to the benefit of Transco's shareholders. Similarly, WFS argues that what it asserts is the "acquisition price" for the NPI system facilities should be eligible for consideration for inclusion in the rate base as an acquisition adjustment. In support of its claim, WFS cites to Crossroads Pipeline Co. (Crossroads),[64] where an affiliate's acquisition cost for a pipeline was reflected in the rate base and Delhi Gas Pipeline Corp. (Delhi),[65] where the purchase price in excess of depreciated original cost was included in the rate base.

49. Having found, in effect, that the spin-down of WFS was a sham transaction, the Commission will not permit Transco to burden ratepayers with a $4 million chimera. In any event, as the ALJ notes, at the hearing, Transco and WFS claimed for the first time that the total amount of the purchase price was $5.25 million, or $4.0 million above the $1.25 million book value of the facilities.[66] This claim contradicts Transco's representations to the Commission in its spin-down application that the transfer price was

[62] See Tr. 975.

[63] See Transco's Rehearing Request at 63 n.42.

[64] 71 FERC ¶ 61,076 (1995).

[65] 43 FERC ¶ 61,024 (1988).

[66] I.D., 99 FERC at 65,254.

the $1.25 million net book value of NPI.[67] It is general Commission policy not to allow pipelines to recover an acquisition premium through its jurisdictional rates so that gas customers are not burdened with an increase in the asset costs simply due to a change in the ownership of the facility.[68] To include the full purchase price in rate base when an acquisition premium has been paid, the acquiring company must show that: (1) it is either converting utility assets to a new public use, or it is placing utility assets in FERC jurisdictional service for the first time; and (2) the acquisition provides substantial, quantifiable benefits to ratepayers.[69] This test has not been met with respect to the NPI system facilities.

50. WFS's reliance on Crossroads and Delhi is misplaced because the factual circumstances differ significantly from the facts presented here. In Crossroads, the Commission approved the inclusion of the acquisition costs in the rate base because the proceeding involved the conversion of an oil pipeline and a determination that the costs associated with the acquisition of the pipeline along with the new construction costs, would be considerably less than the costs associated with constructing a new pipeline. Similarly, in Delhi, the Commission found it appropriate to use the purchase price as the original cost of the facility for ratemaking purposes because gas consumers had not paid for the facility in prior rates since the facilities had not yet been dedicated to interstate gas service at the time of purchase. Therefore, gas customers had not been burdened with an increase in the asset costs simply because of a change in the ownership of the facility.[70] By contrast, the NPI system facilities at issue here had been committed to jurisdictional natural gas service and the costs of the facilities were recovered in jurisdictional rates. As a result, it would conflict with Commission policy to permit the alleged acquisition "price" for the NPI system facilities to be included in the rate base. Furthermore, Transco's suggestion that the $4 million "push down" premium should be recovered, because the NPI facility assets were transferred to WFS, a non-jurisdictional entity, lacks merit since the Commission has reasserted jurisdiction over the rates and services provided on the NPI system facilities. Accordingly, the Commission's policy barring recovery of an acquisition premium through jurisdictional rates continues to apply.

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[67] I.D., 99 FERC at 65,254 citing Item by Reference B at 8 and C at 8.

[68] Commission Staff's Initial Brief citing Kansas Pipeline Co., 96 FERC ¶ 63,014 at 65,061-62 (2001) and the cases cited therein. See also Delhi, 43 FERC at 61,067-68.

[69] See Kansas Pipeline Co., 96 FERC at 65,061.

[70] Delhi, 43 FERC at 61,068.

51. Thus, we agree with the ALJ that the $4.0 million "push down" premium frustrates the Commission's regulation of Transco by the corporation's concerted attempt to recover costs through the WFS gathering rate, which the regulated entity could not recover in its own jurisdictional rates.[71] We agree that shifting these WFS costs to the jurisdictional rates of Transco, by means of the affiliated relationship of Transco and WFS, frustrates our regulation of Transco.[72]

52. WFS argues that the Commission erred in applying the remedies of the September 5, 2002 Order to Superior Natural Gas Corporation and Walter Oil & Gas Corporation (collectively, Walter) because they are settling parties in the separate, unconsolidated proceeding in Docket No. RP02-144. WFS argues that, by imposing an unbundled gathering rate of 1.69 cents per Dth on the "subject spin-down gathering facilities on the NPI system, i.e., over the 3.83-mile, 10-inch diameter and the 18.79-mile, 20-inch diameter pipelines that end in NPI Block 956,"[73] the September 5, 2002 Order wrongly extended the 1.69-cent rate remedy in the Shell complaint to the gathering service on line used by Walter. WFS also contends that the September 5, 2002 Order's requirement that Transco "file all contracts that govern service on the subject NPI gathering facilities,"[74] wrongly required the filing of the gathering contract between WFS and Walter for Walter's gathering service on the NPI system facilities.

53. The Commission applied the 1.69-cent rate to the services performed on the "subject NPI facilities," defined as the 3.83-mile and 18.79-mile pipelines that end in NPI Block 956[75] where they both deliver gas into a Transco pipeline. Walter currently receives gathering service through the NPI system facilities pursuant to a gathering agreement with WFS. Based on the settlement agreement reached between Walter and WFS, the September 5, 2002 Order affirmed the ALJ's decision to dismiss

[71] I.D., 99 FERC at 65,254-55.

[72] Id. at 65,255-56.

[73] September 5, 2002 Order, 100 FERC ¶ 61,254 at P 57.

[74] Id. at P 58.

[75] Id. at P 57.

Walter's complaint in Docket No. RP02-144-000 with prejudice.[76] The dismissal of Walter's complaint, however, did not change the issue in the proceeding, i.e., whether to reassert jurisdiction over the rates and services for gathering on the NPI system facilities. The 1.69-cent rate applies as the maximum recourse rate for all gas flowing through the NPI system facilities, including Walter's gas.[77] In addition, the NPI gathering rate schedule and form of service agreements apply to all such throughput as well. Therefore, as the Commission stated in its letter order on Transco's compliance filing, issued on February 6, 2003, if the contracts for service on the NPI system facilities differ in a material respect from the tariff and form of service agreement, then Transco must file such contracts.[78] Further, if the contracts contain a negotiated rate, Transco must either file the contract or tariff sheets summarizing the contract for any services subject to a negotiated rate.

The Commission orders:

As discussed in the body of this order, the requests for rehearing by Transco, WFS and Keyspan are hereby denied.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,

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[76]Id. at P 62.

[77]As explained in the September 5, 2002 Order, the calculation of 1.69-cent rate is based on the cost of service and rates for the NPI system facilities, which Transco submitted in its January 18, 2001 compliance filing in Docket No. RP01-245-007. In the information provided by Transco in RP01-245-007, the cost of service for the spin-down facilities includes costs of both the 10-inch diameter and the 20-inch diameter pipelines. However, in deriving the rate, the Commission used only the volumes associated with the 20-inch diameter pipeline, since that was the only information on NPI system volumes in the record. Making volume adjustment to the rate calculation to reflect additional volumes on the 10-inch diameter line would decrease the rate from the current rate of 1.69 cents.

[78]Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al., 102 FERC ¶ 61,156 (2003).

Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Shell Offshore Inc,

v. Docket No. RP02-99-006

Transcontinental Gas Pipe Line
Corporation
Williams Gas Processing-
Gulf Coast Company, L.P.
Williams Field Services Company, and
Williams Gulf Coast Gathering
Company, L.L.C.

(Issued May 15, 2003)

BROWNELL, Commissioner, dissenting

1. I voted for the September 5 order. However, making the right decision in this case has not been clear-cut or easy. Upon further consideration, I am persuaded that the Commission should grant rehearing based on the particular facts of this case, applicable law and a proven regulatory policy that enhances competition.

2. Section 1(b) of the Natural Gas Act (NGA) exempts gathering from the Commission's jurisdiction. The Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Decontrol Act of 1989 phased out all wellhead price controls. In 1985, the Commission promulgated Order No. 436 which established a program of open-access, non-discriminatory transportation by which gas distribution companies and industrial end-users could buy gas directly from gas merchants other than the pipelines and ship that gas on the interstate pipelines. Then, in 1992, the Commission issued Order No. 636 which mandated the unbundling of gas sales and interstate transportation. Having exited the merchant business, many pipelines began to transfer their gathering facilities to other entities, either an affiliate or a non-affiliate. In numerous cases, the Commission has found the public convenience and necessity warranted such transfers because the interstate pipeline could eliminate unnecessary expenses and the stand-alone gatherer could more efficiently utilize the facilities involved here. We made that exact finding about these facilities. That finding was consistent with the Commission's evolving

approach to the regulation of the natural gas industry which is a pro-competition policy that relies on market forces to play a greater role in determining supply, demand and price of natural gas. So on rehearing, the fundamental question for me is whether Transco and its affiliates acted in a manner that frustrates our effective regulation of the interstate pipeline and whether the Commission needs to reassert jurisdiction over these gathering facilities.

3. For the first time, the Commission is reasserting jurisdiction over spun-down gathering facilities. I do not think the facts of this case, applicable law and sound regulatory policy warrant such an action. The evidence of cooperative action between Transco and WFS is mixed. The fact that Transco and WFS worked together in planning and implementing the spin-down of the facilities pending transfer is not surprising nor fatal. To me, such cooperation pending the spin-down is a practical, efficient transitional step. The fact that the corporate parent, the Williams Companies, would try to maximize the value of its assets by pursuing the spin-down pursuant to a business plan makes sound business sense. The evidence indicates that Transco did not, after the transfer of assets, manage, operate or provide service on the gathering facilities. Transco avers that it never contacted WFS in connection with producer/shippers for gathering service. The fact that WFS operated Transco's production area facilities, albeit pursuant to an Operating Agreement, is more problematic and we should require complete separation. But, as the Presiding Judge stated:

> No party claims that these overlapping system-coordinated activities by themselves are wrong or unlawful. In fact, as a general matter, they may afford economies of scale and efficiencies that provide benefits to both the customers and the two service providers – a classic win/win situation. 99 FERC ¶ 63,034 at 65,241 (2002)

4. Therefore, the frustration of our regulation of the interstate pipeline is not grounded, per se, in the finding of cooperative actions between Transco and WFS. The Presiding Judge found that the cooperative actions frustrated our regulation of the interstate pipeline because it effectively allowed the unbundled rate for gathering service to be significantly increased above the bundled rate that was being charged prior to the spin-off. Other evidence indicates that the unbundled gathering rate is reflective (some times higher, some times lower) of the rates for gathering service on other systems in the surrounding offshore area.

5. As discussed in Order No. 636, it is appropriate to segregate and charge separate rates for separate services, rather than continue to compel shippers to pay a bundled charge for several distinct services. When we authorized the spin-down, the Commission

recognized, as it has in a number of spin-down cases, that shippers may pay a higher rate. This is neither inequitable nor unwarranted rate stacking. In this case, there is evidence that the unbundled gathering is simply the going competitive rate.

6. I have not been persuaded that the rates proposed to be charged by WFS for non-jurisdictional service have so compromised our ability to regulate the jurisdictional service on the interstate pipeline that we should reassert rate jurisdiction over these gathering facilities. The Commission will continue to employ its NGA authority to ensure that Transco's rates remain just and reasonable. Moreover, I am hard pressed to distinguish this situation from Conoco, Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996), cert. denied sub nom., AMOCO Energy Trading Corp. v. FERC, 519 U.S. 1142 (1997). In Conoco, the court ruled that the Commission lacked jurisdiction to require a pipeline spinning down its gathering facilities to offer default contracts to existing gathering customers at rates consistent with their existing Commission-approved rates. Having authorized the facilities to be spun down, the Commission lost jurisdiction to regulate service on them either directly or indirectly.

7. This order and Sunoco, Inc. v. Transcontinental Gas Pipe Line Corporation, 103 FERC ¶ 61,176 (2003), also being issued today, both raise the question of whether the NGA grants the Commission residual authority once it authorizes a pipeline to spin-off its gathering facilities. While I disagree with my fellow Commissioners on this question, I share their concern about the possibility of offshore pipelines spinning-off their gathering facilities for the purpose evading their contractual obligations or exercising market power. The competitive scheme for regulating the natural gas industry has been working well to this point. However, given the growing divergence of supply and demand for natural gas, it may be time to solicit input from all segments of the industry about what the Commission can do, within our existing jurisdiction, to ensure the maximum exploitation of our offshore gas supplies. I would also welcome a public debate over whether offshore pipelines are, in fact, abusing their ability to spin-off gathering facilities and, if so, whether any statutory changes are needed.

For these reasons, I respectfully dissent.

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Nora Mead Brownell
Commissioner