UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Sunoco, Inc. (R&M) Docket No. RP02-309-005

v.

Transcontinental Gas Pipe Line Corporation

ORDER ON REMAND

(Issued June 16, 2005)

1. This proceeding is on voluntary remand granted by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Transcontinental Gas Pipe Line Corporation v. Federal Energy Regulatory Commission,* No. 04-1234 (D.C. Cir.), an appeal by Transcontinental Gas Pipe Line Corporation (Transco) of Commission orders issued in the captioned complaint proceedings. In the underlying orders, the Commission ruled that, upon Transco's sale of certain offshore facilities which would constitute a breach of a settlement with Complainant, Sunoco Inc. (R&M) (Sunoco), the Commission would provide equitable relief to Sunoco. As discussed below, the Commission modifies its directives in the earlier orders to limit the remedy to require Transco to reimburse Sunoco for additional costs Sunoco is expected to incur as a result of Transco's violation of the settlement, adds further support for the jurisdictional underpinnings of its ruling in light of recent court precedent, addresses certain issues raised on rehearing of the Commission's prior order as relevant, and vacates the earlier orders to the extent inconsistent with today's order. This order is in the public interest because it enforces the sanctity of a jurisdictional settlement and underlying contract in a manner, within the Commission's jurisdiction, that preserves the benefit of the bargain each party obtained under the settlement.

Background

2. As relevant here, Transco generally provides firm transportation services on its mainline pursuant to Rate Schedule FT, and high priority interruptible "IT-Feeder" transportation services on its production area laterals, which laterals extend into the

Outer Continental Shelf (OCS). Transco has separate IT-Feeder volumetric maximum rates for service on the IT-Feeder lateral portion of its system, and zone-based firm and interruptible rates on its mainline. On June 4, 1992, the Commission issued an order which, among other things, approved a settlement filed February 14, 1992 (1992 Settlement) between Transco and Sunoco resolving all outstanding issues between them, including the conversion of Sunoco's Rate Schedule X-11 transportation service to Rate Schedule FT service under Part 284 of the Commission's regulations, and embodying Sunoco's agreement to join in the relevant provisions of earlier Transco settlements regarding take-or-pay cost recovery, rates, and restructuring of services.[1] As a result of that settlement and order, Transco became obligated under a 20-year contract with Sunoco to provide Sunoco with firm transportation service under Rate Schedule FT at the FT maximum rate from certain specified receipt points on Transco's OCS offshore Gulf of Mexico IT-Feeder lateral facilities to onshore delivery points off of its mainline in Pennsylvania.[2] Article V, "Rate Schedule and Price," of the FT service agreement executed pursuant to the 1992 Settlement provides, in pertinent part:

> Buyer [Sunoco] shall pay Seller [Transco] for natural gas delivered to Buyer hereunder in accordance with Seller's Rate Schedule FT and the applicable provisions of the General Terms and Conditions of Seller's FERC Gas Tariff as filed with the Federal Energy Regulatory Commission, and as the same may be legally amended or superseded from time to time. Such Rate Schedule and General Terms and Conditions are by this reference made a part hereof.

3. In an order issued in the instant proceeding on May 6, 2004, the Commission agreed with Transco and Sunoco that the applicable rate under the settlement is the "FT rate", *i.e.*, the maximum rate under Rate Schedule FT, as that rate may change from time to time, for services provided under Rate Schedule FT.[3]

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[1] *Transcontinental Gas Pipe Line Corp.*, 59 FERC ¶ 61,279 (1992).

[2] *See*, Article II of the 1992 Settlement. Sunoco was one of a few shippers who had firm transportation contracts for service on Transco's production-area laterals that were grandfathered after Transco established high-priority interruptible IT-Feeder service as the only service available on the production-area laterals.

[3] *Transcontinental Gas Pipe Line Corp.*, 107 FERC ¶ 61,123 at P 15-16 (2004).

4. On November 20, 2000, Transco filed an application under section 7(b) of the Natural Gas Act (NGA) seeking authorization to abandon by sale to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP), certain of its OCS IT-Feeder lateral facilities (Central Texas facilities), including facilities on which seven of the Sunoco receipt points under the FT contract implementing the 1992 Settlement are located. In conjunction with Transco's abandonment application, WGP filed a petition requesting that the Commission declare the Central Texas facilities to be non-jurisdictional gathering facilities upon sale to WGP. Sunoco, among others, protested Transco's gathering spin-down proposal. Sunoco argued that the proposal conflicts with its FT contract, but did not raise the matter of compliance with the 1992 Settlement. Nor did Transco inform the Commission of the effect of its abandonment proposal on Transco's provision of services agreed to under the 1992 Settlement. On July 25, 2001, the Commission issued an order, finding the sale to be in the public interest, granting the requested abandonment by sale of the facilities to WGP, and declaring that, upon such sale, the facilities would function primarily as non-jurisdictional gathering facilities, thereby disclaiming NGA jurisdiction over WGP as a non-jurisdictional gatherer.[4] To date, however, Transco has not informed the Commission that it has, in fact, sold the subject facilities to WGP.[5] Accordingly, the abandonment is not yet effective and Transco continues to provide service to Sunoco from the subject receipt points pursuant to the terms of the FT contract executed with Sunoco under the 1992 Settlement.

5. On May 2, 2002, Sunoco filed a complaint in the instant proceeding, asserting that the proposed sale of the facilities on which its seven receipt points are located is barred by the 1992 Settlement. Sunoco claimed that, in obtaining service from WGP from those points to replace the service abandoned by Transco, it will likely have to pay an additional $15 million to $28 million in charges to WGP that it otherwise would not have to pay under the 1992 Settlement. Sunoco sought a number of forms of relief, including the institution of a formal investigation, injunctive-type relief, and refunds with interest of what it claimed were millions of dollars in take-or-pay cost recovery charges it paid to Transco pursuant to the 1992 Settlement. Transco answered, principally relying on two claims: (1) that the complaint is barred as a collateral attack

[4] *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115 , *order on reh'g*, 97 FERC ¶ 61,296 (2001).

[5] On June 16, 2003, in compliance with the May 15, 2003 Order, Transco submitted a letter stating that because several business, legal and regulatory issues remain outstanding that affect the proposed transfer of the Central Texas facilities, it could not predict the timing for the implementation of the proposed transfer of the Central Texas facilities.

on the Commission's July 25, 2001 final order approving abandonment and disclaiming jurisdiction, and (2) that the Commission lacks jurisdiction to enforce the 1992 Settlement as to the subject seven receipt points because they are located on what will be non-jurisdictional gathering facilities upon the sale to WGP, whereas it asserts that the 1992 Settlement only governs jurisdictional transportation by Transco.

6. In a series of orders starting with its order issued September 5, 2002,[6] the Commission addressed Sunoco's complaint. Initially relying on settlement language that the Commission since has found to be irrelevant insofar as it pertains to Sunoco's right-of-first-refusal, as opposed to the settlement rate (FT maximum rate), the September 5, 2002 Order found that the sale of facilities would violate the 1992 Settlement and granted Sunoco equitable relief by modifying the 1992 Settlement to require Transco to obtain the subject upstream capacity from its affiliate and assign it to Sunoco at rates, terms, and conditions consistent with the 1992 Settlement. On rehearing, in an order issued May 15, 2003,[7] the Commission modified the remedy to allow Sunoco to directly contract with WGP for the subject gathering services and for Transco to reimburse Sunoco for any charges from WGP that exceed a cost-based, unbundled gathering rate derived from costs and throughput from the filing Transco must make to comply with its general rate case settlement in Docket No. RP01-245 at such time that it transfers the Central Texas facilities to WGP. [8]

7. Sunoco filed a request for clarification or, in the alternative, rehearing, and Transco filed for rehearing and clarification of the May 15, 2003 Order. On May 6, 2004, the Commission issued an order granting rehearing and clarification.[9] Upon further review of the 1992 Settlement and the 1992 service agreement between Transco and Sunoco, the Commission found that it had incorrectly relied on right-of-first-refusal language of the 1992 settlement and, therefore, erred in ordering a gathering rate to be

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[6] *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,252 (2002).

[7] *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,176 (2003).

[8] Pursuant to the Docket No. RP01-245 general rate case settlement, Transco must file a limited section 4 change in rates to reflect the removal of costs due to the spin-down of gathering facilities that occur subsequent to the effectiveness of the settlement.

[9] *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp.*, 107 FERC ¶ 61,123 (2004).

established. The Commission found that, in order to allow Sunoco to receive the benefit of the bargain it received in the 1992 Settlement, as embodied in its FT service agreement, Sunoco should only be required to pay Transco the rates required by the FT Rate Schedule, as those rates may be changed from time to time until the end of the primary term of the contract, August 1, 2012. Thus, whether Sunoco contracts directly with WGP for gathering service or obtains the service through a release of the gathering capacity from Transco, Transco was required to reimburse Sunoco for any gathering charges from WGP so that Sunoco would ultimately pay only the settled FT maximum rate for the combination of services it will receive from WGP and Transco.

8. On June 7, 2004, Transco filed a request for rehearing of the May 6, 2004 Order. On July 6, 2004, the Commission issued a notice of denial of Transco's rehearing request by operation of law.[10] Transco then filed an appeal in the United States Court of Appeals for the District of Columbia Circuit in *Transcontinental Gas Pipe Line Corporation v. Federal Energy Regulatory Commission*, No. 04-1234 (D.C. Cir. 2004). On January 27, 2005, the Commission filed a motion requesting a voluntary remand for the purpose of issuing a further order in this proceeding. On February 11, 2005, in response to the Commission's motion, the D.C. Circuit issued an order to hold the case in abeyance and remanded the record in the case to permit issuance of a further order.

9. In light of changes in the Commission's rulings throughout the course of this proceeding, including changes directed today, a number of Transco's arguments have become moot. Despite this, and in no small part undoubtedly due to the Commission's having modified its rulings over the course of its three prior orders, Transco continues to raise arguments on rehearing of the May 6, 2004 Order and on appeal, that appear to relate to rulings long-since modified. Below, we vacate our prior orders to the extent they direct remedies that we may lack jurisdiction to enforce, and we discuss the issues in the case, including Transco's request for rehearing of the May 6, 2004 Order, in light of today's ruling and recent court decisions to clarify the jurisdictional and equitable grounds for today's decision.

[10] *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp*., 108 FERC ¶ 61,009 (2004).

Discussion

Violation of the 1992 Settlement

10. Under Article V of the contract executed pursuant to the 1992 Settlement, Transco agreed to charge, and Sunoco agreed to pay, the maximum FT reservation and usage rate for the services it was to provide Sunoco from the seven receipt points on the subject Central Texas facilities to delivery points in Pennsylvania. As a result of the proposed sale of the Central Texas facilities, Transco will terminate service on those facilities and, therefore, will fail to provide the full services it agreed to provide under the settlement and contract. It would no longer receive Sunoco's gas volumes at those seven points and would then commence to receive the gas at a downstream point on its IT-Feeder lateral where the lateral connects with the Central Texas facilities. As a further result, Sunoco will pay a total cost for the services in excess of the FT maximum rate Sunoco agreed to pay under the 1992 Settlement because, although Transco will continue to charge its maximum FT rate for the services it will continue to provide, WGP also will commence charging Sunoco a gathering rate. More specifically, as a result of Transco's unilateral actions, Sunoco will bear increased costs as a result of charges it is expected to incur from WGP. For these reasons, Transco's act of terminating service from the subject seven receipt points and selling the subject West Texas facilities will result in its violation of the 1992 Settlement, causing harm to Sunoco.

11. Transco, nonetheless, has argued that the 1992 Settlement was only intended to govern jurisdictional transportation service under Rate Schedule FT and not non-jurisdictional gathering. It asserts that what it claims is the Commission's reformation of the service agreement to delete the subject seven receipt points was consistent with what it characterizes as the "NGA-jurisdictional" nature of the 1992 Settlement. Thus, Transco appears to be claiming that terminating service from the seven receipt points in the original contract and selling the pipeline facilities is not inconsistent with the 1992 Settlement as the resulting non-jurisdictional gathering services performed by WGP from the subject seven receipt points were never intended to be governed by the 1992 Settlement.

12. Transco's argument is disingenuous. The FT contract executed pursuant the settlement listed the seven subject receipt points with no express authorization for or apparent contemplation of Transco selling off the very facilities on which those points are located over the objection of Sunoco. The assumption we believe inherent in the settlement and contract was that Transco would continue to own the facilities and, as such, the rates and services would continue to be subject to the Commission's jurisdiction. Moreover, Transco provided no evidence that the settlement deal would have changed had it refunctionalized its own facilities as non-jurisdictional gathering

facilities. The Commission would retain NGA section 4 and 5 rate and service "in-connection with" jurisdiction over any gathering services Transco performs in connection with its jurisdictional transmission services.[11] Therefore, the mere refunctionalization of Transco's facilities would change nothing. What does not appear to have been contemplated (or authorized) was the *sale* of the facilities on which the services are provided. Thus, Transco's argument rests on a truism. We believe it reasonable to find that the 1992 Settlement only was intended to govern the rate Transco charges for services Transco provides Sunoco on facilities Transco owns and would not apply to a third-party like WGP if Transco sells the facilities, irrespective of the jurisdictional status of the facilities, rates and services once the facilities are in the hands of the third-party.[12] The Commission could not impose the 1992 Settlement's provisions on a third-party. Stating this truism, that the 1992 Settlement was only intended to govern "NGA-jurisdictional" services, therefore, does nothing to show that Transco will not violate the 1992 Settlement by unilaterally terminating service from the subject receipt points and selling the subject facilities to another party who is expected to cause Sunoco to incur additional costs we do not believe were contemplated by that settlement.

13. Transco never seriously disputed the Commission's earlier finding that Transco will have violated the express terms of the 1992 Settlement and its contract with Sunoco if that sale occurs, but appears to believe that it can unilaterally modify the settlement and contract by exploiting the Commission's lack of NGA section 7 jurisdiction to prevent it from abandoning the facilities subsequently found to primarily provide a gathering function. That subsequent lack of jurisdiction does not render its action any less of a violation of the 1992 Settlement. Nor does the later loss of jurisdiction over the seven receipt points affect whether the predicate act of terminating service from those

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[11] *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991) (*Northern*).

[12] Thus, the "gathering" jurisdictional issue Transco raises is a red herring. As the Commission observed in the May 15, 2003 Order, at P7, the facilities are to be sold and, therefore, the same issue regarding enforcement of the 1992 Settlement would exist if the facilities were jurisdictional transmission and were sold to another jurisdictional pipeline. It is the fact that the services would be provided by a third-party, not by Transco, that is important. The facilities are to be sold to another party who is not subject to any obligations under the 1992 Settlement and against whom the requirements of the 1992 Settlement cannot be imposed. Thus, it does not matter whether WGP will be engaged in non-jurisdictional gathering. It cannot and will not be affected by our rulings in this case. It can charge whatever rate it can negotiate for its services.

points violates the settlement. We now turn to the central issue Transco has raised in the case: whether, and to what extent, the Commission has jurisdiction to impose a remedy for Transco's violation of the 1992 Settlement if the sale occurs.

Jurisdiction

14. The principal issue in the instant proceeding raised by Transco is whether the Commission lacks jurisdiction to establish a remedy for Transco's violation of the 1992 Settlement if the sale of the facilities to WGP is consummated. The Commission previously addressed this issue in the earlier orders herein, but believes that further discussion and modification of the Commission's rulings is warranted, particularly in light of a recent decision by the D.C. Circuit in *Columbia Gas Transmission Corporation* v. *Federal Energy Regulatory Commission*, No. 04-1049 (D.C. Cir. April 15, 2005) (*Columbia*). As discussed below, in order to remove any vestige of our prior remedies that may be assailed on grounds that we lack jurisdiction to impose them, we modify our prior orders to remove any obligation on Transco's part to obtain the subject capacity on WGP and release it to Sunoco or in way to regulate rates Sunoco is charged for the gathering services WGP will provide. Our ruling here, therefore, is that the remedy for Transco's violation of the 1992 Settlement is solely to reimburse Sunoco for any additional costs Sunoco may incur as a result of Transco's violation of the 1992 Settlement rate.

15. By selling the subject facilities and moving the receipt points under its contract with Sunoco to a single, downstream point where the subject facilities connect to Transco's IT-Feeder lateral in the OCS, Transco will have unilaterally reduced the service it agreed to provide under its contract with Sunoco with no concomitant reduction in the rate it charges for the service to reflect increased costs it pays in violation of the 1992 Settlement and its contract with Sunoco. Transco's action, therefore, will cause a violation of sections 4 and 5 of the NGA because the change in service would be unjust and unreasonable, and the existing rates would become unjust and unreasonable, in that they would be in violation of a Commission-approved settlement. Unfortunately, it would be a violation of a Commission-approved settlement that we cannot prevent. The facilities it proposes to sell have been determined to function primarily as gathering upon their sale to WGP and, therefore, the Commission lacks jurisdiction under section 7(b) of the NGA to prevent their transfer. Thus, the lack of jurisdiction over the facilities trumps jurisdiction the Commission otherwise would have under sections 4 and 5 of the NGA to bar the unjust and unreasonable change in Transco's services and rates (*i.e.*, it would be providing less service at greater overall cost than contracted for, which would be in violation of a Commission-approved settlement and contract).

16. In *Columbia*, the court found that the Commission could not enforce a voluntarily-filed tariff provision requiring the pipeline to install non-jurisdictional gathering facilities. In reaching its decision, the court relied on its holding in *Detroit Edison*[13] that the Commission "may neither accept the filing of a tariff provision that covers non-jurisdictional activity (in that case, unbundled retail distribution service), nor assert jurisdiction over such an activity."[14] Transco has made similar arguments throughout the course of the instant proceeding that the Commission's remedy is barred on the theory it would be indirectly enforcing the 1992 Settlement's provisions with respect to non-jurisdictional gathering services. The Commission's alternate remedy, that Transco obtain gathering capacity from WGP and then release it to Sunoco at rates terms and conditions of the 1992 Settlement, effectively requires Transco to provide the gathering services, even though WGP would provide the physical gathering operations and service. Although the Commission would have NGA section 4 and 5 "in connection with" jurisdiction over Transco's gathering rates and services, [15] since they would be provided in connection with its jurisdictional transportation service, the Commission lacks the jurisdiction to *order* Transco to provide such services.[16] Accordingly, we vacate our prior orders to the extent that they establish a remedy for Transco's breach of the 1992 Settlement that it obtain capacity on WGP and release it to Sunoco at a net rate that does not exceed the settlement FT rate.

17. The issue then is whether the Commission is barred from establishing any other remedy at all in light of *Columbia*. The Commission recognizes that two remedies normally available are beyond the Commission's jurisdiction to impose in the instant case. The first is the remedy of specific performance, which is barred given that the sale of the facilities will place them in the hands of a third-party, non-pipeline gatherer and which, under Commission policy, causes WGP's gathering rates and services to be non-jurisdictional. The second remedy barred by a lack of jurisdiction is to prevent the sale

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[13] *Detroit Edison Co*. v. *FERC*, 334 F.3d 48, 54-55 (D.C. Cir. 2003) (*Detroit Edison*).

[14] *Columbia*, *mimeo* at 7.

[15] *Northern*, 929 F.2d 1261 (8th Cir. 1991).

[16] Thus, unlike in *Columbia*, where the Commission lacked jurisdiction to enforce a tariff provision requiring the installation of meters on gathering facilities, given the Commission's lack of NGA section 7 jurisdiction over gathering facilities, the Commission can regulate and enforce a jurisdictional pipeline's tariff gathering rates under NGA sections 4 and 5.

of the facilities by vacating the July 25, 2001 Order and rejecting the abandonment. The facilities have been determined to function primarily as gathering upon their sale to WGP and, therefore, the Commission lacks jurisdiction under section 7(b) of the NGA to prevent their transfer or to otherwise enforce the 1992 Settlement by requiring that the services be provided from the seven points as agreed to in the contract. The 1992 Settlement cannot be enforced in a way so as to require the 1992 Settlement services to be performed. However, the service aspect of the 1992 Settlement and resultant service agreement never have appeared to be in jeopardy as a result of the proposed sale of facilities to WGP. As Transco itself states,[17] there never has been any real cause for concern that Sunoco will be unable to obtain service from WGP and have its gas delivered from the subject seven receipt points to the interconnect with Transco's IT-Feeder transmission system facilities; the only issue is the rate Sunoco must pay.

18. Upon review of *Columbia* and other relevant court decisions, we find that we have jurisdiction, and our action will not conflict with *Columbia* or other cases Transco relies on, to impose a remedy for Transco's violation of the 1992 Settlement by requiring Transco to reimburse Sunoco for the additional costs it will incur as a result of that violation. More specifically, as a result of that violation, Sunoco will bear increased costs as a result of charges it is expected to incur from WGP. Consistent with *Consumers' Counsel*,[18] discussed *infra*, the Commission may order Transco to reimburse Sunoco for additional costs Sunoco incurs solely as a result of Transco's violation of the 1992 Settlement. These costs constitute consequential damages incurred as the result of the violation of a jurisdictional settlement that Sunoco should be permitted to recover from Transco pursuant to the equitable, remedial power of the Commission under section 16 of the NGA. The fact that the Commission would lack jurisdiction over Sunoco's incurrence of these costs through WGP's charges is irrelevant. WGP may charge any rate it wishes and may keep the proceeds of its transactions with Sunoco. Pursuant to NGA section 16, we will require Transco to make Sunoco whole for any additional costs Sunoco incurs that result from Transco's violation of the 1992 Settlement; specifically, Transco must reimburse Sunoco for the additional costs in the form of charges from WGP that Sunoco will incur following the sale of the subject facilities.

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[17] Transco Request for Rehearing, filed October 7, 2002, at 7.

[18] *Office of Consumers' Counsel, State of Ohio v. FERC*, 808 F.2d 125 (D.C. Cir. 1987) (*Consumers' Counsel*).

19. We do not believe that our remedy for Transco's violation of the 1992 Settlement would constitute enforcement of a non-jurisdictional component of a settlement contrary to the recent decision in *Columbia*. The 1992 Settlement's rate and service provisions are not being enforced as that would require Transco to continue to perform the service agreed to under that settlement from the subject seven receipt points and to charge the 1992 Settlement rate, *i.e.*, the FT maximum rates, for such service. The remedy we impose here does not require Transco to engage in gathering services or install gathering facilities or charge gathering rates for the services WGP will provide. Transco is not required to obtain the capacity from WGP and, thus, it will have no continuing contractual relationship with Sunoco to provide gathering services, whether directly or indirectly. WGP will be providing those services and will not be regulated by the Commission. Transco is only required to compensate Sunoco for additional costs Sunoco incurs solely as a result of Transco's violation of the 1992 Settlement. WGP will be providing the non-jurisdictional gathering services and its rates, services, and facilities are completely unaffected by our ruling. We are not enforcing a non-jurisdictional component of a settlement; Transco will not own the subject facilities if it sells them and will not being held to the provisions of the 1992 Settlement and its contract executed thereunder once the sale is consummated.

20. Transco has argued that the Commission's earlier remedies in this case attempted to reassert jurisdiction over what will be WGP's gathering facilities and services by indirectly imposing the equivalent of an unlawful "default contract" like that found beyond the Commission's jurisdiction to enforce in *Conoco*.[19] We believe that today's remedy, limited to reimbursement for additional costs, does not constitute an indirect form of "default contract" and that *Conoco* is distinguishable on its facts. In *Conoco*, the court overturned a Commission order imposing contract provisions on non-jurisdictional third-party gatherers that would have enforced NGA rate and service obligations on the third-party. The reason the default contracts at issue in *Conoco* were found unlawful is that they directly regulated the rates the non-jurisdictional third-party gatherer could charge for non-jurisdictional services. Unlike here, the contracts found unlawful in *Conoco* were between the shipper and the non-jurisdictional gatherer, not between the shipper and the pipeline. Here, WGP is not regulated, directly or indirectly. It will be free to negotiate to charge any rate it wishes and can keep the revenues. Nor is it obligated to provide services or in any way have its services regulated as a result of our action. No regulation, direct or indirect, of the rates or services for non-jurisdictional third-party gathering performed by a non-jurisdictional gathering company

[19] *Conoco Inc*. v. *FERC*, 90 F.3d 536, 550-53 (D.C. Cir. 1996), *cert. denied sub nom.*, *AMOCO Energy Trading Corp*. v. *FERC*, 519 U.S. 1142 (1997) (*Conoco*).

results from the Commission's remedy here. Transco's argument is fatally flawed because it focuses exclusively on the net rate effect on the shipper, Sunoco, to find an alleged similarity with unlawful default contracts and ignores the crucial distinction with unlawful default contracts: the rates and services of the non-jurisdictional gatherer, WGP, are not affected and are in no way regulated under our ruling and it is not subject to a contract that the Commission is imposing on it. Transco is simply being required to pay for damages its violation of a jurisdictional settlement caused Sunoco to incur.

21. Moreover, even if the Commission's remedy were found to effectively result in a net reduction in Transco's rates for the services it continues to provide Sunoco under the 1992 Settlement, that remedy would be within the Commission's jurisdiction under sections 4 and 5 of the NGA to enforce. Transco's transportation rates for the service it provides Sunoco are within the Commission's exclusive jurisdiction under the NGA. The principles expressed in *Columbia* are not violated simply by effectively reducing the rates the shipper pays for jurisdictional service; the non-jurisdictional gatherer's rates must be affected for our jurisdiction to be implicated. An indirect and remote relation to such non-jurisdictional gathering services, as argued by Transco, is not sufficient to constitute the unlawful regulation of such services, unlike under an unlawful default contract.[20]

22. Thus, even assuming that the Commission's remedy is treated as a net rate reduction for Transco, the standard for review of the Commission's action would be section 5 of the NGA, not section 1(b). The Commission has jurisdiction to modify Transco's jurisdictional rates charged Sunoco under the 1992 Settlement provided that the Commission meets its burden under that section. We believe we would meet that section 5 burden and so find that: (1) Transco's existing rate charged Sunoco under the 1992 Settlement will become unjust and unreasonable upon termination of service provided from the subject receipt points and sale of the subject facilities if Sunoco begins to incur additional costs for services formerly rendered by Transco in violation of the 1992 Settlement, and (2) a Commission-imposed replacement rate, *i.e.*, Transco's FT rate reduced by those additional costs, would be just and reasonable.

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[20] For example, the fact that the pipeline's jurisdictional rates recover an allocated portion of the overhead costs of uncertificated corporate buildings and corporate salaries does not mean that the Commission is actually regulating such non-jurisdictional buildings and persons if it reduces the allocation in setting the pipeline's rates or eliminates such costs upon a finding of imprudence. Likewise, the fact that the Commission may adjust the debt or equity rate components of the rate of return authorized a pipeline in a rate case does not mean that the Commission is indirectly regulating loan rates or the price of the company's common stock.

Reasonableness of the Commission's Remedy

23. In general, the courts have held that the Commission has a great deal of discretion under section 16 of the NGA when imposing remedies for violations of provisions of the NGA.[21] The courts have recognized that, among other remedies, monetary compensation may be accorded for harm resulting from violations of the NGA that conflict with the purposes of the act.[22] For example, in *Consumers' Counsel*,[23] supra, the court held that the Commission had authority to modify a settlement and condition abandonment authorization on the pipeline's paying for the costs of converting to propane service that its customers incurred as a result of the pipeline's termination of natural gas service to them. Other monetary remedies are also within the Commission's discretion to invoke.[24]

24. The Commission has ruled here that, if Transco sells the subject facilities, the Commission will impose a remedy pursuant to its equitable discretion requiring Transco to reimburse Sunoco for any additional costs it incurs in the form of gathering charges from WGP as a result of Transco's violation of the 1992 Settlement. We believe that this remedy is equitable and appropriate in light of the bargain struck in the 1992 Settlement and the expected harm Sunoco will incur as a result Transco's violation of that settlement. In its request for rehearing of the May 6, 2004 Order, Transco narrowly attacked the specific ruling of the May 5, 2004 Order modifying the May 15, 2003 Order to provide that, once the subject gathering facilities are spun-down, Transco may charge only the Rate Schedule FT rate reduced by the charges from WGP. Transco

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[21] *Niagara Mohawk Power Co. v. FPC*, 379 F.2d 150 (D.C. Cir. 1967).

[22] *See cases cited*, *Columbia Gas Transmission Corp*., 85 FERC ¶ 61,437 (1998).

[23] 808 F.2d 125 at 129-130.

[24] For example, the Commission may require pipelines that violate the NGA to make refunds calculated to compensate those harmed by the violations. *See, e.g., Gulf Oil Corporation v. FPC*, 563 F.2d 588 (3rd Cir. 1977), *cert denied* 434 U.S. 1062 (1978), *reh'g denied* 435 U.S. 981 (1978); *Mesa Petroleum Company v. FPC*, 441 F.2d 182 (5th Cir. 1986). In this context, the term "refunds" has been used to describe the payment of compensation even in cases where the money was not first paid to the company. *Washington Urban League v. FERC*, 886 F.2d 1381 (3rd Cir. 1989). The Commission may require that violators refund the profits they obtain as a result of the violations, provided that the amounts paid do not constitute a penalty. *Coastal Oil & Gas Corporation v. FERC*, 782 F.2d 1249 (5th Cir. 1986).

characterized the May 5, 2004 Order as requiring Transco to "subsidize" Sunoco's gathering service on the spun-down facilities by ordering the service to be provided to Sunoco free of charge at Transco's expense.[25]

25. Transco submits that the Commission's May 6, 2004 Order is contrary to the intended purpose of the Commission's equitable remedy in its May 15, 2003 Order in this proceeding. Transco states that under the Commission's equitable remedy set forth in the May 15, 2003 Order, Sunoco would, at the time of the sale, continue to receive service from those seven receipt points on the Central Texas gathering facilities so long as Sunoco pays, on a net basis, "whatever rate Transco could charge another shipper for the services it receives from Transco, . . . determined as if Transco still owns the subject facilities and provides the services at regulated rates."[26] The Commission stated in the May 15, 2003 Order that such rate will be "a cost-based, unbundled gathering charge calculated on an unbundled basis utilizing the costs and throughput attributable to the subject Central Texas gathering facilities."[27] Transco argues that the basic principle of the Commission's equitable remedy was that the net amount charged to Sunoco would be based on a cost-based rate as if the Commission still regulated the services involved.

26. Transco contends that now, however, the May 6, 2004 Order has precluded even the charging of a cost-based gathering rate, or any other rate at all, for service on the spun-down facilities. Transco observes that the May 6, 2004 Order states, in paragraph 17, "Sunoco is only required to pay the FT rate required by the 1992 contract during the primary term." Transco asserts that this is not only unlawful, but is also contrary to the Commission's earlier equitable remedy set by the May 15, 2003 Order. Accordingly, Transco requested that the Commission grant rehearing of the May 6, 2004 Order and require Sunoco to pay (on a net basis) a cost based gathering rate for service it receives on the spun-down gathering facilities in addition to a reduced FT rate for the remaining transmission service.

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[25] As is clear from its Brief to the Court in its Petition for review of the orders in this proceeding, Transco is also attacking the ruling imposing the alternative remedy requiring Transco to obtain capacity on WGP and assign it to Sunoco at the same rates, terms, and conditions as under the 1992 Settlement. Our ruling today eliminating that alternate obligation may render moot certain of its arguments.

[26] *Id.* at P 12.

[27] *Id.*

27. Transco asserts that it has long been settled that, to the extent the Commission purports to be acting within its jurisdiction under the NGA, the Commission must afford a regulated company an opportunity to earn a fair return on its investment in facilities,[28] and that the Commission may not, in setting jurisdictional rates, "appropriate the profits of the regulated company's (or affiliate's) unregulated business in order to reduce jurisdictional rates."[29] Transco contends that the fact here that the Commission is only purporting to uphold under the NGA a jurisdictional service agreement between Sunoco and Transco (despite the fact that a portion of the service thereunder has now been found to be non-jurisdictional gathering) does not relieve the Commission of its other obligations under the NGA; nor does it permit the Commission to set rates under the service agreement in such a way as to bar any recovery of non-jurisdictional costs. Transco submits that the Commission simply has no authority under the NGA to require a regulated pipeline to subsidize a shipper's non-jurisdictional gathering service at all, much less to the extent of providing cost-free gathering service.

28. Transco's arguments are based on a number of false premises and are largely moot in light of the change we make today in the remedy being ordered. At the outset, we are not setting a rate for gathering. This is not a rate design issue. Sunoco's transportation rate was settled. We are simply requiring Transco to make Sunoco whole for Transco's violation of the 1992 Settlement. Thus, we are not imposing gathering rates, "free' or otherwise, on Transco or WGP. Transco is simply compensating Sunoco for the harm it will incur as a result of Transco's violation of the 1992 Settlement. WGP's gathering rates also are not being regulated. It may charge whatever rate it can negotiate with Sunoco. Under the 1992 Settlement, Transco agreed to charge, and Sunoco agreed to pay, only the maximum FT reservation and usage rates for the services it was to provide Sunoco, despite the location of the subject receipt points on Transco's offshore IT-Feeder system for which it otherwise could have separately charged its volumetric IT-Feeder maximum rate in addition to the FT maximum rate. As a result of the sale of facilities, Transco will fail to provide the full services it agreed to provide and Sunoco will pay a total cost for the services in excess of the rate Sunoco agreed to pay under the 1992 Settlement. Specifically, Sunoco will incur additional costs, WGP's gathering charges, solely as a result of Transco's violation of the settlement.

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[28] *Citing, FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).

[29] *Citing, Panhandle E. Pipe Line Co. v. FPC,* 324 U.S. 635, 641 (1945); *Colorado Interstate Gas Co. v. FPC,* 324 U.S. 581, 593-94 (1945). *Citing also, FPC v. Conway Corp.,* 426 U.S. 271 (1976).

29. Thus, contrary to Transco's arguments, requiring Transco to reimburse Sunoco for such additional costs does not constitute setting a "free" rate for gathering. It simply requires Transco to provide Sunoco with the benefit of its bargain under the 1992 Settlement. The service never was "free" under the settlement; Sunoco agreed to pay and Transco agreed to charge the FT maximum rate for transportation provided from the seven receipt points to the Pennsylvania delivery points. Thus, Transco's "free rate" argument miscasts a central feature of the 1992 Settlement it negotiated with Sunoco. Moreover, the court precedents Transco cites are irrelevant. Transco will not be engaged in "unregulated business" here and, therefore, it will not have any "unregulated business" profits taken away by our action; it proposes to sell its facilities that will be used by WGP to provide gathering service for Sunoco upon the sale thereof. For the same reason, Transco will not be barred from recovery of "non-jurisdictional costs," because it will not incur such costs.[30] Finally, WGP's profits are not going to be "appropriated." WGP can charge whatever it wishes and it can keep the revenues (and profits) it receives from Sunoco. Our ruling does not cause its rates to be regulated or for it to disgorge its profits. Contrary to Transco's arguments, even if our remedy is considered to constitute a reduction in the rate Transco charges Sunoco, that action does not reduce WGP's rates or otherwise affect its profits in any way whatsoever.

30. Transco's reliance on the May 15, 2003 Order to support an equitable remedy involving establishing a cost-based gathering rate to be used to reduce the amounts Transco would have to reimburse is misplaced. In the May 6, 2004 Order, the Commission correctly found that its earlier ruling in the May 15, 2003 Order, that Sunoco had to pay a new cost-based gathering rate of the Commission's own design, was in error. The May 15, 2003 Order incorrectly relied on right-of-first-refusal language, instead of the settlement's rate provision, to arrive at a remedy under which the Commission calculated a cost-based gathering rate for Sunoco. Thus, there is no basis under the 1992 settlement to order such a remedy. As discussed above, Transco had, in fact, agreed to what Transco now incorrectly characterizes as a "free" charge for service it provides Sunoco on the IT-Feeder portion of its system. The service it agreed to provide was not "free." Sunoco agreed to pay the FT maximum rate for services Transco was to continue to provide Sunoco from receipt points on Transco's offshore OCS IT-Feeder laterals to the interconnect with its mainline for further transportation on

[30] Transco's argument makes little sense even if its first premise were true. If Transco would in fact be performing gathering services for Sunoco, the Commission can regulate such rates and services under its NGA section 4 and 5 "in-connection-with" jurisdiction.

its mainline to delivery points in Pennsylvania. For the entire service, Transco agreed to charge and Sunoco agreed to pay only Transco's Rate Schedule FT maximum reservation charge and usage rate.[31]

31. Accordingly, Transco's proposed remedy of setting a cost-based gathering rate and requiring Sunoco to effectively pay that rate would be inconsistent with the settlement transportation rate Sunoco bargained for in the 1992 Settlement and would require Sunoco to bear additional costs not agreed to in that settlement. Moreover, it would effectively impose the very kind of de facto gathering rate regulation and default contract it has opposed on jurisdictional grounds all along. Therefore, we reject its proposed remedy.

32. Finally, we affirm our finding that it was not error to fail to summarily reject Sunoco's complaint as a collateral attack on the Commission's final order granting abandonment. We have not reversed that order or otherwise modified it in any way. Sunoco did not limit its request for relief to actions we have found lacking in jurisdiction to implement. Nor are we bound to the remedies the Complainant may propose. We also affirm that the Commission has exclusive jurisdiction to interpret and enforce jurisdictional settlements it approves such as the 1992 Settlement. Transco has asserted that the issues in the case are more properly before a local court because the contract provides that the parties agreed that the law of Texas is to apply. We do not cede to the state court either the Commission's jurisdiction to determine if the Commission-approved settlement has been violated or its discretionary authority to decide what remedy should be imposed to rectify that violation.

33. In conclusion, the simple fact of this case is that, if and when Transco implements its spin down proposal, it will breach the 1992 Settlement and related service agreement that it entered into with Sunoco. Our action here does nothing more than preserve Sunoco's benefit of the rate bargain under the 1992 Settlement despite Transco's unilateral actions that attempt to hide behind a mantle of its affiliate's non-jurisdictional gathering. While Transco has made many arguments in this proceeding, the essence of all the arguments is that it may violate the 1992 Settlement with impunity by selling the subject facilities, thereby causing Sunoco to incur additional costs, because we lack jurisdiction over the resulting services to be provided by WGP. To

[31] It is important to note that, after the sale of the subject OCS facilities to WGP, Transco will continue to charge Sunoco nothing extra beyond its FT maximum rate for the service it will provide Sunoco under the 1992 Settlement, despite the fact that its new receipt point under its contract with Sunoco is located on its OCS production area IT-Feeder lateral.

accept such an argument would fly in the face of common sense and equity and, most importantly, would undermine the Commission's jurisdiction to enforce the sanctity of jurisdictional contracts and settlements it approves.

34. The recent decision in *Brooklyn Union Gas Co. v. FERC*, No. 04-1079 (D.C. Cir. May 31, 2005) supports the Commission's goal of encouraging settlements by enforcing the sanctity of such agreements on the parties, like Transco, who enter into such agreements. The court agreed with the Commission's rationale that parties might hesitate to enter into rate settlements if a subset of settling parties "could later pull the rug out from under them" and found reasonable the Commission's holding that "a strong commitment to preexisting settlements would better serve the public interest than allowing modifications over the objection of one or more parties." Here, Transco's unilateral act of selling off facilities needed to fulfill commitments under a Commission-approved settlement, despite the other settling party's objections, with resulting increased costs being incurred by that settling party, implicates the Commission's jurisdiction to ensure that such actions should not be allowed to occur without monetary consequences for Transco.

The Commission orders:

(A) Pursuant to sections 5 and 16 of the NGA, upon the effective date of a sale of the subject Central Texas facilities to WGP, Transco is directed to reimburse Sunoco for additional costs, in the form of gathering charges from WGP, that Sunoco incurs as a result of Transco's violation of the 1992 Settlement, as discussed in the text above.

(B) The Commission's prior orders issued in the instant proceeding are vacated to the extent they are inconsistent with this order.

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

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sunoco, Inc. (R&M)

v. Docket No. RP02-309-005

Transcontinental Gas Pipe Line
Corporation

(Issued June 16, 2005)

Nora Mead BROWNELL, Commissioner *dissenting*:

I dissented from the May 15, 2003 order in this proceeding, because I concluded that the Commission was inappropriately attempting to do indirectly what it was legally barred from doing directly, namely, regulate nonjurisdictional gathering service. Having already attempted three different approaches to explaining its actions, the Commission has now obtained a voluntary court remand and is taking the extraordinary step of vacating its prior three orders to take yet a fourth stab at devising a defensible rationale. Again, I dissent.

As I explained in my May 15, 2003 dissent, 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 its existing gathering customers at rates, terms, and conditions consistent with their existing Commission-approved contracts. Having authorized the facilities to be spun-off, the Commission lost jurisdiction to regulate service on them either directly or indirectly.

The majority attempts to distinguish *Conoco* by arguing that the Commission is not regulating the rate that WGP, the purchaser of the gathering facilities, will charge Sunoco, but, rather, is simply ordering Transco to pay damages to compensate for a breach of contract. The end result, however, is still an attempt to regulate the rate that Sunoco pays for nonjurisdictional gathering service. Moreover, the 1992 Settlement Agreement explicitly references the possibility of abandonment of service, provided it is

done in accordance with Section 7(b) of the NGA, and contains a broad reservation of Transco's rights under the NGA. *See* Articles II.A.2 and IV.3. Therefore, it is not clear to me that the spin-off of these gathering facilities actually constitutes a breach of the 1992 Settlement Agreement. To the extent it does, I believe it is more appropriate to follow long-standing Commission practice of having breach-of-contract damages claims resolved by the courts.

As I explained in my May 15, 2003 dissent, once Transco sells these gathering facilities, the provisions of the 1992 Settlement concerning service on these facilities will become nonjurisdictional. The Commission has addressed the issue of violations of nonjurisdictional provisions of Commission-approved settlements in the hydropower context. The Commission has approved hydropower licensing settlements that include a mix of jurisdictional and nonjurisdictional provisions; the jurisdictional provisions have been incorporated into the license, and the nonjurisdictional ones have not. In those cases, we state that we have no authority to enforce the nonjurisdictional provisions but parties are free to pursue private enforcement action in court. See, e.g., Erie Boulevard Hydropower, L.P., 88 FERC ¶ 61,176 (1999). I continue to believe that the Commission should have taken the same course here.

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Nora Mead Brownell