

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Transcontinental Gas Pipe Line Corporation Docket No. RP02-99-011

Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services Docket No. RP02-99-012

ORDER DENYING REHEARING
AND ON COMPLIANCE FILING

(Issued February 15, 2007)

1. This order denies the request for rehearing filed by Shell Offshore Inc. (Shell) of the Commission's September 15, 2005 Order Denying Rehearing¹ in the captioned complaint proceeding. In addition, the order finds the filing submitted by Transcontinental Gas Pipe Line Corporation (Transco) to be consistent with the Commission's February 15, 2005 Order on Remand.²

Background

2. The September 15, 2005 Rehearing Order denied Shell's request for rehearing of the Commission's February 15, 2005 Order on Remand in the captioned proceeding. That order, in turn, addressed the July 13, 2004 opinion by the U.S. Court of Appeals for

¹ *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services*, 112 FERC ¶ 61,293 (2005) (Rehearing Order).

² *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services*, 110 FERC ¶ 61,162 (2005) (Remand Order).

the District of Columbia Circuit in *Williams Gas Processing Co., L.P. v. FERC*.³ The court vacated Commission orders⁴ that had granted a complaint by Shell. In those orders, the Commission reasserted jurisdiction over the rates charged for gathering services on Transco's North Padre Island gathering facilities, which Transco had spun-down to its affiliate Williams Field Services (WFS), and the Commission directed Transco to file maximum cost-based gathering rates for these services. The court held that the Commission, in granting Shell's complaint, had misapplied the criteria set forth in *Arkla Gathering Service Co.*⁵ for reasserting jurisdiction under the Natural Gas Act (NGA).

3. The *Arkla* test involves a determination that, as a result of the concerted action of the pipeline and the gathering affiliate, the Commission's effective regulation of the pipeline is frustrated. The court found that the actions of WFS in increasing its gathering rates and attaching anti-competitive conditions to its gathering services, such as requiring Shell to commit its remaining reserves to WFS' gathering system after the spin-down, did not warrant a reassertion of jurisdiction over WFS under that test. The court found that the Commission had failed to demonstrate the type of abuses the Commission indicated in *Arkla* would trigger a reassertion of jurisdiction. In particular, the court held that the Commission did not show that it met the requirement of *Arkla*, that the abuse must be directly related to the affiliate's unique relationship with the pipeline such that the affiliate is leveraging its relationship with the pipeline to enhance its market power. The court found that WFS' relationship to Transco was irrelevant in that, as a deregulated monopolist, WFS could have (and likely would have) undertaken the same course of conduct of charging higher rates or imposing onerous conditions for service if it were not affiliated with Transco. The court remanded the case for further proceedings consistent with its opinion.

4. The Remand Order found that, based on the record of these proceedings and the court's interpretation of the Commission's precedent, the Commission lacked sufficient

³ 373 F.3d 1335 (2004) (*Williams Gas Processing*).

⁴ *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,254 (2002), *reh'g denied*, 103 FERC ¶ 61,177 (2003).

⁵ *Arkla Gathering Service Co.*, 67 FERC ¶ 61,257 at 61,871, *order on reh'g*, 69 FERC ¶ 61,280 (1994), *reh'g denied*, 70 FERC ¶ 61,079 (1995), *reconsideration denied*, 71 FERC ¶ 61,297 (1995) (collectively, *Arkla*), *aff'd in part and rev'd in part*, *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (*Conoco*).

bases to reassert NGA jurisdiction or to assert jurisdiction under the Outer Continental Shelf Lands Act (OCSLA) over the gathering rates and services of WFS' North Padre Island gathering facilities. The Commission denied Shell's complaint and directed Transco to remove the North Padre Island gathering rate and rate schedule from its tariff.

5. On rehearing of the remand order, Shell contended that the Commission should modify the *Arkla* test and grant relief based upon the revised test. In the September 15, 2005 Rehearing Order, the Commission denied Shell's request for rehearing. The Commission found that the case had been fully litigated based upon the existing *Arkla* test, and that Shell did not contest the Remand Order's finding that the circumstances presented in this case do not warrant reassertion of jurisdiction under the criteria in the *Arkla* test. The Rehearing Order also terminated the proceedings, finding that it would not be equitable to change the *Arkla* test in the context of the instant proceedings. Instead, the Commission issued a contemporaneous Notice of Inquiry in Docket No. PL05-10-000⁶ soliciting comments on whether it would be appropriate to modify the *Arkla* test or to adopt a new test to govern the circumstances under which the Commission will reassert its NGA jurisdiction over the services provided by the gathering affiliates of natural gas companies.

Transco's Compliance Filing and Shell's Request for Rehearing

6. On September 29, 2005, Transco filed revised tariff sheets that reflect the removal of the North Padre Island gathering rate, rate schedule and form of service agreement from Transco's Third Revised Volume No. 1 tariff, with a proposed effective date of November 1, 2005. This filing was made in compliance with ordering paragraph (B) of the Remand Order. Shell filed a protest on October 11, 2005, which it supplemented in an October 13, 2005 filing.⁷ Transco responded to Shell's protests with an Answer to

⁶ *Notice of Inquiry on Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, Notice of Inquiry, 112 FERC ¶ 61,295 (2005) (the Notice of Inquiry).

⁷ The Commission notes that Shell's October 13, 2005 supplement is predicated on a misunderstanding of 18 C.F.R. § 385.212 of the Commission's Rules of Practice and Procedure. That regulation does not require a Statement of Issues, along with citations to Commission and legal precedent upon which the pleading will rely, to be included in a protest. The requirement for a Statement of Issues, found in 18 C.F.R. § 385.713, applies to requests for rehearing and not to protests. Thus, Shell's protest did not require a Statement of Issues and its supplemental protest was not necessary.

Motion for Stay on October 27, 2005. Shell filed an answer to Transco's answer on November 3, 2005. In addition to the pleadings concerning Transco's compliance filing, Shell filed a request for rehearing of the September 15, 2005 Rehearing Order on October 17, 2005.

7. The common theme in all of Shell's pleadings is its argument that the Commission erred in terminating the proceedings in the complaint docket. Shell asserts that the Commission instead should have held these proceedings in abeyance pending any final action taken by the Commission in the Notice of Inquiry,⁸ and that the Commission's failure lacked a reasoned basis.⁹ Although Shell concedes that the Commission's termination was without prejudice to Shell's filing a new complaint should the Commission revise the *Arkla* test, it argues that its "right to file a new case after completion of the NOI is not an equitable or reasonable substitute for [Shell's] right to seek redress under the revised *Arkla* test in the instant proceeding."¹⁰ In support of its position, Shell argues that there is recent precedent for holding proceedings in abeyance pending Commission action on a generic policy: the *Policy Statement on Income Tax Allowance*,¹¹ issued in response to comments on a notice of inquiry on the Commission's income tax policy.¹² This notice of inquiry was in response to D.C. Circuit Court's remand of certain orders pertaining to rates charged by SFPP, L.P.'s petroleum products pipeline.¹³ The court found that the Commission's policy on income tax allowances, established in *Lakehead Pipe Line Company, L.P.*,¹⁴ lacked a reasoned basis. On remand,

⁸ Shell protest at 3-4; Shell request for rehearing at 7-15.

⁹ Shell request for rehearing at 12.

¹⁰ *Id.* at 10.

¹¹ 111 FERC ¶ 61,139 (2005).

¹² *Inquiry Regarding Income Tax Allowances*, Request for Comments, Docket No. PL05-5-000 (December 2, 2004).

¹³ *BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004) (*BP West*).

¹⁴ *Lakehead Pipe Line Company, L.P.*, 71 FERC ¶ 61,388 (1995), *reh'g denied*, 75 FERC ¶ 61,181 (1996) (*Lakehead*).

the Commission initiated a notice of inquiry and, unlike the instant proceedings, it held the remand case in abeyance pending the outcome of the notice of inquiry. Because the Commission did not provide a reasoned basis for deviating from the precedent in *BP West*, Shell asserts that the Commission's action is arbitrary and capricious and an abuse of discretion.¹⁵

8. In response to Shell's arguments in its protest to the compliance filing, Transco asserts that Shell's argument that the proceedings should have been held in abeyance is not responsive to the compliance filing but is instead a motion for stay.¹⁶ As such, Shell's pleadings are defective, as they have failed to make a prima facie case for stay under controlling case law.¹⁷

Discussion

9. In response to the Notice of Inquiry, the Commission received thirteen comments addressing whether the Commission should modify the *Arkla* test and evaluating possible changes in the test. Contemporaneously with this order, the Commission is issuing an Order Terminating Proceeding and Clarifying Policy.¹⁸ In that order, the Commission examines the statutory and regulatory requirements governing the Commission's assertion of NGA jurisdiction over the gathering affiliates of interstate pipelines.

¹⁵ Shell request for rehearing at 9.

¹⁶ Transco's October 27, 2005 pleading is styled "Answer ... to Motion for Stay," and it was filed pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, even though it was filed in response to Shell's protest to the Transco compliance filing. Transco acknowledges that answers to protests are not authorized under the Commission's regulations. However, Transco reasons that, because Shell's protest argues that the Commission erred in not holding the proceedings in abeyance, Shell is actually seeking a stay, to which an answer is permissible under Rule 213.

¹⁷ Transco answer at 2 – 4, citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985); *CMS Midland, Inc.*, 56 FERC ¶ 61,117 (1991), *aff'd sub nom.*, *Mich. Mun. Coop. Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 550 U.S. 990; and *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

¹⁸ See *Order Terminating Proceeding and Clarifying Policy*, Docket No. PL05-10-000 (Termination Order).

Although the Termination Order clarifies the *Arkla* test in certain respects,¹⁹ it does not make any change to the *Arkla* test relevant to the current case. The Termination Order finds that the Commission may only assert NGA jurisdiction over the activities of an affiliated gatherer, when (1) the gatherer has used its market power over gathering to benefit the pipeline in its performance of jurisdictional transportation or sales service and (2) that benefit is contrary to the Commission's policies concerning jurisdictional services adopted pursuant to the NGA.

10. Consistent with this holding, the Termination Order states that the fact that an affiliated gatherer has abused its market power over gathering to benefit its own gathering service would not, by itself, justify an assertion of jurisdiction. The Termination Order explains that the statutory purpose of the NGA does not include regulation of gathering by companies that are not jurisdictional "natural gas companies" as defined in NGA section 2(6). A gathering affiliate's exercise of market power to charge high prices may increase its own profits, but does not affect the Commission's regulation of jurisdictional pipeline transportation service.²⁰ It does not permit the pipeline to circumvent any of the Commission's policies concerning transportation service or otherwise benefit the pipeline in its performance of jurisdictional service.²¹

11. Under these standards, no change is warranted in the Commission's determination not to assert jurisdiction over Transco's gathering affiliate, WFS, in the instant case. The evidence in the instant case, as the court has already held in *Williams Gas Processing*,

¹⁹ See Termination Order at PP 62-68 clarifying the concerted action prong of the *Arkla* test.

²⁰ See also Termination Order at PP 57-58, rejecting Shell's contention that we should treat a gathering affiliate's charges in excess of a reasonable gathering rate as being additional charges for the pipeline's jurisdictional transportation service.

²¹ This contrasts with the type of conduct by an affiliated gatherer that the Termination Order finds might justify an assertion of jurisdiction. One example the Termination Order gives of such conduct is where the affiliated gatherer refuses to provide gathering service or charge higher rates, unless the shipper also enters into a contract with the affiliated pipeline for long-term firm service, rather than short-term firm or interruptible transportation service. This could enable the pipeline to obtain more profitable contracts for its jurisdictional transportation service than it otherwise could. That is because the Commission requires pipelines to accept a maximum rate bid for a short-term service, absent a higher net present value bid for a longer-term service. Termination Order at P 52.

shows only that WFS charged higher prices and imposed onerous conditions in order to benefit its own gathering business. It did not take these actions in order to benefit Transco in the performance of Transco's jurisdictional business. As the court stated in *Williams Gas Processing*, "WFS, as a deregulated nonprofit could have and likely would have undertaken the same course of conduct had Transco been owned by someone else entirely."²² Thus, the Commission continues to find that Shell has failed to show that WFS engaged in the type of conduct such that an assertion of jurisdiction is necessary to prevent frustration of the statutory purpose of the NGA. This finding also renders moot Shell's argument that the Commission should have held its proceedings in abeyance pending modification to the *Arkla* test. Even if the Commission had held the proceedings in abeyance, Shell would receive no relief.

12. The Commission notes that the North Padre Island gathering facilities at issue in the instant proceeding are located offshore and are subject to regulation under the OCSLA. The court in *Williams Gas Processing* interpreted the OCSLA as giving the Department of Interior, and not this Commission, the authority to enforce the non-discrimination and other requirements of the OCSLA. Therefore, the Termination Order holds that it is consistent with the purposes of both the NGA and the OCSLA that a remedy, if any, for excess charges by non-natural gas companies, such as WFS, for OCS gathering be provided by the Department of Interior and not this Commission.

13. Finally, the Commission accepts Transco's revised tariff sheets, effective November 1, 2005, because they fully comply with the Commission's February and September 2005 orders in this proceeding.

The Commission orders:

(A) Shell's request for rehearing of the September 15 Order is denied, as discussed in the body of this order.

²² 373 F.3d at 1342.

(B) Transco's revised tariff sheets submitted on September 29, 2005 are accepted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary