

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 04-1234, *et al.*

**TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, D.C. 20426**

OCTOBER 18, 2006

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

1. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,252 (2002);
2. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,176 (2003);
3. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 107 FERC ¶ 61,123 (2004);
4. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,400 (2005) (“Remand Order”); and
5. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 114 FERC ¶ 61,180 (2006) (“Rehearing Order”).

C. Related Cases

Counsel is not aware of any other related cases pending before this or any other court.

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October 18, 2006

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GLOSSARY

1992 Settlement	Joint Stipulation and Agreement entered into by Transco and Sunoco, dated February 14, 1992
FERC or Commission	Federal Energy Regulatory Commission
FT Service Agreement	Service Agreement entered into between Transco and Sunoco pursuant to the 1992 Settlement
FT Rate	Transco's rates for firm service on its mainline
IT-Feeder Rate	Transco's interruptible transportation service rate for service on its supply laterals
Order No. 636	<i>Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol</i> , Order No. 636, FERC Stats. & Regs. ¶ 30,939, <i>on reh'g</i> , Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, <i>on reh'g</i> , Order No. 636-B, 61 FERC ¶ 61,272 (1992), <i>reh'g denied</i> , 62 FERC ¶ 61,007 (1993), <i>aff'd in part, rev'd in part, United Distribution Cos. v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996)
Remand Order	<i>Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.</i> , 111 FERC ¶ 61,400 (2005)
Rehearing Order	<i>Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.</i> , 114 FERC ¶ 61,180 (2006)
Sunoco	Sunoco, Inc.
Transco	Transcontinental Gas Pipe Line Corporation
Williams	Williams Gas Processing – Gulf Coast L.P., a non-jurisdictional gathering affiliate of Transco

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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably required Transcontinental Gas Pipe Line Corporation (“Transco”) to compensate Sunoco, Inc. (“Sunoco”) for the cost of obtaining natural gas transportation services Transco agreed to (but will no longer) provide under a

Commission-approved settlement, after Transco unilaterally transfers facilities to a non-jurisdictional affiliate.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to Petitioner's Brief.

INTRODUCTION

In 1992, Transco and Sunoco entered into a settlement agreement (the "1992 Settlement"). Sunoco agreed to terminate five years of litigation with Transco in exchange for Transco's agreement to provide Sunoco for twenty years with transportation service from specified points on the Outer Continental Shelf to Sunoco's refinery in Pennsylvania, at Transco's maximum firm transportation ("FT") rate, as that rate may change from time to time. This settlement rate was not available to other shippers, who could only obtain the same transportation service by paying the FT rate *plus* an interruptible transportation ("IT") Feeder rate for service on Transco's supply laterals on the Outer Continental Shelf.

In 2001, the Commission approved Transco's application to sell certain Outer Continental Shelf pipeline facilities to a non-jurisdictional affiliate. Because the facilities were non-jurisdictional gathering facilities, the Commission could not prevent Transco's unilateral abandonment of these facilities. However, the

proposed sale would unilaterally terminate service from seven Outer Continental Shelf receipt points specified in the 1992 Settlement, shifting Sunoco's receipt points downstream. This would require Sunoco to obtain gathering services from the unregulated gathering affiliate, while at the same time remaining liable to Transco for the full 1992 Settlement Rate (the maximum FT rate) for reduced transportation services. In its complaint, Sunoco alleged it might incur additional charges ranging from \$15 million to \$28 million as a result of the sale.

In the challenged orders, the Commission initially ordered certain remedies that the Commission later vacated on voluntary remand. In its orders following the voluntary remand, the Commission ultimately required Transco, if it effectuates the sale, to reimburse Sunoco for the additional amounts Sunoco would be required to spend to obtain the transportation service promised in the 1992 Settlement. *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,252 (2002), JA 233, *on reh'g*, 103 FERC ¶ 61,176 (2003), JA 256, *on reh'g*, 107 FERC ¶ 61,123 (2004), JA 293, *on voluntary remand*, 111 FERC ¶ 61,400 (2005) ("Remand Order"), JA 311, *on reh'g*, 114 FERC ¶ 61,180 (2006) ("Rehearing Order"), JA 359.

Transco contended that the challenged orders improperly interpreted the 1992 Settlement, and enforced the 1992 Settlement in a manner that indirectly regulated non-jurisdictional "gathering" of natural gas. In the Remand and Rehearing Orders,

the Commission rejected these contentions, finding that the 1992 Settlement expressly assured Sunoco of transportation services from the specified Outer Continental Shelf receipt points at the maximum FT rate for twenty years. The Commission further found that it was well within its jurisdiction to order Transco to reimburse Sunoco for amounts Sunoco must pay to obtain the promised transportation in excess of that which Sunoco would owe under the 1992 Settlement, to make Sunoco whole for Transco's breach of the 1992 Settlement.

This appeal followed.

STATEMENT OF FACTS

I. EVENTS LEADING TO THE CHALLENGED ORDERS

A. Order No. 636¹

The Natural Gas Act ("NGA") exempts from Commission jurisdiction the production and gathering of natural gas. NGA § 1(b), 15 U.S.C. § 717(b).

However, prior to Order No. 636, pipelines performed all the actions needed to bring gas to market, with purchasers paying a single contract price for these

¹ *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, *on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part, rev'd in part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

“bundled services.” Accordingly, FERC asserted jurisdiction over many pipeline gathering facilities because the gas they gathered directly entered the flow of interstate commerce. *See, e.g., Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954) (intrastate gathering facility is subject to federal regulation if facility sells gas to companies distributing it over interstate pipelines).

In order to open the natural gas industry to competition, in Order No. 636, the Commission mandated open access to pipeline transportation facilities and required pipelines to unbundle their sales service from their transportation service. Order No. 636 at 30,393-94. In response to the new competition with independent non-regulated gatherers, pipelines began abandoning jurisdictional gathering facilities and transferring them to wholly-owned affiliates, and simultaneously petitioning FERC to classify the transferred facilities as non-jurisdictional, in a process known as a “spin-down.” *See, e.g., Williams Gas Processing – Gulf Coast Co. v. FERC*, 331 F.3d 1011, 1015 (D.C. Cir. 2003). Because gathering facilities are non-jurisdictional, the Commission has no discretion to deny the transfer of such facilities. *Id.* at 1022.

To give pipeline customers access to new sources of gas, Order No. 636 also authorized pipeline sales customers unilaterally to abrogate their purchase obligations. Order No. 636-A at 30,648. When customers exercised that right and

secured gas supplies from other suppliers, the pipelines incurred liabilities under their contracts with gas producers requiring that they “take or pay” for gas to serve their customers. *United Dist. Cos.*, 88 F.3d at 1177. The allocation of this take or pay liability was often decided between pipeline and customers through settlement.

B. Transco’s Unbundling

Transco’s natural gas pipeline stretches northeastward from production areas in the Gulf of Mexico, terminating in the New York City area. *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1168 (D.C. Cir. 2005). The pipeline is divided into six zones, three upstream production area zones near the Gulf Coast and three downstream market area zones. *Id.* In the production area, “supply lateral” lines transport gas from the gathering areas to the mainline. *Id.* at 1169.

In 1991, in anticipation of Order No. 636, Transco unbundled its transportation and sales service through settlement agreements with its customers. *Id.* Pursuant to these settlements, Transco’s former bundled sales customers converted to firm transportation customers, paying a two-part firm transportation rate for transporting gas on the mainline. *Id.* at 1170. On the supply laterals, Transco adopted an interruptible service rate structure, charging a one-part rate based on the volume actually transported with no separate reservation charge. *Id.*

While generally Transco does not provide firm transportation service on its supply laterals, there were a few customers who had historically purchased firm transportation in the production area, including on the supply laterals. *Id.* at 1170 n.2. When Transco established interruptible-only service on the supply laterals, these older service agreements were “grandfathered,” with the shippers continuing to receive firm service in the production area over both supply laterals and the mainline. *Id.* Sunoco had such a grandfathered firm transportation contract. Rehearing Order P 2, JA 359.

C. Transco’s Settlement with Sunoco

For almost fifty years, Sunoco had received firm transportation service from Transco from various receipt points on the Transco system to Sunoco’s refinery in Pennsylvania. Sunoco Complaint, R. 1 at 3, JA 4. Prior to the Order No. 636 settlements, Transco provided firm transportation service to Sunoco under Rate Schedule X-11, from certain identified receipt points. *Id.* at 3-4, JA 4-5.

On February 14, 1992, Transco and Sunoco entered into the 1992 Settlement, resolving litigation over Sunoco’s obligation to pay take or pay costs to Transco and Transco’s obligation to continue providing firm service to Sunoco. *Id.* at 4, JA 4. The Settlement was approved by the Commission on June 11, 1992.

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

Settlement provided for: (1) Transco to provide Sunoco with firm transportation service for an initial term of twenty years (*i.e.* until 2012) not subject to pre-granted abandonment; (2) Sunoco to retain its existing firm capacity entitlements of 40,000 Mcf per day at all existing receipt points; and (3) Sunoco to become a settling party to, and pay surcharges pursuant to, Transco's take or pay cost recovery settlement, and to withdraw all legal challenges to Transco's take or pay cost recovery and restructuring settlements. *Id.* at 62,017-18; R. 1 at 4, JA 5.²

Under the settlement, Sunoco received a special rate for its enhanced transportation service, paying only the maximum FT Rate, as that rate may change from time to time, for the entire haul from wellhead to the Pennsylvania refinery. Rehearing Order P 2, JA 360. Other shippers with Outer Continental Shelf receipt points and onshore mainline delivery points were required to pay both the FT Rate for firm transportation service on the mainline *plus* the IT-Feeder Rate for service on the supply laterals.

Sunoco was the only customer on the Transco system that had objected to Transco's take or pay cost recovery and service restructuring settlements, and was

²By becoming a "Settling Party" under the take-or-pay settlement, Sunoco became obligated for certain surcharges, including "Producer Settlement Payments" and "Litigating Producer Settlement Payments." Rehearing Order P 2 n.2, JA 359-60 (citing *Transcontinental*, 59 FERC ¶ 61,279 at 62,018 n.8).

the sole party pursuing an appeal of the Commission's orders authorizing Transco to recover take or pay costs from historically transportation-only customers. R. 1 at 4-5, JA 5-6. Accordingly, the Transco-Sunoco settlement brought a final resolution to the contested take or pay cost recovery issues on the Transco system. *Id.* at 5, JA 6.

D. Transco's Spin-Down Proceeding

On November 20, 2000, Transco filed an application under NGA § 7(b), 15 U.S.C. § 717f(b), requesting authorization to abandon certain pipeline facilities in offshore Texas by transfer to Williams Gas Processing – Gulf Coast L.P. (“Williams”), a non-jurisdictional gathering affiliate of Transco. *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115 at 61,429, *on reh'g*, 97 FERC ¶ 61,296 (2001), *aff'd*, *Williams*, 331 F.3d at 1023. Abandonment of these facilities required partial abandonment of service under Transco's firm transportation agreement with Sunoco, as seven receipt points in Central Texas included in Sunoco's 1992 Settlement must be deleted. *Id.* Upon approval of the abandonment, Transco would file the necessary conforming changes to its FERC gas tariff, including removal of reference to the abandoned facilities. *Id.* at 61,430.

In the spin down proceeding, Sunoco complained that the spin down would constitute a disavowal of its existing contractual service from the seven receipt

points on the Central Texas facilities, and requested that the spin down not be approved or, in the alternative, requested that the Commission require Transco and Williams to provide written assurance that they would continue to honor Sunoco's contract. *Transcontinental*, 96 FERC at 61,433. The Commission concluded, however, that when facilities are found to be used primarily in gathering, NGA § 1(b) directs that they be excluded from the Commission's jurisdiction, and the Commission has no discretion to withhold authorization for the transfer. *Id.* at 61,435. Further, the transfer to Williams was consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition. *Transcontinental*, 96 FERC at 61,435; *Transcontinental*, 97 FERC at 62,381. Accordingly, on July 25, 2001, the Commission granted Transco's request to abandon service, which was affirmed by this Court. *Transcontinental*, 96 FERC at 61,429; *Williams*, 331 F.3d at 1023.

The Commission found that it was unjust and unreasonable for Transco to charge rates designed to recover the cost of and earn a fair return on its investment in the abandoned facilities as, upon abandonment, Transco would no longer own them or use them to provide jurisdictional service. 97 FERC at 62,389. Thus, if the Central Texas facilities were abandoned, Transco was ordered to file replacement rates removing all costs associated with the abandoned facilities. *Id.*

II. THE CHALLENGED ORDERS

On May 2, 2002, Sunoco filed a complaint alleging that the proposed spin-down of the Central Texas facilities on which its seven receipt points were located violated its 1992 Settlement with Transco. Remand Order P 5, JA 312. Sunoco claimed that it would incur an additional \$15 million to \$28 million in charges in purchasing transportation service from Williams to replace the service abandoned by Transco. *Id.*

In the first three of the challenged orders, *Sunoco*, 100 FERC ¶ 61,252, JA 233, *on reh'g*, 103 FERC ¶ 61,176, JA 256, *on reh'g*, 107 FERC ¶ 61,123, JA 293, the Commission found Transco in violation of the 1992 Settlement and ordered remedies. *See* Remand Order PP 6-7, JA 312-13; Rehearing Order P 5, JA 360. Transco sought review of these three orders in this Court, *Transcontinental Gas Pipe Line Corp. v. FERC*, D.C. Cir. No. 04-1234. On February 11, 2005, this Court granted the Commission's request for a voluntary remand for the purpose of issuing a further order in this proceeding. Remand Order P 8, JA 313.

On remand, the Commission vacated its prior orders to the extent they directed remedies, and reexamined the issues of Transco's breach of contract and the remedies for that breach. Remand Order P 9, JA 313. The Commission again concluded that Transco's abandonment of Sunoco's receipt points violated the 1992

Settlement. Remand Order P 10, JA 313. Under Article V of the service contract executed pursuant to the 1992 Settlement (the “FT Service Agreement”), Transco agreed to charge, and Sunoco agreed to pay, the maximum FT Rate for transportation from the seven receipt points on the Outer Continental Shelf Central Texas facilities to the Pennsylvania refinery. *Id.* As a result of the proposed spin down, Transco will no longer provide service on the specified receipt points, and, therefore, will fail to provide the full services it agreed to provide under the 1992 Settlement. *Id.* Instead of receiving Sunoco’s gas at those seven points, Transco would receive the gas at a downstream point where its supply lateral connects with the mainline. *Id.* Thus, as a result of Transco’s unilateral action, Sunoco will pay a total cost for service in excess of the FT Rate Sunoco agreed to pay under the 1992 Settlement. *Id.*

Transco disputed the finding that the spin down would breach the 1992 Settlement, arguing that the 1992 Settlement was intended only to cover Commission-regulated transportation service. The fact that the 1992 Settlement governed jurisdictional transportation, however, does not change the fact that the sale of the Central Texas facilities to a third party not bound by the settlement, with a consequent reduction in the jurisdictional service provided, would breach the 1992 Settlement. Rehearing Order P 17, JA 362.

While the Commission could not prevent Transco from abandoning non-jurisdictional facilities, Remand Order P 15, JA 314; Rehearing Order P 19, JA 363, the Commission could provide Sunoco with a remedy for that breach by modifying the net revenues Transco may demand from Sunoco for the diminished jurisdictional services. Rehearing Order P 19, JA 363. The Commission would not, by this remedy, be attempting to regulate non-jurisdictional gathering because the Commission orders imposed no obligation on the gathering affiliate, Williams, nor made any effort to regulate Williams' rates. Remand Order P 20, JA 316; Rehearing Order P 22, JA 364.

The Commission rejected Transco's arguments that the 1992 Settlement permitted Transco to unilaterally reduce service, finding that the 1992 Settlement guaranteed service to Sunoco from the designated receipt points at the FT Rate, as that rate may change from time to time. Rehearing Order P 11, JA 361. The 1992 Settlement, therefore, only preserved Transco's right to file under NGA § 4, 15 U.S.C. § 717c, to propose changes in its generally-applicable Rate Schedule FT and tariff, not to unilaterally change receipt points specifically guaranteed to Sunoco under the terms of the 1992 Settlement. *Id.*

Transco argued that the Commission's remedy was inequitable because it would require Transco to "subsidize" Sunoco for its gathering costs by establishing

a “free” rate for gathering; and it would prevent Transco from recovering the full cost of services provided under the 1992 Settlement. The Commission found that it mischaracterizes both the 1992 Settlement and the Commission’s remedy to view them as parsing out separate cost-based components for gathering, as opposed to transportation, and providing a “free” gathering service. Rehearing Order P 48, JA 370. The service provided Sunoco under the 1992 Settlement from the subject receipt points never was “free”; Sunoco paid the maximum FT Rate for firm transportation service from the receipt points to the Pennsylvania delivery points. *Id.* PP 45, 48, JA 369, 370. Further, as additional consideration, Sunoco dismissed litigation it was pressing against Transco. *Id.* P 2, JA 359.

Thus, the 1992 Settlement rate was a black-box settlement rate, not a cost-based rate designed to recover the cost of the transportation services Transco agreed to provide Sunoco under the 1992 Settlement. Rehearing Order P 45, JA 369. Rather, in return for certain agreements and concessions by Sunoco in settlement of other take-or-pay proceedings, Transco agreed to provide Sunoco with firm transportation service from the specified Outer Continental Shelf receipt points on its offshore supply lateral system to delivery points in Pennsylvania, charging only the maximum FT Rate for the entire haul. *Id.* Any other shipper tendering gas at

those Outer Continental Shelf points would be subject to the FT rate *plus* the IT-Feeder rate. *Id.*

This is not, therefore, a rate design issue. Remand Order P 28, JA 318. Consistent with the 1992 Settlement, the Commission's remedy does not set a cost-based rate for services Transco will continue to provide Sunoco, but rather provides Sunoco with an equitable remedy to make it whole for the harm incurred by Transco's unilateral abandonment of IT-Feeder facilities needed to fulfill its service obligation under the 1992 Settlement. Rehearing Order P 46, JA 370.

The Commission further disagreed that its remedy here undermined its pro-competitive gathering unbundling policies. Instead, the Commission's action preserves Sunoco's benefit of the rate bargain under the 1992 Settlement, in furtherance of the Commission's goal of encouraging settlements by enforcing their sanctity. Rehearing Order P 55, JA 371. The remedy imposed here is unique to the settlement involving only Transco and Sunoco, and thus should not affect pipeline industry decisions on whether to spin down gathering facilities. *Id.* P 57, JA 371.

SUMMARY OF ARGUMENT

In 1992, Sunoco agreed to resolve litigation claims against Transco, in exchange for Transco's promise to provide transportation service for twenty years from specified receipt points on the Outer Continental Shelf to Sunoco's refinery in Pennsylvania, at Transco's Rate Schedule FT maximum rate. In 2001, Transco sought authorization to sell the facilities upon which those specified receipt points were located to its non-jurisdictional gathering affiliate, Williams. If the sale were consummated, Sunoco would be obliged to pay Williams a separate, unregulated gathering rate for transportation on the IT-Feeder supply laterals that contained the Outer Continental Shelf receipt points, in addition to the Rate Schedule FT maximum rate Sunoco was obligated to pay Transco under the 1992 Settlement.

Because the proposed sale involved non-jurisdictional gathering facilities, the Commission lacked authority to prevent it. The Commission, however, possesses ample equitable authority to require Transco to reimburse Sunoco for the additional transportation costs Sunoco would be required to pay to Williams for the transportation service Transco agreed to provide in the 1992 Settlement.

Through this equitable remedy, the Commission is not indirectly regulating non-jurisdictional gathering rates. The remedy imposed does not in any manner affect or attempt to regulate the rates charged by Williams to provide its gathering

service. The remedy likewise does not require Transco to “subsidize” Sunoco for its gathering costs by providing “free” gathering service. Under the 1992 Settlement, Sunoco was to obtain service over Transco’s supply laterals, as well as service on its mainline, for the FT maximum rate. The 1992 Settlement rate was never designed to recover Transco’s costs of providing such service to Sunoco, but rather was a black-box settlement rate set in consideration of Sunoco’s settlement of litigation on other issues. All the challenged orders require here is that Transco continue to provide Sunoco with the benefit of its bargain made in the 1992 Settlement.

Transco also contends the 1992 Settlement, and the FT Service Agreement entered into to effectuate the settlement, reserved Transco’s right to unilaterally reduce its service to Sunoco. The agreements, however, only preserve Transco’s rights to file under NGA § 4 to change its generally-applicable Rate Schedule FT and the terms and conditions of its tariff. The agreements do not permit Transco to unilaterally change receipt points guaranteed to Sunoco in the 1992 Settlement.

The Commission’s remedy here, moreover, does not undermine the Commission’s pro-competitive gathering unbundling policies, but rather preserves Sunoco’s benefit of the rate bargain under the 1992 Settlement, in furtherance of the Commission’s goal of encouraging settlements by enforcing their sanctity. The

Commission's gathering unbundling policies are unaffected by the unique remedy imposed here, involving only Transco and Sunoco, and concerning only their rights, responsibilities and obligations under their 1992 Settlement.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC's orders to assure they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995). Judicial scrutiny under the Natural Gas Act is limited to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record. *See, e.g., Pennsylvania Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997). The "breadth of agency discretion is, if anything, at [its] zenith when the action relates primarily . . . to the fashioning of policies, remedies and sanctions." *Tennessee Gas Pipe Line Co. v. FERC*, 400 F.3d 23, 25 (D.C. Cir. 2005) (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984)). *See also id.* at 27 (the Court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions.").

This Court affords a high degree of deference to the Commission's interpretation of a settlement agreement. *Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 869 (D.C. Cir. 1991). Further, "an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous."

Southwest Gas Corp. v. FERC, 145 F.3d 365, 370 (D.C. Cir. 1998) (quoting *Transcontinental*, 922 F.2d at 871). The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. NGA § 19(b), 15 U.S.C. § 717r(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

II. THE COMMISSION FASHIONED A REASONABLE REMEDY FOR TRANSCO’S BREACH OF THE 1992 SETTLEMENT.

A. The Commission Reasonably Found a Breach of the 1992 Settlement and Set a Reasonable, Jurisdictional Remedy.

Under the 1992 Settlement, Transco agreed to charge, and Sunoco agreed to pay, the maximum FT Rate for service from seven receipt points on the Central Texas facilities to delivery points in Pennsylvania. Remand Order P 10, JA 313. 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 1992 Settlement. *Id.* As a result, Sunoco will pay a total cost for service in excess of the FT maximum rate Sunoco agreed to pay under the 1992 Settlement because Sunoco will be required to continue to pay Transco the FT maximum rate for diminished service, plus Sunoco will have to pay

Williams a gathering rate for transportation from the Central Texas facilities. *Id.* According to Sunoco, the additional charges it could incur from having to obtain a portion of its service from Williams might range from \$15 million to \$28 million. *Id.* P 5, JA 312. For these reasons, Transco's act of terminating service from the subject seven receipt points and selling the subject West Texas facilities will violate the 1992 Settlement, causing harm to Sunoco. *Id.* P 10, JA 313.

Because the facilities Transco proposes to sell are gathering facilities, the Commission lacks authority under NGA § 7(b) to prevent their transfer. *Id.* P 15, JA 315. Moreover, because the facilities and the gathering affiliate are non-jurisdictional, two remedies normally available to the Commission for violation of a jurisdictional agreement are beyond the Commission's jurisdiction to impose here. *Id.* P 17, JA 315. The remedy of specific performance is unavailable because the sale will place the facilities in the possession of a non-jurisdictional gathering affiliate. *Id.* Similarly, the Commission cannot reject or condition the abandonment because the facilities are non-jurisdictional. *Id.*

Nevertheless, the Commission found that it has equitable, remedial authority under NGA § 16, 15 U.S.C. § 717o, to impose a remedy against Transco for its violation of the jurisdictional 1992 Settlement, by requiring Transco to reimburse Sunoco for the additional costs Sunoco will bear as a result of the charges it is

expected to incur from Williams. *Id.* P 18, JA 315. The Courts have held that the Commission has broad discretion under NGA § 16 when imposing remedies, including monetary compensation for harm resulting from violations of the NGA. *Id.* P 23, JA 317 (citing *Office of Consumers' Counsel v. FERC*, 808 F.2d 125, 129-30 ((D.C. Cir. 1987); *Niagara Mohawk Power Co. v. FPC*, 379 F.2d 150 (D.C. Cir. 1967)).

Alternatively, if the Commission's remedy were viewed as reducing Transco's rates for the services it continues to provide Sunoco under the 1992 Settlement, that remedy is within the Commission's jurisdiction under NGA § 5, 15 U.S.C. § 717d. Remand Order P 21, JA 316. The Commission has authority under NGA § 5 to modify Transco's jurisdictional rates charged Sunoco under the 1992 Settlement. *Id.* P 22, JA 316. The Commission met the NGA § 5 burden in finding that: (1) Transco's existing rate charged Sunoco under the 1992 Settlement would 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. *Id.*; Rehearing Order P 23, JA 317.

B. The Proposed Spin Down Violates the 1992 Settlement.

Transco contends on a number of grounds that the spin down would not breach the 1992 Settlement or the FT Service Agreement. The Commission reviewed the 1992 Settlement and the FT Service Agreement and found Transco's proposed unilateral reduction in service to be contrary to the language and intent of the agreements. Rehearing Order P 13, JA 361. This Court "affords a high degree of deference to the Commission's interpretation of a settlement agreement," arising from "Congress' express delegation of adjudicative authority to the agency, a delegation that 'closely resembles a direct Congressional authorization to implement the provisions of a statute through regulations.'" *Transcontinental Gas Pipe Line*, 922 F.2d at 869 (quoting *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987)). See also *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1502 (D.C. Cir. 1987) ("the law in this circuit requires a reviewing court to defer to an agency's interpretation of a settlement agreement concerning matters within its statutory field of administration").

Transco first contends that the 1992 Settlement and FT Service Agreement were intended only to cover Commission regulated transportation service, and, therefore, the spin down of non-jurisdictional facilities would not constitute a breach. Br. 25-26, 38. Nevertheless, the sale of Central Texas facilities to a third

party, not bound by the settlement, will result in *reduced* jurisdictional services being provided, in violation of the settlement. Rehearing Order P 17, JA 362. The Commission found that the proposed sale and reduction in jurisdictional service was not contemplated or agreed to by the parties. Remand Order P 12, JA 314; Rehearing Order P 19, JA 363.

Transco asserts that Article IV, Paragraph 3³ of the 1992 Settlement is a so-called *Memphis*⁴ clause reserving Transco's rights under NGA §§ 4 and 7 to make any and all NGA rate, tariff or certificate changes at the Commission, including the spin down. Br. 27-28, 38. However, the Commission concluded that the *Memphis* clauses in the 1992 Settlement and the FT Service Agreement did not preserve

³ Article IV, Paragraph 3 of the 1992 Settlement states:

Except as expressly provided by this Stipulation and Agreement, nothing herein is intended, nor shall it be construed, as limiting or affecting in any way Transco's rights under the Natural Gas Act to file and place into effect any changes in rates or modifications, additions, or deletions to its FERC Gas Tariff employing different concepts or methods from those reflected herein. Similarly, except as expressly provided by this Stipulation and Agreement, Sun preserves its rights under the Natural Gas Act.

R. 1 Attachment, Stipulation and Agreement, at 8, JA 66.

⁴ *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958).

Transco's right to unilaterally eliminate service from receipt points specified in those agreements. Rehearing Order P 9, JA 361.

Article IV, Paragraph 3 of the 1992 Settlement is memorialized in Article V, Paragraph 1 of the FT Service Agreement,⁵ which states that Sunoco would pay Transco in accordance with the FT rate schedule and the general terms and conditions "as filed with the Federal Energy Regulatory Commission, and as the same may be legally amended or superseded from time to time." *Id.* P 11, JA 361. The Commission found that the FT Service Agreement is the standard, *pro forma*, contract set forth in the tariff which incorporates the FT maximum rate on file and all applicable General Terms and Conditions of the tariff that are applicable to all FT shippers. *Id.* Thus, Article IV, Paragraph 3 of the 1992 Settlement only preserved Transco's right to file under NGA § 4 to propose changes in the

⁵ Article V, Paragraph 1 of the FT Service Agreement provides:

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.

R. 1 Attachment, Service Agreement, at 3, JA 72.

generally-applicable Rate Schedule FT maximum rate in its tariff or to propose changes to generally applicable tariff provisions. *Id.* Neither right relates to or supports Transco's claimed right to unilaterally eliminate receipt points specifically listed in the exhibit to the FT Service Agreement with Sunoco and guaranteed to Sunoco under the terms of the 1992 Settlement, and to sell the related facilities to an entity who would not be subject to the provisions of the 1992 Settlement. *Id.*

As this Court has found in prior cases involving Transco's rates, Transco's *Memphis* clauses authorize Transco to make unilateral filings to change the rates, terms and conditions of shippers' firm service. *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003). *See also Exxon Corp. v. FERC*, 206 F.3d 47, 51 (D.C. Cir. 2000). The Court rejected claims, however, that the *Memphis* clauses permitted Transco to unilaterally change the *service* provided under the agreement by requiring shippers to take additional services. *Exxon Mobil*, 430 F.3d at 1173; *Exxon Mobil*, 315 F.3d at 311. Rather, the *Memphis* clauses only require shippers to accept changes in the rates, terms or conditions of *service already agreed upon*. *Id.* Similarly, here, Transco is attempting to unilaterally change the *service* provided under the 1992 Settlement by *reducing* service. The *Memphis* clauses Transco relies upon do not authorize that result.

Transco also suggests that Article II, section A, Paragraph 2 of the 1992 Settlement⁶ reserved to Transco NGA § 7 rights to unilaterally effectuate the spin down without breaching the 1992 Settlement and FT Service Agreement. Br. 28. The Commission disagreed. Rehearing Order P 13, JA 361. The § 284.221(d) pre-granted abandonment referenced in that section only relates to abandonment of service at the end of the contract term, and not to abandonment of facilities. *Id.* Moreover, this provision of the 1992 Settlement reflects one of the special settlement features that differentiates Sunoco's service under the 1992 Settlement from service provided other FT shippers. *Id.* FT service normally provides for pre-granted abandonment of service upon expiration of the contract term. *Id.* However, under the 1992 Settlement, pre-granted abandonment of service is *not* authorized at the end of the twenty-year contract term, requiring Transco to file a NGA § 7(b) abandonment application to abandon service to Sunoco. *Id.*

⁶ Article II, section A, Paragraph 2 of the 1992 Settlement states:

Upon its effectiveness pursuant to Article V hereof, FERC approval of this Stipulation and Agreement shall provide that pregranted abandonment under section 284.221(d) of the Regulations will not be applicable to this FT service. As a result, abandonment of this FT service shall occur only in accordance with the procedures and standards set forth in section 7(b) of the Natural Gas Act.

R. 1 Attachment, Stipulation and Agreement, at 3-4, JA 61-62.

Further, Transco's section 7 abandonment rights were limited by other settlement provisions. Article II, Section A, Paragraph 1 of the 1992 Settlement⁷ provides for a twenty-year contract period, upon completion of which Transco is required to continue providing service to Sunoco as long as Sunoco matches the rate Transco can obtain from other shippers. This provision is memorialized in Article IV of the FT Service Agreement, which provides that the primary term of the agreement is until August 1, 2012. Rehearing Order P 13, JA 361. Thus, Transco's purported broad section 7 rights were, in fact, severely limited by the ability of Sunoco to continue service through the primary term and even beyond if it matched the rate that Transco could obtain from another shipper. *Id.*

⁷ Article II, Section A, Paragraph 1 of the 1992 Settlement provides:

The initial contract term (the "primary term"), shall be twenty (20) years from the first day of the first month following the Commission's approval of the Stipulation and Agreement having become effective pursuant to Article V hereof. Upon completion of the primary term, the contract shall be extended from year-to-year thereafter unless Sun or Transco gives written notice of termination not less than three years prior to the requested termination date. Unless Sun provides the appropriate notice to terminate service, Transco shall not take action to terminate service to Sun so long as Sun has agreed to pay rates no less favorable than Transco is otherwise able to collect from any other third-party shipper for such service.

R. 1 Attachment, Stipulation and Agreement, at 3, JA 61.

Transco argues that the 1992 Settlement and FT Service Agreement contemplated that Transco might divest itself of the facilities, because the 1992 Settlement, as embodied in the FT Service Agreement, was intended to survive any corporate changes. Br. 27-28. Transco relies for this argument on Article VI, Paragraph 5 of the FT Service Agreement, which states “this agreement shall be binding upon, and inure to the benefit of the parties hereto and their respective successors and assigns,” R. 1 Attachment, Service Agreement, at 4, JA 73, as proof that the parties contemplated a sale of the subject facilities. Br. at 28.

This provision likewise does not support Transco’s position. Rehearing Order P 19, JA 363. Even assuming, *arguendo*, that the parties contemplated that a sale of a portion of Transco’s facilities needed to provide the 1992 Settlement services would occur and would be governed by Article VI, Paragraph 5, then the deal embodied in the FT Service Agreement and 1992 Settlement would survive and would apply to the successor entity. *Id.* The 1992 Settlement would not be violated if the successor entity were to become subject to the 1992 Settlement and FT Service Agreement. *Id.*

That is not the case here. *Id.* Williams is not subject to the 1992 Settlement or the FT Service Agreement. *Id.* Moreover, the Commission found it disingenuous for Transco to rely on this succession provision to support the claim

that the proposed sale was contemplated by the parties, and at the same time argue that this same provision would not impose the 1992 Settlement and FT Service Agreement on its successor, Williams. *Id.* Thus, it is reasonable to assume that Sunoco did not contemplate, and therefore did not agree to, a corporate succession unilaterally undertaken by Transco that would result in Transco's replacement with an entity not subject to the 1992 Settlement and FT Service Agreement. *Id.*

Transco challenges the finding that Sunoco's firm transportation contract is for a "fixed" rate, *see* Br. 29, as Transco contends that it could refunctionalize its costs and charge Sunoco a gathering rate in addition to the FT maximum rate if no spin-down occurs. Br. 35-36. Transco contends that it has a separately stated gathering rate under Rate Schedule FT as reflected on Sheet No. 33 of its tariff, and therefore it could, if it retained the facilities, refunctionalize them as gathering and charge Sunoco a gathering rate in addition to the FT rate. *Id.* This argument likewise provides no basis upon which Transco could charge Sunoco anything other than the 1992 Settlement rate. Rehearing Order P 52, JA 371.

The Commission never suggested that the settlement rate is "fixed"; it is whatever the maximum rate for FT service is as set forth in the tariff and as that rate may change from time-to-time. *Id.* Nevertheless, this was a special settlement rate for Sunoco, because it provided for no additional charges above the FT maximum

rate despite the fact that a significant portion of the service provided under the settlement is on Transco's Outer Continental Shelf facilities. *Id.* P 45, JA 369. To transport volumes between the same points, any other Transco shipper would have to pay the FT rate for mainline firm transportation plus Transco's IT-Feeder rate to bring their gas to Transco's mainline where FT service begins. *Id.* Even if Transco refunctionalized its own facilities as non-jurisdictional gathering, the Commission would retain NGA §§ 4 and 5 "in connection with" rate and service jurisdiction over any gathering services Transco performs in connection with its jurisdictional transmission services. Remand Order P 12, JA 314. *See* NGA § 4(a) ("All rates and charges made, demanded, or received by any natural-gas company for or *in connection with* the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable" (emphasis added)); *Phillips Petroleum Co.*, 347 U.S. at 685 (intrastate gathering facility is subject to federal regulation if facility sells gas to companies distributing it over interstate pipelines). Therefore, the mere refunctionalization of Transco's facilities would change nothing. Remand Order P 12, JA 314.

Further, the separately stated gathering rates on Tariff Sheet No. 33 on which Transco relies apply only to certain specifically designated receipt points on Transco's system, as listed on Sheets 33A and 33B. Rehearing Order P 52, JA 370.

Neither sheet includes the Sunoco receipt points designated in Sunoco's FT Service Agreement under the 1992 Settlement. *Id.* Thus, even if Transco did retain the subject facilities and refunctionalize them as gathering, and filed revised IT-Feeder rates and separately unbundled gathering charges, the 1992 Settlement would still bar Transco from charging Sunoco anything other than the 1992 Settlement rate, *i.e.* the maximum FT rate as that rate may change from time to time. *Id. See also id.* P 17, JA 362.⁸

Indeed, Transco's proposed unilateral deletion of seven of the settlement's designated receipt points would be inconsistent with the terms of Article IV, Paragraph 2 of the 1992 Settlement, R. 1 Attachment, Stipulation and Agreement, at 8, JA 66, which states that "[i]t is specifically understood and agreed that this Stipulation and Agreement is an integrated settlement and that the various parts hereof are not severable without upsetting the balance of consideration achieved

⁸ In this hypothetical circumstance, Transco could charge the new gathering rates to other shippers who get service from Transco on the refunctionalized facilities because they are not subject to the 1992 Settlement. Rehearing Order P 52, JA 371. The 1992 Settlement, however, provides for no charges above the FT maximum rate despite the fact that a significant portion of the service provided under the 1992 Settlement is on Transco's Outer Continental Shelf facilities. *Id.*; *see also id.* P 17, JA 362.

between Transco and Sun.” Rehearing P 20, JA 363. Transco’s own comments in support of the 1992 Settlement emphasized this very point.

In considering the joint offer of settlement, the Commission should be mindful that [the 1992 Settlement] is the product of protracted and difficult negotiations between Transco and Sun on a broad array of disputed issues. The delicate balance of considerations is a result of compromise by both parties. The settlement cannot be severed into parts, nor can it be modified, without upsetting the balance of considerations.

Sunoco Complaint, R. 1, January 10, 2001 Letter Attachment at 3, JA 153 (quoting Transco’s initial comments in support of the 1992 Settlement).

Accordingly, Transco’s proposed unilateral abandonment by sale of the seven Central Texas receipt points prior to the end of the primary term of the contract is not authorized by the reservation of any rights in the 1992 Settlement or the FT Service Agreement. Rehearing Order P 13, JA 361. Instead, Transco’s position conflicts with the letter and intent of the 1992 Settlement and FT Service Agreement for Sunoco to continue to receive transportation service from the 1992 Settlement’s designated receipt points at the settlement rate for at least twenty years and thereafter so long as Sunoco wishes. *Id.*

C. The Commission’s Remedy for Breach of the 1992 Settlement Was Well Within Its Jurisdiction.

1. NGA §§ 16 and 5 Provide the Commission Ample Authority to Order the Remedy Imposed Here.

The Commission has broad powers under NGA § 16 in crafting equitable remedies for violations of settlements, contracts, and regulations that conflict with the purposes of the NGA. Remand Order P 18, JA 315; Rehearing Order P 40, JA 368 (citing *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986)). Section 16 gives the Commission ““broad authority so as to do equity consistent with the public interest.”” *Northern Natural Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986) (quoting *Columbia Gas*, 750 F.2d at 109). The Commission may ““use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.”” *Id.* (quoting *Niagara Mohawk*, 379 F.2d at 158). Section 16 “unquestionably gives FERC the authority, in fashioning remedies, to consider equitable principles.” *Id.*

Coastal recognized the Commission’s authority to impose a monetary remedy to restore the *status quo ante* or to prevent unjust enrichment for the pipeline’s injury to its customers attributable to the pipeline’s unlawful abandonment of interstate service. Rehearing Order P 40, JA 368. *See Coastal*,

782 F.2d at 1253. *Coastal* also recognized that the Commission could order a pipeline to reimburse a customer for volumes of gas the customer had to buy to replace volumes it should have received under the contract. *Id.* Thus, it is consistent with *Coastal* to impose a monetary remedy here for Transco's termination of service from the existing receipt points in violation of the 1992 Settlement, which will cause injury to Sunoco in the form of increased costs (gathering charges from Williams). Rehearing Order P 40, JA 368. Contrary to Transco's protestations, the Commission's remedy is not a penalty, *see* Br. 18 n.20, but rather reimbursement to Sunoco for its increased costs, thereby acting to restore the *status quo ante* under the 1992 Settlement at least as far as the total costs Sunoco and Transco agreed Sunoco would incur under the settlement. Rehearing Order P 40, JA 368.

Likewise, *Office of Consumers' Counsel*, 808 F.2d at 129-130, held that the Commission had remedial authority to modify a settlement and condition abandonment authorization on the pipeline paying for the costs of converting to propane service (a non-jurisdictional service) that its customers incurred as a result of the pipeline terminating natural gas service to them. Rehearing Order P 41, JA 368. Here, the Commission similarly directed Transco to pay Sunoco for the increased non-jurisdictional costs (Williams gathering charges) it will incur as a

result of Transco's abandonment of service from the subject seven receipt points.

Id.

Transco claims *Consumers' Counsel* is inapposite because, there, the Commission conditioned abandonment on the pipeline's obligation to pay the costs, whereas here the Commission did not so condition abandonment. Br. 18 n.20. However, while here the Commission lacks jurisdiction to condition abandonment of gathering facilities, *Consumers' Counsel* still upheld the same end result: the pipeline had to pay money to its customers to compensate them for the increased non-jurisdictional costs they had to bear as a result of unlawful conduct by the pipeline. Rehearing Order P 41, JA 368.

The Commission recognized that its remedy could alternatively be seen as reducing Transco's rate under the 1992 Settlement, *i.e.*, the FT maximum rate, because the rate Sunoco pays Transco for transportation service will be offset by the reimbursement amounts relative to the same gas volumes. *Id.* P 23, JA 364. Even under this alternative view, such a reduction would be authorized under NGA § 5. *Id.*; Remand Order P 22, JA 316.

The Commission has authority under NGA § 5 to modify Transco's jurisdictional rates charged Sunoco under the 1992 Settlement. Remand Order P 22, JA 316. The Commission found that it met the NGA § 5 burden in finding that:

(1) Transco's existing rate charged Sunoco under the 1992 Settlement would 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. *Id.*; Rehearing Order P 23, JA 364.

Transco contends that the Commission failed to satisfy § 5 because "there is no lawful basis for modifying the contracts to cover non-jurisdictional services." Br. 31. The Commission's action did not, however, extend the contract to cover *non-jurisdictional* services, but rather reduced the applicable rates to reflect diminished *jurisdictional* service. Remand Order P 22, JA 316. The reduction in Transco's net revenues from its continued transactions with Sunoco is reasonable and equitable in light of the additional costs Transco will be directly, and unilaterally, causing Sunoco to incur. Rehearing Order P 47, JA 370.

2. Transco's Remaining Challenges to the Commission's Jurisdiction Are Unavailing.

Transco's primary challenge to the Commission's jurisdiction to order the remedy imposed here is that, in so doing, the Commission is thereby asserting rate

jurisdiction over non-jurisdictional gathering service, in contravention of *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005); *Williams Gas Processing – Gulf Coast, L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004); and *Conoco Inc. v. FERC*, 90 F.3d 536, 550-53 (D.C. Cir. 1996). Br. 14-20.

Contrary to Transco’s claims, the Commission has not required, and has no intent to require, a remedy where the “legal substance” will indirectly regulate Williams’ non-jurisdictional gathering rates or services. Rehearing Order P 25, JA 364. The Commission’s purpose is to provide Sunoco with the benefit of its bargain under the 1992 Settlement in a remedy that has no affect on non-jurisdictional gathering rates or services of Williams. *Id.* The Commission is in no way establishing the type of contract that Sunoco may enter into with Williams or in any way regulating, directly or indirectly, the rates Williams may charge Sunoco or any other aspect of Williams’ services or facilities. *Id.* Williams is free to charge an unregulated rate and can provide services under unregulated terms and conditions agreed to by the parties. *Id.* If this remedy did indirectly regulate Williams’ rates, it would have an effect on the rates Williams could charge Sunoco, but that is not the case. *Id.* Rather, the Commission’s remedy only affects Transco’s net charges to Sunoco. *Id.*

Because the Commission's remedy in no way affects Williams or its non-jurisdictional service, the cases relied upon by Transco are inapposite. *See* Br. 14. In *Columbia*, the Commission enforced a tariff provision requiring metering on non-jurisdictional gathering lines, asserting jurisdiction on the ground that the tariff provision was voluntarily filed by the pipeline. 404 F.3d at 461. The Court found that the voluntary filing of the provision could not extend the Commission's jurisdiction to such non-jurisdictional activity. *Id.* at 463; Rehearing Order P 33, JA 366.

Here as the Commission is not attempting to enforce a non-jurisdictional component of an otherwise jurisdictional settlement. Remand Order P 19, JA 316; Rehearing Order PP 21, 31, JA 364, 366. The 1992 Settlement's provisions, related to service from the subject seven receipt points, "are not being enforced as that would require Transco to continue to provide service from the subject seven receipt points and to charge the 1992 Settlement rate, *i.e.*, the FT maximum rates, for such service." Remand Order P 19, JA 316; Rehearing Order P 21, JA 363. Williams will be performing the gathering at whatever rate it wishes to charge and will not be regulated by the Commission. *Id.*

Conoco overturned orders conditioning spin-down authority on the gathering affiliate offering default contracts to existing customers.⁹ 90 F.3d at 542, 550-53. The Court found that the Commission lacked jurisdiction to require the non-jurisdictional gathering affiliate to execute gathering agreements with the pipeline's existing customers.¹⁰ *Id.* at 552. Similarly, in *Williams*, the Court rejected Commission efforts to regulate a gathering rate charged by a gathering affiliate, finding that the Commission had not shown that the gathering affiliate's price hikes frustrated the Commission's ability to maintain just and reasonable rates on the pipeline. 373 F.3d at 1343.

Here, in contrast, the Commission orders imposed no obligation on *Williams*, nor made any effort to regulate *Williams*' rates. Remand Order P 20, JA 316; Rehearing Order P 22, JA 364. Requiring *Transco* to reimburse *Sunoco* for additional costs *Sunoco* incurs from *Williams* does not, directly or indirectly,

⁹ The "default" contracts, which the court in *Conoco* found the Commission lacked authority to impose, were two-year term contracts the Commission ordered affiliated gatherers in spin-down proceedings to offer the pipeline's existing customers, which contained non-discriminatory, open access terms and conditions of service consistent with those included in the existing contracts with the pipeline and at the same rate currently charged by the pipeline. Rehearing Order P 25 n.17, JA 364-65 (citing *Conoco*, 90 F.3d at 542).

regulate Williams' rates or services. *Id.* There is no "default contract," *see* Br. 14, being imposed on Williams. Rehearing Order P 25, JA 364-65.

FPC v. Conway Corp., 426 U.S. 271 (1976), held that the Commission may take non-jurisdictional rates into account in setting jurisdictional rates as long as the rate remedy operates only against the jurisdictional rate.¹¹ Rehearing Order P 28, JA 365. Here, consistent with *Conway*, the Commission's remedy only affects Transco's jurisdictional rates and does not affect Williams' rates or services. *Id.*

Transco contends that the distinction between Williams' gathering rates and Transco's rates is "meaningless" because the payment to Sunoco will in any event come "100% out of the companies' commonly owned coffers." Br. 19. However, it was a condition of the spin down that Transco and Williams operate on an arms-

¹⁰ Nevertheless, the *Conoco* Court specifically left open the possibility that the Commission may have other options for assuring customers continuity of service and reasonable rates for gathering. *Id.* at 553.

¹¹ Similarly, the Commission has the jurisdiction to exclude, as imprudent, non-jurisdictional costs from the cost of service used to compute pipeline jurisdictional rates without indirectly regulating such non-jurisdictional costs. Rehearing Order P 28 n.22, JA 365. The Commission also has the jurisdiction to reduce a jurisdictional rate to reflect a reduction in non-jurisdictional costs, like compressor fuel or electric power costs, which are recovered in the jurisdictional rates. *Id.*

length basis.¹² Rehearing Order P 26, JA 365. Accordingly, Williams will be paid by Sunoco in full at whatever rate Williams can obtain, and, if the affiliates are operating at arms-length as required, it should make no difference to Williams that Transco will ultimately reimburse Sunoco for its increased costs in reduced rates. *Id.* Nothing the Commission directs Transco to do affects the rates Williams charges or the profits it may exact from its non-jurisdictional gathering services. *Id.*

Thus, contrary to Transco's claims, *see* Br. 19-20, the Commission is not attempting to regulate indirectly that which it may not regulate directly. Therefore, *Richmond Power & Light Co. v. FERC*, 574 F.2d 610 (D.C. Cir. 1978), is distinguishable. Rehearing Order P 29, JA 366. *Richmond* reversed orders requiring otherwise non-jurisdictional "wheeling" as a condition of jurisdictional rates, on the ground that "[w]hat the Commission is prohibited from doing directly it may not achieve by indirection." 574 F.2d at 619-20. Here, *Richmond* is not applicable because the Commission is not arriving at an unlawful end result, *i.e.*, a

¹² In its July 25, 2001 Order granting abandonment of the subject facilities, the Commission noted that "Transco already has in its tariff standards of conduct for gathering affiliates that prevent it from acting in a discriminatory manner by guarding against the risk of affiliate abuse and ensuring an arm's length relationship between it and [Williams]." 96 FERC ¶ 61,115 at p. 61,435.

forced change in Williams' gathering rates, through indirect means. Rehearing Order P 29, JA 366. Nothing the Commission does to Transco's rates will have any effect on the rates Williams charges Sunoco. *Id.* As required by *Conway*, the "end result" of the Commission's remedy will not affect Williams' non-jurisdictional rates. *Id.* The "end result" effectively achieved here is lawful and within the Commission's jurisdiction because it relates only to the net jurisdictional charges Sunoco pays Transco for jurisdictional transmission service. *Id.*

Transco also relies on *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 635 (1945), for the proposition that the Commission may not set jurisdictional rates to appropriate the profits of either the regulated company's or its affiliate's unregulated business. Br. 18 n.20. There will, however, be no appropriation of profits from an unregulated business under the Commission's remedy. Rehearing Order P 30, JA 366. Transco will not be gathering Sunoco's gas once the sale of the subject facilities takes place, so the Commission's remedy cannot have any effect on Transco's profits from unregulated business. *Id.* Williams will not be regulated, and Williams can keep any profits it obtains from the charges it exacts from Sunoco. *Id.* Therefore, there is no appropriation of non-jurisdictional profits. *Id.*

Further, Transco's argument that Commission modified the 1992 Settlement in a manner that must meet the *Mobile-Sierra*¹³ public interest standard is unavailing. *See* Br. 31. *Mobile-Sierra* does not address the appropriate equitable remedy for a violation of a Commission-approved settlement. Rehearing Order P 42, JA 368. In any event, the Commission's action here meets the public interest goal of preserving the sanctity of Commission-approved settlements and contracts. *Id.* The Commission adopted the rationale of *Brooklyn Union v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005), that "a strong commitment to preexisting settlements would better serve the public interest than allowing modifications over the objection of one or more parties." *Id.*

Transco also contends that the Commission is asserting jurisdiction over any potential contractual dispute between Williams and Sunoco over Williams' gathering rates, a matter which Transco argues should be adjudicated by the state courts. Br. 20-21. Transco is incorrect. Rehearing Order P 35, JA 367. Such a dispute would be beyond the Commission's jurisdiction to resolve. *Id.* To the

¹³ *Mobile-Sierra* refers to *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

contrary, the Commission's remedy has absolutely no impact on any contractual arrangements between Williams and Sunoco. *Id.*

The Commission's remedy only affects the jurisdictional transportation rates Transco charges Sunoco under a Commission-approved settlement, not the interpretation of a private contract under state contract law. *Id.* The FT Service Agreement, under which Sunoco receives service, is simply the *pro forma* FT Service Agreement of the tariff, the interpretation of which is not open to question. *Id.* The interpretation of a Commission-approved settlement is solely within the Commission's special expertise and is given great deference and weight by the courts. *Id.* (citing *Lomack Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000)). Here, the Commission was called on to interpret how the 1992 Settlement should be applied in light of events and changed circumstances not expressly covered by the 1992 Settlement or the Commission's orders approving the 1992 Settlement. *Id.* The Commission found it appropriate to retain its jurisdiction over that matter. *Id.*

D. The Commission’s Remedy Is Equitable and Reasonable.

The Commission required Transco to reimburse all additional costs Sunoco incurs from Williams on the ground that this would best preserve the benefit of Sunoco’s rate bargain under the 1992 Settlement. Rehearing Order P 43, JA 369. Transco argues that this remedy is in fact inequitable because it requires Transco to “subsidize” Sunoco for its gathering costs by establishing a “free” rate for gathering, and would cause Transco to fail to recover the full cost of service for services provided under the 1992 Settlement. Br. 39-41.

It mischaracterizes both the 1992 Settlement and the Commission’s remedy to view them as parsing out separate cost-based components for gathering, as opposed to transmission, and providing a “free” gathering service. Rehearing Order P 48, JA 370. The service provided Sunoco under the 1992 Settlement from the subject receipt points never was “free”; Sunoco paid the maximum FT rate for firm transportation service from the 1992 Settlement’s agreed-to Outer Continental Shelf receipt points to the Pennsylvania delivery points. Rehearing Order PP 45, 48, JA 369-70.

Transco’s arguments regarding cost recovery likewise incorrectly assume that the 1992 Settlement rate is cost-based and that it includes a cost component for the gathering facilities Transco intends on selling to Williams. Rehearing Order P 45,

JA 369. As discussed, the 1992 Settlement rate was a black-box settlement rate, not a cost-based rate designed to recover the cost of the transportation services Transco agreed to provide Sunoco under the 1992 Settlement. *Id.* Rather, in return for certain agreements and concessions by Sunoco in settlement of other take-or-pay proceedings, Transco agreed to provide Sunoco with firm transportation service from certain Outer Continental Shelf receipt points on its offshore supply lateral system to delivery points in Pennsylvania, charging only the maximum FT rate for the entire haul. *Id.* Any other shipper tendering gas at those Outer Continental Shelf points would be subject to both the IT-Feeder rate and the FT rate. *Id.*

Accordingly, this is not a rate design issue. Remand Order P 28, JA 318. Sunoco's transportation rate was settled. *Id.* Under the 1992 Settlement, Transco agreed to charge, and Sunoco agreed to pay, only the maximum FT rate 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 IT-Feeder rate in addition to the FT maximum rate. *Id.* In the event that Transco completes the spin-down transaction, 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.

Id. Here, the Commission is simply requiring Transco to make Sunoco whole for those additional costs. *Id.*

Transco points to the fact that, under its rate case settlement in Docket No. RP01-245-000, *et al.*, Transco must file to reduce its jurisdictional cost of service, and its rates, to reflect the sale of the subject gathering facilities when that sale occurs.¹⁴ Br. 22. Thus, Transco asserts that the jurisdictional transmission service intended to be covered by the firm transportation contract will in fact continue to be rendered at just and reasonable rates. *Id.*

An adjustment to the FT maximum rate to reflect the sale of the subject facilities would only affect the maximum FT rate that Sunoco pays as a settlement rate, which was never intended to reflect the cost of the specific services provided Sunoco under the 1992 Settlement. Rehearing Order P 45, JA 369. If the adjustment to the FT rate reduced the maximum rate for FT service, that adjustment

¹⁴ Transco's existing general system-wide maximum rates resulted from a partial settlement of its NGA § 4 rate case in Docket No. RP01-245-000, *et al.*, as approved in an order issued July 23, 2002. *Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,085 (2002). Article V, section B of that settlement established procedures for Transco to file to adjust its system-wide rates to reflect the sale of certain facilities, including the subject facilities. Rehearing Order P 43 n. 46, JA 369.

is part of the bargain struck in the 1992 Settlement. *Id.* The 1992 Settlement rate is not fixed; it is whatever the FT maximum rate is as such rate may change from time to time. *Id.*

Further, while the adjustment to FT rates to remove the gathering charges for the subject facilities may reduce the FT maximum rate Sunoco pays Transco under the 1992 Settlement, that reduction would not compensate Sunoco for the increased gathering costs. *Id.* Rather, that reduction would likely be *de minimis* due to the relatively small cost of the limited facilities being sold that carry Sunoco's gas, *vis-à-vis* Transco's entire cost-of-service allocable to the FT service, and would not adequately compensate Sunoco for the increased costs it ultimately will incur. *Id.*

Accordingly, Transco's argument that reimbursing Sunoco will cause it to under-recover its FT cost of service is irrelevant since Sunoco's settlement rate was never cost-based. Rehearing Order P 46, JA 370. Consistent with the 1992 Settlement, the Commission's remedy does not set a cost-based rate for services Transco will continue to provide Sunoco, but rather provides Sunoco with an equitable remedy to make it whole for the harm incurred by Transco's unilateral abandonment of IT-Feeder facilities needed to fulfill its service obligation under the 1992 Settlement. *Id.*

Viewed as action taken under NGA § 5, the Commission is reducing a non-cost based, black-box settlement rate for Sunoco with the purpose of providing an equitable remedy for Transco's unilateral actions by restoring the rate *status quo* for Sunoco under the 1992 Settlement. Rehearing P 47, JA 370. The reduction in Transco's net revenues from its continued transactions with Sunoco is reasonable and equitable in light of the additional costs Transco will be directly, and unilaterally, causing Sunoco to incur. *Id.*

Transco claims that the Commission's remedy is at odds with the Commission's actions in other spin-down proceedings. Br. 41-42. Other spin-down cases are inapposite because they did not involve a violation of a Commission-approved settlement. Rehearing Order P 49, JA 370. Here, the underlying settlement that drives the outcome of this case was a part of the consideration for settling five years of litigation over take-or-pay and service restructuring issues not present in the normal spin-down case. *Id.* Unraveling this settlement and returning the parties to complex, decades-old take-or-pay litigation that the instant 1992 Settlement resolved raises wholly different administrative and policy issues than in the normal spin-down case. *Id.*

E. Transco's Procedural Claims Are Without Merit.

Transco asserts that Sunoco's complaint was an unlawful collateral attack on the Commission's abandonment orders and was a *de facto* late-filed request for rehearing of those orders which the Commission should have dismissed under NGA § 19. Br. 42-43. Transco asserts that it included in its abandonment filing references to the seven upstream gathering points in the FT Service Agreement with Sunoco, and that the "disavowal" of the FT Service Agreement was the basis for Sunoco's protest in that proceeding. *Id.* at 43.

The Commission disagreed. Rehearing Order P 54, JA 371. The Commission did not reverse or modify the abandonment order in any way. *Id.* While Sunoco's complaint challenged the abandonment, Sunoco also raised issues about the application of the 1992 Settlement that were appropriate for the Commission to review even in light of the Commission's action in granting Transco's request for abandonment. *Id.*

For example, Sunoco's alternative request for relief was to restore the parties to the position they had been in prior to the settlement. *Id.* While Transco did discuss the removal of the subject receipt points in its abandonment application, it omitted material facts about the existence of the 1992 Settlement and the circumstances under which that settlement was executed. *Id.* Indeed, because the

Commission has found that it lacks jurisdiction to deny abandonment of non-jurisdictional gathering facilities, the abandonment proceeding would have been the wrong forum for Sunoco to raise claims for monetary relief based on the 1992 Settlement. *Id.* It necessarily would have had to file a separate complaint to raise these settlement issues. *Id.* Thus, the Commission found that it was reasonable to address issues that were not before the Commission in the abandonment proceeding. *Id.*

F. The Commission's Remedy Was in the Public Interest and Does Not Undermine Its Unbundling Policies.

The complex rate and regulatory issues arising from pipeline rate filings are frequently resolved by settlements. The Commission has long taken the view, as has this Court, that settlements are in the public interest and should be encouraged. *See, e.g., United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984); *Pennsylvania Gas & Water Co. v. FPC*, 463 F.2d 1242 (D.C. Cir. 1972). *See also Brooklyn Union*, 409 F.3d 404 (cited in Remand Order P 34, JA 319, and Rehearing Order P 55, JA 371). Here, the Commission's action was in the public interest because it enforced the sanctity of a jurisdictional settlement and preserved Sunoco's benefit of the rate bargain under the 1992 Settlement. Remand Order P 1, JA 311; Rehearing Order P 55, JA 371. Accepting Transco's argument, on the

other hand, that it could unilaterally sell off facilities needed to fulfill commitments under a Commission-approved settlement, despite Sunoco's objections, with resulting increased costs to Sunoco, would undermine the Commission's jurisdiction to enforce the sanctity of jurisdictional contracts and settlements it approves. Remand Order P 34, JA 319; Rehearing Order P 55, JA 371.

Nevertheless, Transco contends that the remedy ordered here contradicts and undermines the Commission's "long-standing pro-competitive gathering unbundling policies." Br. 41. The Commission found instead that the remedy imposed here is unique to Transco and Sunoco because of the violation of a Commission-approved settlement involving only those two parties. Rehearing Order P 57, JA 371. Thus, enforcement of that settlement here should not affect pipeline industry decisions on whether to spin down gathering facilities. *Id.*

On balance, consistent with *Brooklyn Union*, the Commission is simply supporting the important policy of ensuring that parties abide by the deals they enter into in a Commission-approved settlement by preserving the benefit of the bargains reached under the settlement. Rehearing Order P 58, JA 372. It is consistent with the Commission's policy of encouraging settlements to avoid the waste of administrative resources that results from allowing one party to unilaterally unravel existing settlements that terminated complex litigation over long-settled issues. *Id.*

By providing Sunoco with a remedy, the Commission is not expanding its jurisdiction but is simply ensuring that Sunoco receives the benefit of its rate bargain under the 1992 Settlement despite changed circumstances beyond Sunoco's control brought about by the unilateral actions of the other party to the settlement.

Id. To do otherwise would permit one party to render the settlement and associated service agreement meaningless and would substantially undermine the value of the Commission's approval of settlements. *Id.*

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 11,489 words, not including the tables of contents and authorities, the glossary, the certificates of counsel and the addendum.

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