

ARCO Pipe Line Company,
Order Accepting for Filing and Suspending
Tariff and Tariff Supplements Subject to
Refund and Investigation, Rejecting Other
Tariff Supplements as Moot, and
Consolidating Proceedings
55 FERC ¶ 61,153 (1991)

In ARCO Pipe Line Company, 55 FERC ¶ 61,153 (1991), the Federal Energy Regulatory Commission (Commission) found that under certain factual circumstances, it can deviate from its policy expressed in Buckeye Pipe Line Company, 13 FERC ¶ 61,267 (1980) that oil pipeline rate filings shall be suspended for only one day. The Commission said in Buckeye that there may be cases in which an exception to the one-day suspension policy is warranted where it has reason to believe:

- (1) a particular unadjudicated oil pipeline rate increase may have significant anticompetitive effects or impose undue hardships on a shipper or a group of shippers, and
- (2) a suspension for the maximum period permitted by the Interstate Commerce Act (ICA) might have sufficient mitigative effects to render such a suspension worthy of consideration.

55 FERC ¶ 61,153 at 61,489.

In the instant order, the Commission found that an exception to the one-day suspension policy was justified. The Commission stated that in Cheyenne Pipeline Company, 19 FERC ¶ 61,077 (1982) it had suspended proposed tariff changes and cancellations for seven months based upon its analysis of specific sections of the ICA and in consideration of claims that the pipeline engaged in unfair and monopolistic practices. In the Cheyenne order the Commission found that the anticompetitive effect of the proposed change and potential hardship on the shippers indicated that a longer suspension period could provide sufficient mitigative effects to warrant such a suspension. (55 FERC at ¶ 61,489).

The Commission found in ARCO that a seven-month suspension was warranted because of intervenor Sinclair Oil Corporation's assertions of serious anticompetitive effects and economic harm. (Id. at 61,489).

ARCO Pipe Line Company,
Order Accepting for Filing and Suspending
Tariff and Tariff Supplements Subject to
Refund and Investigation, Rejecting Other
Tariff Supplements as Moot, and
Consolidating Proceedings
55 FERC ¶ 61,153 (1991)

[¶ 61,153]

ARCO Pipe Line Company, Docket Nos. IS91-26-000, IS91-27-000, and IS90-34-000

Order Accepting for Filing and Suspending Tariffs and Tariff Supplements Subject to Refund and Investigation, Rejecting Other Tariff Supplements as Moot, and Consolidating Proceedings

(Issued April 30, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

This order concerns various tariffs and tariff supplements filed by ARCO Pipe Line Company (ARCO) relating to the termination of service on a certain portion of its petroleum products pipeline system.¹ This order: (1) accepts certain tariffs and supplements for filing and suspends them for seven months, to be effective December 1, 1991, subject to refund and investigation; (2) rejects certain other sup-

plements as moot; and (3) consolidates the above-captioned dockets with the ongoing proceeding in Docket No. IS90-34-000.

Background

On May 30, 1990, in Docket No. IS90-34-000, ARCO filed certain tariffs, to be effective June 30, 1990, to reflect proposed increases in the rates for the transportation of

¹ See, e.g., *Trunkline Gas Company*, 50 FERC ¶ 61,085, at pp. 61,240-61,243 (1990); *ANR Pipeline Company*, 50 FERC ¶ 61,091, at pp. 61,257-61,260 (1990); *Mississippi River Transmission Corporation*, 50 FERC ¶ 61,092, at pp. 61,261-61,263 (1990); *Equitrans Inc.*, 50 FERC ¶ 61,103, at pp. 61,339-3 and 61,340 (1990); *Alabama-Tennessee Natural Gas Company*, 51 FERC ¶ 61,036 (1990); *ANR Pipeline Company*, 51 FERC ¶ 61,038 (1990). These cases indicate that my opposition is based on a reading of the policy statement, prior Commission precedent handling rate design changes, and my obligation to protect consumers of natural gas from unreasonably high rates.

² 53 FERC ¶ 63,019 (1990).

³ *ANR Pipeline Company*, 50 FERC ¶ 61,091, at p. 61,257 (1990); *Trunkline Gas Company*, 50 FERC ¶ 61,085, at p. 61,240 (1990).

¹ Supplement No. 2 to FERC Tariff No. 1766, FERC Tariff No. 1778, FERC Tariff No. 1779, Supplement No. 1 to FERC Tariff No. 1779, Supplement No. 4 to FERC Tariff No. 1766, Supplement No. 3 to FERC Tariff No. 1766, and Supplement No. 2 to FERC Tariff No. 1765.

souri unless ARCO delivers petroleum products to it. Sinclair maintains that despite ARCO's large rate increases for transportation of petroleum products to these terminals, it has been unable to find any alternative system that can physically deliver petroleum products to these terminals. If ARCO proceeds with its plan to refuse all further shipments of petroleum products, Mr. Fink asserts, Sinclair will be irreparably and irretrievably injured. Mr. Fink states that Sinclair will have no viable means to deliver petroleum products to its Mexico and Carrollton, Missouri terminals and will be at the mercy of other pipelines that possess market power for deliveries to its other terminal operations.

Sinclair alleges that the tariffs, if implemented, would be unlawful because they would: (1) result in rates, and terms and conditions that are unjust and unreasonable, in violation of section 1(5) of the Interstate Commerce Act (ICA); (2) cause unjust discrimination, in violation of section 2 of the ICA; and (3) cause undue or unreasonable preference and prejudice, in violation of section 3(1) of the ICA. Sinclair asserts the tariffs would result in a drastic and irreparable injury to Sinclair and would permanently and adversely affect competition in the Kansas and Missouri petroleum products markets. Accordingly, Sinclair requests that the tariffs be suspended for seven months as allowed by section 15(7) of the ICA.

On April 29, 1991, ARCO filed a motion for leave to file an answer to Sinclair's protests. ARCO states that the Commission lacks authority to disapprove or prevent abandonments of service by an oil pipeline carrier, either generally or in the context of this case.

Discussion

Based upon a review of ARCO's filing the Commission finds that the proposed tariffs and tariff supplements have not been shown to be just and reasonable and may be unjust and unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission will accept ARCO's proposed tariffs and tariff supplements for filing and suspend their effectiveness, subject to investigation and refund, and to the conditions set forth below.

Sinclair's protest raises serious questions as to the lawfulness of ARCO's proposed tariff amendments under sections 1(5), 2, and 3(1) of the ICA. The proposed changes are alleged to discriminate against a captive shipper who has no alternative to ARCO for service to its Mis-

souri terminals. By not allowing further nominations on the line ARCO is essentially terminating service which would leave Sinclair with no pipeline service for its terminals. Further, the actions by ARCO are alleged to be retaliatory in nature, resulting from Sinclair's protest of ARCO's rate increase in Docket No. IS90-34-000.

Generally, since the *Buckeye Pipe Line Company* order⁷ the Commission has suspended oil pipeline tariffs for one day. However, the *Buckeye* order stated that there may be cases that arise in which an exception to the one-day rule is warranted; namely, when the Commission has reason to believe: (1) the particular unadjudicated oil pipeline rate increase there involved may have significant anticompetitive effects or impose undue hardship on a shipper or a group of shippers, and (2) a suspension for the maximum period permitted by the Interstate Commerce Act might well have sufficient mitigative effect to render such a suspension worthy of consideration.

The Commission finds that in light of the allegations and supporting affidavit by Sinclair, an exception to the one-day rule announced in *Buckeye* is justified. In *Cheyenne Pipeline Company*, the Commission suspended the proposed tariff changes and cancellations for seven months based on an analysis of the relevant sections of the ICA including sections 1(4), 3(1), 15(1), and 15 (7) and in consideration of the claims of unfair and monopolistic practices.⁸ In that order the Commission found that "[i]ssues concerning the anticompetitive effect of the proposed change, and potential hardship on the shippers indicate that a longer suspension could provide sufficient mitigative effect to warrant such a suspension."⁹

The Commission finds that the standards established in *Buckeye* and *Cheyenne* are satisfied in this case where Sinclair has asserted that ARCO's proposed tariffs may have serious anticompetitive effects, as well as cause serious economic harm. Accordingly, in view of the potential hardship on Sinclair and the fact that a suspension for the maximum period could provide a sufficient mitigative effect, the Commission will suspend Supplement Nos. 2 and 3 to FERC Tariff No. 1766, Supplement No. 2 to FERC Tariff No. 1765, and FERC Tariff Nos. 1778 and 1779 for seven months, to be effective December 1, 1991. In addition, the Commission rejects as moot, due to the seven-month suspension period, Supplement No. 1 to FERC

⁷ 13 FERC ¶ 61,267, at p. 61,596 (1980).

⁸ 19 FERC ¶ 61,077 (1982). See, also, *Williams Pipe Line Company*, 50 FERC ¶ 61,179 (1990), where the Commission suspended tariffs for seven months

due to the possibility that the proposed rate increase and restructuring would have anticompetitive effects and result in undue hardship on certain shippers.

⁹ 19 FERC ¶ 61,077, at p. 61,122 (1982).

Tariff No. 1779 and Supplement No. 4 to FERC Tariff No. 1766.

Pursuant to 49 U.S.C. § 15(7) and 18 C.F.R. § 340.1, the Commission shall require ARCO to keep an accurate account of all rates and/or charges collected subject to refund. Interest shall be determined as set forth in 18 C.F.R. § 340.1.

The Commission orders:

(A) Pursuant to 49 U.S.C. § 15(7), an investigation shall be instituted into the lawfulness of the tariffs and tariff supplements proposed by ARCO.

(B) The investigation in Docket Nos. IS91-26-000 and IS91-27-000 shall be consolidated with the ongoing proceeding in Docket No. IS90-34-000.

(C) Pending hearing and decision, ARCO's proposed Supplement Nos. 2 and 3 to FERC Tariff No. 1766, Supplement No. 2 to FERC Tariff No. 1765, and FERC Tariff Nos. 1778 and 1779 are accepted for filing and suspended for seven months, to be effective December 1, 1991, subject to investigation and refund.

(D) Supplement No. 1 to FERC Tariff No. 1779 and Supplement No. 4 to FERC Tariff No. 1766 are rejected as moot.

(E) Pursuant to 18 C.F.R. § 340.1, ARCO shall keep an accurate account of all amounts received by reason of the instant filings, specifying when, by whom, and in whose behalf such amounts are paid. The accounts of the transactions shall be in detail so that refunds with interest can be ordered of any portion of the rates or charges found unjustified.

Commissioner Trabandt *dissented* with a separate statement attached.

Commissioner Terzic *dissented* with a separate statement attached.

Charles A. TRABANDT, Commissioner, dissenting:

ARCO Pipe Line Company (ARCO), an oil pipeline, filed with this Commission a notice that effectively would cancel service in certain markets. The majority suspends the tariff containing that proposal for seven months. I dissent.

With this suspension, a majority of three Commissioners, in the name of protecting a "captive" customer, arrogates to itself authority to regulate abandonment of oil pipeline service under the Interstate Commerce Act. I find one problem with that: the Interstate Commerce Act confers no such jurisdiction on the Commission. Congress decided to leave entry and departure from the oil pipeline business unregulated. The Commission, no matter how much it wants to, cannot exercise power

Congress refused to grant. I, therefore, vociferously protest today's usurpation.

Indeed, the decision here flies directly in the face of the D.C. Circuit's holding that "pipeline companies may abandon service at will." *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1509 n.51 (D.C. Cir.) *cert. denied, sub nom. Williams Pipeline Company v. Farmers Union Central Exchange, Inc.*, 469 U.S. 1034 (1984). The majority cites to precedent, namely, *Cheyenne Pipeline Company*, 19 FERC ¶ 61,077 (1982) in an attempt to lend veneer to its actions. I think, as did Commissioner Sheldon in her dissent, 19 FERC at p. 61,124, the Commission wrongly decided that case. Even so, I find the *Cheyenne* facts distinguishable.

There, the abandonment formed one part of a transaction involving the sale of the pipeline and changes in the direction oil flowed. Indeed, Commissioner Sheldon argued in her dissent — and the majority opinion did not rebut this — that had the abandonment occurred separately from the rest of the deal, all would agree we could not act. This case involves nothing more than a naked abandonment.

In addition — as if creating jurisdiction out of thin air were not enough — the rationale for stopping ARCO in its tracks bears comment. Further danger lurks beneath it. The order, slip op. at 4, states:

[The customer]'s protest raises serious [legal] questions [under the Interstate Commerce Act]. The proposed changes are alleged to *discriminate against a captive shipper* who has no alternative to ARCO for service

(Emphasis added)

Here we see the "undue discrimination" epithet, if not its cousin, form the basis for sweeping assertions of remedial jurisdiction. The emerging view seems to be that stomping one's feet and repeating the incantation "undue discrimination" solve all the alleged legal shortcomings in our statutes. We heard it for the first time in electricity, *Wisconsin Electric Power Company*, 46 FERC ¶ 61,019 (1989), and now we see it in oil pipelines.

I do not agree with that school of jurisprudence, no matter how worthy may be the end to which the majority uses this doctrine. Even if I thought this policy necessary (and here, I wonder how helpless the "captive" customer really finds itself, given the general prevalence of intermodal competition for oil transportation and the fact that ARCO would ship for the right price), I believe it flies in the face of our system of separation of powers. Therefore, I dissent.

Branko TERZIC, Commissioner, dissenting:

In issuing this decision, the Commission, in my view, commits an *ultra vires* act. It asserts jurisdiction in an area where it has none.

Briefly, the majority tells ARCO Pipe Line Company (ARCO), an oil pipeline company subject to rate regulation under the Interstate Commerce Act (ICA), 49 U.S.C. §1 *et seq.* (1976), that it cannot abandon service between specified points on the date it desires to do so. This the Commission cannot do because the ICA subjects oil pipelines to no licensing (entry) or abandonment (exit) requirements. Thus, oil pipelines have an unbridled statutory right to abandon service at will. *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1509 n.51 (D.C. Cir.) *cert. denied, sub nom. Williams Pipeline Company v. Farmers Union Central Exchange, Inc.*, 469 U.S. 1034 (1984).

To justify acting beyond its legal power, the majority uses sophistry in asserting that ARCO's tariff filings "... have not been shown to be just and reasonable and may be unjust and unreasonable, and unduly discriminatory. . . ." By raising the specter of discrimination and couching the supporting rationale in language normally associated with review of tariffs containing rate changes, the majority does not accurately reflect the nature of the

involved tariff cancellations. These tariffs simply effect an abandonment of service not subject to Commission review and do not represent rate changes that would be subject to review under other sections of the ICA cited by the majority.¹ The matter is so clear in my mind, I cannot understand what compels the majority to do what the statute and case law clearly say it cannot do.²

Finally, the majority noted that ARCO filed a motion for leave to answer Sinclair's protest — a motion that apparently was granted because the order noted ARCO's arguments with respect to the Commission's authority over abandonment. If the majority indeed had considered the entire pleading, it would not have placed reliance on Sinclair's assertion that it has no alternative to ARCO's service as a reason for preventing this abandonment. The majority should have recognized that ARCO's pleading contains evidence that Sinclair's Kansas City terminal, the affected service location, now receives service from one of ARCO's competitors. This recognition would have negated the majority's concern that the proposed changes might "... discriminate against a captive shipper who has no alternative to ARCO for service. . . ."

For the above reasons, I dissent.