

124 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Generating Coalition

Docket No. RP08-27-001

v.

Southern California Gas Company

ORDER DENYING REHEARING

(Issued July 28, 2008)

1. On March 10, 2008, the Southern California Generating Coalition (SCGC)¹ filed a request for rehearing of the Commission's February 7, 2008 order Dismissing Complaint in this proceeding.² The order dismissed the complaint filed by SCGC that alleged that Southern California Gas Company (SoCalGas), pursuant to authorization granted by the California Public Utilities Commission (CPUC), intends to charge a fee, called Firm Access Rights (FAR) charge, for access to its intrastate pipeline system in violation of the Supremacy Clause of the United States Constitution, the Natural Gas Act (NGA), and the Commission's rules and regulations. As discussed below, the Commission denies rehearing.

Background

2. SCGC's complaint requested that the Commission determine that the proposed charges by SoCalGas are preempted by the Commission's exclusive jurisdiction over interstate transportation of natural gas under the NGA. SCGC asserted that the

¹ SCGC consists of a group of gas-fired electric generators located in southern California, the City of Anaheim, Burbank Water and Power, Glendale Water and Power, Imperial Irrigation District, Los Angeles Department of Water and Power, City of Pasadena, and Reliant Energy Services, Inc.

² *Southern California Generation Coalition v. Southern California Gas Co.*, 122 FERC ¶ 61,110 (2008) (February 2008 Order).

Commission previously ruled in *Union Pacific Fuels*³ that a similar type of access charge was an impermissible charge to interstate shippers because it encroached upon the Commission's exclusive jurisdiction over transportation of natural gas in interstate commerce. In response to the complaint, SoCalGas and the CPUC argued that the FAR is not similar to the charges in *Union Pacific Fuels*, and is a permissible intrastate charge that SoCalGas can impose.

3. The February 2008 Order dismissed the complaint based upon its finding that the FAR charge does not encroach upon the Commission's exclusive jurisdiction over gas transported in interstate commerce. The order found that the FAR charge is imposed upon SoCalGas customers who have executed intrastate transportation agreements with SoCalGas, and this charge reflects specific intrastate services that SoCalGas provides to customers. Thus, the Commission determined that the FAR charge is not similar to the charge rejected by the Commission in *Union Pacific Fuels*.

Request for Rehearing

4. Only SCGC filed a request for rehearing raising a number of issues. First, SCGC asserts that the Commission erred in finding that the FAR charge encompasses transportation service for holders of FAR firm or interruptible receipt point access rights because there is no actual transportation provided under the FAR charge. Second, SCGC argues that the Commission erred in finding that the FAR charge is imposed on intrastate customers, when it is only the contract underlying the FAR charge, and not the FAR charge itself, that makes the market participant an intrastate customer. Third, the Commission erred in finding that the contracts underlying the FAR charge (the Receipt Point Master Agreement and the Receipt Point Access Contract) cover an array of intrastate transportation services, when the only service actually provided is the right to confirm upstream pipeline nominations by nominating gas volumes from the physical border to paper delivery points. Finally, SCGC contends that the Commission erred in finding that the FAR charge falls within the Hinshaw Amendment to the NGA and thus is exempt from Commission regulation.

A. Intrastate Transportation Service and the FAR Charge

5. SCGC contends that SoCalGas' proposed tariff makes clear that no transportation is provided over its backbone transportation system to FAR holders unless the FAR holders enter into additional contracts with SoCalGas. SCGC argues that although

³ *Union Pacific Fuels, Inc., et al. v. Southern California Gas Co.*, 76 FERC ¶ 61,300, at 62,494 (1996), *reh'g denied*, 77 FERC ¶ 61,283 (1996), *aff'd in part sub nom., Public Utils. Comm'n of the State of Cal. v. FERC*, 143 F.3d 610 (D.C. Cir. 1998), *on remand*, 85 FERC ¶ 61,177 (1998) (*Union Pacific Fuels*).

SoCalGas claimed that under the tariff provision establishing the FAR charge, Schedule No. G-RPA, some transportation service is provided to the holder of the FAR charge, no transportation service is actually provided under that schedule. Rather, SCGC contends, what SoCalGas did in adopting Schedule G-RPA was to carve out the firm and interruptible charges from the transportation rates. SoCalGas did not revise its transportation tariff sheets, thus SCGC avows that no transportation is provided to the FAR holder.⁴ Because no transportation service is provided to FAR holders, SCGC contends that the FAR charge has the effect of controlling access by interstate shippers to the SoCal Gas system and thus impermissibly burdens interstate transportation in violation of the Commission's exclusive NGA jurisdiction.

6. SCGC asserts that a review of SoCalGas tariff schedules and contracts shows that transportation service would continue to be provided to the same downstream entity on the SoCalGas system that currently holds transportation rights, but that holders of access rights under the FAR charge do not receive any transportation rights solely as a result of holding those access rights. In support of this assertion, SCGC refers to Schedule G-RPA and the SoCalGas receipt point access agreements, including the Receipt Point Master Agreement and the Receipt Point Access Contract. SCGC argues that these contracts in essence provide that a receipt point access rights holder would have a right to transport natural gas *onto* the SoCalGas system at the specified receipt point, but not *across* the SoCalGas system. The end-user to whom the receipt point access right holder nominates the delivery of gas would hold the transportation rights, as it does currently. Thus, SCGC asserts that the Commission was incorrect in describing the FAR charge as one conveying transportation rights.⁵

B. The FAR Charge and Transportation Service Under the SoCalGas Tariff Schedule and Receipt Point Access Contracts⁶

7. SCGC contends that both the form contracts that noncore customers must execute to obtain transportation service from SoCalGas and the applicable rate schedules provide for transportation service across the entirety of SoCalGas' system from receipt point to burner tip without any differentiation between "backbone" service or "local transmission" service. However, SCGC asserts, the holder of the FAR charge does not obtain any transportation service solely as a result of paying the FAR charge, unless that entity also has an underlying contract that provides for such transportation. SCGC argues that the

⁴ SCGC Request for Rehearing at 1, 7 – 14.

⁵ *Id.* at 4 – 7.

⁶ SCGC's second and third issue on rehearing summarized in P 4 are closely related and will be discussed together.

same applies when a receipt point access rights holder may “deliver” gas to a “storage account”⁷ or to any off-system delivery service agreement. SCGC argues that, as with deliveries by a FAR access rights holder to an end use customer, the transmission service would be provided not to the receipt point rights holder but to the storage customer or the off-system delivery customer.

8. SCGC concludes that it is the underlying contract that provides transportation service for the FAR holder, and not an entity’s status as a holder of FAR access rights. Because the FAR charge controls access by interstate shippers to SoCalGas’ transmission system and does not provide intrastate transportation rights, SCGC claims that the Commission erred in finding that the FAR charge is intrastate in nature and beyond the Commission’s NGA jurisdiction.

9. SCGC asserts that the Commission erred in finding that SoCalGas’ scheme for providing receipt point access rights is not unique but is comparable to PG&E’s provision of Unbundled Backbone service. SCGC states that, because the right to access the PG&E receipt points is part of PG&E customers’ transportation rights on the PG&E backbone system, the PG&E allocation of receipt point access is not comparable to SoCal Gas’ FAR charge. Under the FAR charge, SoCalGas is merely offering receipt point access rights, and not transportation rights, while PG&E’s customers receive unbundled transportation on the PG&E backbone system with corresponding rights to receipt points. The result of this difference is that, the FAR rights holder obtains only access to the SoCal Gas receipt points and not transportation rights, which has the effect of adversely affecting the operation of upstream firm interstate pipelines by diminishing the value of that capacity.⁸

C. The FAR Charge Commission Precedent and the Hinshaw Amendment

10. SCGC states that under the new access rights scheme, an “upstream pipeline shipper” will be required to nominate deliveries to the holder of receipt point rights who, in turn, will have the right to nominate deliveries to an end user or a storage customer. SCGC argues that while the new access charges will not be assessed directly to particular interstate pipeline shippers, the Commission erred in contending that the new access charges will not be assessed “for the simple nomination of gas for delivery to the SoCalGas system.” That, SCGC asserts, is actually the only right that the holder of a receipt access contract will have. Thus, SCGC argues, it is similar to the charge in *Union Pacific Fuels* and does not fall within the Hinshaw exemption which applies only to activities after receipt of natural gas within or at the boundary of a state. SCGC cites to

⁷ SCGC refers to Schedule G-TBS.

⁸ SCGC Request for Rehearing at 20.

the Commission's statement in *Union Pacific Fuels* that "it is only after SoCal's receipt of the gas at the Wheeler Ridge interconnection that the Hinshaw exemption comes into play."⁹

11. According to SCGC, the FAR charge is preempted because it is a charge that SoCalGas will levy for the right to nominate gas into the SoCalGas system instead of being a charge for a service that is provided after gas is received into the system. All actions required to meet the FAR tariff requirements occur before SoCalGas receives the gas into its system.

12. SCGC requests that the Commission grant rehearing and find that the SoCalGas FAR charge constitutes a condition for gaining access to the SoCalGas system, and it is therefore preempted by the Commission's exclusive jurisdiction over the transportation of gas in interstate commerce under the NGA. SCGC adds that the Commission should find also that the SoCalGas access charge scheme would be an obstacle to the accomplishment and execution of Congressional objectives under the NGA.

Discussion

13. The crux of SCGC's request for rehearing is that the Commission erred in determining that there is actual intrastate transportation service associated with the FAR charge, which SCGC refers to as an "access charge." It argues that the only service actually provided is the right to confirm upstream pipeline nominations by nominating gas volumes from the physical border receipt points to paper delivery points. SCGC further contends that, because neither Schedule No. G-RPA nor any of the form contracts that would be executed by a holder of receipt point rights provide for any transportation service to be provided to the holder, the FAR charge is similar to the Wheeler Ridge charge rejected by the Commission in *Union Pacific Fuels*. Thus, SCGC argues that the Commission erred in not finding that the FAR charge is preempted by the Commission's exclusive jurisdiction over the transportation of gas in interstate commerce under the NGA.

14. The Commission continues to find that the FAR charge is part of intrastate service provided by SoCalGas and subject to the jurisdiction of the CPUC. As the CPUC explained, the reason the FAR charge was adopted was to allocate the amount of firm takeaway capacity on the SoCalGas intrastate system and by doing so to:

ensure that the holders of the FAR will be able to access the receipt points on the transmission system and have their gas transported to the designated delivery points. This is in

⁹ *Union Pacific Fuels*, 76 FERC ¶ 61,300 at 62,495.

contrast to the current system where upstream gas shippers and end-use customers have no guarantee that their gas will flow through the receipt points. The problem is exacerbated under the current system when there are capacity constraints on the SoCalGas transmission system.¹⁰

The FAR charge is an unbundled portion of SoCalGas' backbone transportation service. The firm access rights allow the FAR holders not only a firm right to receive the gas into the SoCalGas system but also ensures delivery after receipt, under SoCalGas' transportation agreements, to a variety of points on the system, including to storage or to off-system delivery points. Together the FAR charge and transportation service constitute firm service on SoCalGas' system, and are unquestionably intrastate service.

15. We also disagree with SCGC's contention that, because the end-user holds the transportation rights "across the entirety of the SoCalGas system," the FAR charge provides no intrastate benefits.¹¹ SoCalGas has never claimed that the FAR charge provides for transportation service to the burner tip. Rather, end-use customers must contract for that firm transportation service separately under the applicable SoCalGas tariff. In fact, the "Applicability" provision in Schedule G-RPA specifically states that the acquisition of firm access rights under the FAR charge does not guarantee that any end-use customer thereby also acquires firm transportation across the local system. The FAR receipt point access rights are inextricably linked to intrastate transportation through the transportation contracts required of intrastate shippers to transport gas on the SoCalGas intrastate system.

16. The February 2008 Order stated that:

Under the FAR system the holders of firm access rights will determine which supply flows from each supplier on each day within each zone and 'moves the control of the SoCalGas receipt points from the FERC-regulated interstate pipelines to the holders of the FAR....' (citation omitted) The FAR system will provide market participants with assurance that they can access the transmission system of SDG&E and SoCalGas on a firm basis.¹²

¹⁰ CPUC Decision D.06-12-031 (December 14, 2006) p. 2.

¹¹ SCGC Request for Rehearing at 10, 13-14.

¹² February 2008 Order at P 57.

In its rehearing request SCGC does not challenge this. Rather, SCGC agrees, stating that it “understands what SoCalGas is attempting to accomplish and SCGC does not disagree with the end result.” However, SCGC goes on to state that it objects to “the means of obtaining the end result” because “the FAR scheme creates a new class of customer that is not necessarily an intrastate transportation customer, but merely the holder of rights to determine which gas comes through the southern California gate.”¹³

17. The Commission disagrees. The FAR charge does not create a new class of customer. Rather, it enhances the intrastate services currently available by ensuring access to the SoCalGas receipt points. A FAR receipt point access holder may also have transportation service under the SoCalGas tariff and transportation contracts or it may sell the gas to another transporter. Either way, the Commission continues to find that the FAR charge is for an important aspect of SoCalGas’ intrastate service, ensuring access to the SoCalGas receipt points. The FAR Charge does convey priority to receipt rights, and is therefore part of the intrastate transportation of gas on the SoCalGas system.

18. Whether SCGC is correct in its claim that the various agreements and schedules cited by SCGC do not specifically provide for transportation under that agreement or schedule, is not critical to our determination that the FAR charge is intrastate in nature and beyond the Commission’s NGA jurisdiction. As stated above, the FAR charge provides for specific benefits to the holder – guaranteed access to the SoCalGas receipt points. Thus, it differs from the charge in *Union Pacific Fuels*, which conferred no rights but was intended to reimburse SoCalGas for the cost of new intrastate facilities. Regardless of whether the FAR charge in and of itself provides for intrastate transportation service, which SCGC argues was the basis of the February 2008 Order, the FAR charge is inextricably linked to intrastate transportation service on the SoCalGas system. It is this inextricable link to intrastate transportation service that causes the FAR charge to not be subject to our jurisdiction under the NGA.

19. In *Union Pacific Fuels*, the Commission noted that an “access charge” could be structured not to infringe on federal jurisdiction, stating:

With relatively minor changes to the interconnection charge, the CPUC could accomplish its purpose without infringing on our exclusive jurisdiction. The CPUC need only change the applicability of the charge to those customers of SoCalGas who have service agreements for the actual transportation of natural gas over the interconnection facilities.¹⁴

¹³ SCGC Request for Rehearing at 28.

¹⁴ *Union Pacific Fuels*, 77 FERC at 62,249.

20. The *Union Pacific Fuels* interconnection charge was levied on the interstate shipper on the volumes nominated to only one of a number of receipt points on the SoCalGas transmission system. The charge was levied for the express purpose of recovering the \$38 million cost to SoCalGas of construction of the Wheeler Ridge interconnection facilities.¹⁵ Here the FAR charge is imposed on a party under a contract with SoCalGas, and it is applicable at all eleven receipt points throughout the SoCalGas system.

21. Moreover, there is no requirement that an interstate shipper sign up for FAR to gain entry to the intrastate system, as interruptible transportation rights are available to interstate shippers who do not purchase FAR, and interstate shippers have the option of transferring their rights to other shippers for either firm or interruptible transportation instead of purchasing a FAR. The FAR charge is not a charge on interstate shippers for reimbursing SoCalGas for the cost of facilities constructed by SoCalGas to access SoCalGas' system, which makes it clearly distinguishable from the prohibited charge in *Union Pacific Fuels*.

22. These services on the SoCalGas system are properly subject to regulation by the CPUC, and exempt from the FERC's jurisdiction pursuant to the Hinshaw Amendment. As such it falls under the Commission's ruling in *Union Pacific Fuels* that the Hinshaw Exception applies "after receipt of the gas" by SoCalGas.¹⁶ The charge is not imposed on the interstate movement of the gas. Rather while it is a charge that guarantees movement on the SoCalGas system, it is not a charge for delivery to the SoCalGas system, which the Commission struck down in *Union Pacific Fuels*. The FAR charge arises from a contract between the title holder of the gas and SoCalGas for intrastate service, *viz.* access and delivery within SoCalGas' intrastate system.

23. It would be inappropriate and beyond the Commission's jurisdiction to dictate how the CPUC should accomplish the result that was sought by SoCalGas for its customers, a result that all agree benefits interstate shippers because it guarantees delivery on the SoCalGas system. No such guarantee exists at the present time. While there may be other ways of obtaining that result, and SCGC refers to the method on the PG&E system, only the CPUC is authorized to make that determination, not this Commission. The Commission will not second-guess that choice, as long as the system chosen does not infringe upon our jurisdiction, and we find that it does not.

24. Other SCGC arguments are similarly without merit. The Commission did not, as SCGC contends, find that the FAR charge was "comparable to PG&E's Provision of

¹⁵ *Union Pacific Fuels*, 76 FERC at 62,491-92.

¹⁶ *Id.* 76 FERC at 62,495.

Unbundled Backbone Service,” and that the similarity was a reason to approve the FAR charge. Rather, the February 2008 Order merely stated that the FAR charge “is not unique in California; all parties acknowledge that PG&E has had a system of firm tradable backbone rights for many years.”¹⁷

25. SCGC was also in error when it asserted that the FAR system will make current upstream firm interstate capacity valueless. Rather, the Commission finds that this service will benefit interstate shippers directly by providing certainty that once the shipment is destined for a FAR holder, its delivery is guaranteed. Similarly, we find there is nothing to support SCGC’s claim that the FAR access charge scheme would be an obstacle to the accomplishment and execution of Congressional objectives under the NGA.

26. The Commission concludes that the FAR charge is consistent with the “minor changes” we suggested in *Union Pacific Fuels*, in that the FAR charge is imposed on a party under a contract with SoCalGas, and its purpose is to facilitate access to the SoCalGas intrastate system at all eleven of the SoCalGas receipt points. Thus, FAR receipt point access rights are inextricably linked to intrastate transportation through the transportation contracts required of intrastate shippers to transport gas on the SoCalGas intrastate system. The FAR charge ensures access to SoCalGas receipt points, thereby facilitating the intrastate transportation of gas on the SoCalGas system. In short, the FAR charge is inherently intrastate in nature. SCGC’s request for rehearing is denied.

The Commission orders:

SCGC’s request for rehearing is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ February 2008 Order P 65.