UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sunoco, Inc. (R&M) Docket No. RP02-309-002

v.

Transcontinental Gas Pipe Line
Corporation

ORDER ON REHEARING AND CLARIFICATION

(Issued May 6, 2004)

1. On September 5, 2002, the Commission issued an order granting, in part, a complaint filed by Sunoco, Inc. (R&M) (Sunoco) against Transcontinental Gas Pipe Line Corporation (Transco) for breach of a 1992 Commission-approved settlement.[1] On May 15, 2003, the Commission issued an order denying Transco's request for rehearing of the September 5, 2002 Order, clarifying Transco's obligations under the order, and requiring Transco to make a filing to comply with the requirement of the May 15, 2003 Order.[2] Sunoco filed a request for clarification or, in the alternative, rehearing, and Transco filed for rehearing and clarification. As discussed below, the Commission grants rehearing and dismisses Transco's request for clarification as moot.

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

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

Background

2. On June 4, 1992, the Commission issued an order which, among other things, approved a settlement filed February 14, 1992 (1992 Settlement) between Transco and Sunoco resolving all outstanding issues between them, including terms and conditions of service related to the conversion of Sunoco's Rate Schedule X-11 transportation service to Rate Schedule FT service under Part 284 of the Commission's regulations, and embodying Sunoco's agreement to join in the relevant provisions of earlier Transco settlements regarding take-or-pay cost recovery, rates, and restructuring of services.[3] As a result of that order, Transco became obligated under a contract with Sunoco to provide firm transportation service under Rate Schedule FT to Sunoco for twenty years at the maximum FT rate from certain specified receipt points, including the seven points on offshore Gulf of Mexico facilities that are the subject of Sunoco's complaint in the instant proceeding, to delivery points in Pennsylvania. The 1992 settlement also stated that the parties agreed that the various parts of the settlement were not severable without upsetting the balance of consideration achieved between Transco and Sunoco.

3. On July 25, 2001, the Commission issued an order approving Transco's comprehensive gathering spin-down proposal, wherein the Commission authorized Transco to abandon by sale to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP), certain Outer Continental Shelf (OCS) facilities (Central Texas facilities) on which seven of Sunoco's receipt points under the 1992 Settlement are located, and declared the facilities to be non-jurisdictional gathering facilities.[4] Sunoco, among others, protested Transco's gathering spin-down proposal, but did not raise the matter of compliance with the 1992 Settlement. Nor did Transco inform the Commission of the 1992 Settlement. To date, however, Transco has not informed the Commission that it has, in fact, sold the subject facilities to WGP.[5] Accordingly, the abandonment is not yet effective and Transco continues to provide service to Sunoco from the subject receipt points.

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[3] Transcontinental Gas Pipe Line Corporation, 59 FERC ¶ 61,279 (1992).

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

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

4. On September 5, 2002, the Commission issued an order in the instant proceeding addressing Sunoco's complaint, which presented the issue of whether the 1992 Settlement barred Transco from terminating service for Sunoco at the seven specific receipt points on facilities which the Commission authorized Transco to abandon by sale in the July 25, 2001 Order. In its complaint, Sunoco alleged that obtaining service from WGP to replace the service abandoned by Transco would cost Sunoco an additional $15 million to $28 million. The September 5, 2002 Order found that the action by Transco to terminate service at the subject receipt points would deprive Sunoco of a part of the bargain it struck with Transco under the 1992 Settlement. To remedy this, the order granted Sunoco equitable relief by modifying the 1992 Settlement to require Transco to obtain the subject upstream capacity from its affiliate and assign it to Sunoco at rates, terms, and conditions consistent with their 1992 Settlement, as approved by the June 4, 1992 Order.

5. Transco filed a request for rehearing of the September 5, 2002 Order arguing that the Commission erred in several respects in granting Sunoco's complaint and granting equitable relief. On May 15, 2003, the Commission issued an order on rehearing. On reconsideration, the Commission clarified that the 1992 Settlement can be met just as well if Sunoco directly contracts with WGP for the subject gathering services and Transco reimburses Sunoco for any charges that exceed the rate Transco could charge under the 1992 Settlement. The Commission stated that what this means is that irrespective of what rate WGP charges for the service, Sunoco is only required to ultimately pay a net rate that complies with the 1992 Settlement, to wit: a rate "no less favorable than Transco is otherwise able to collect from any other third-party shipper for such service." The Commission stated that whether Transco acquires the capacity from WGP and assigns the capacity to Sunoco, or whether Sunoco directly acquires the capacity from WGP and is reimbursed by Transco for any excess charges from WGP, the net rate Sunoco ultimately pays for the service to the subject points cannot exceed the rate that meets the 1992 Settlement's rate requirement. The Commission defined that rate to be the unbundled rate derived from costs and throughput from the filing Transco must make to comply with its rate case settlement in Docket No. RP01-245 at such time that it transfers the Central Texas gathering facilities to WGP.

Discussion

A. Requests for Clarification and/or Rehearing and Clarification

6. In its request for rehearing, Transco asserts that the Commission erred in stating that the 1992 Settlement imposes a "rate cap" applicable to service under the Rate Schedule FT service agreement between Transco and Sunoco. Transco states that the May 15, 2003 Order repeatedly characterizes article II, section A.1 of the 1992 Settlement as establishing a "rate cap" applicable to the services provided to Sunoco.

Transco asserts that such characterization of article II, section A.1 of the 1992 Settlement is incorrect. Transco submits that the provision has its origins in an August 7, 1989 Revised Stipulation and Agreement approved by the Commission in Docket No. RP88-68, et al.,[6] where, among other things, Transco agreed with its former sales customers that Rate Schedule FT service resulting from conversions from firm sales service would not be subject to pregranted abandonment under section 284.221(d) of the Commission's regulations, and that unless that customer gave Transco notice of its election to terminate its Rate Schedule FT service, "Transco will not terminate such service agreement, so long as the customer is willing to pay rates no less favorable than Transco is otherwise able to collect from third parties for such service."[7] Transco states that this settlement provision is reflected in the Rate Schedule FT service agreements with Transco's former sales customers.[8] Transco states that as part of the 1992 Settlement, it agreed to the same provisions with Sunoco.

7. Transco contends that the provision does not establish a "rate cap" under the service agreement. Transco asserts that it ensures a customer's ability to continue Rate Schedule FT service at the expiration of the primary term by establishing a condition of Transco's ability to terminate service, i.e., Transco will not terminate service if the customer is willing to pay rates no less favorable than Transco is otherwise able to collect from third parties for the service. Transco argues that its ability to establish the rates charged under its Rate Schedule FT agreements is governed by the applicable provisions of the NGA and the Memphis clauses in Transco's rate settlements and contracts, including the 1992 Settlement and the Rate Schedule FT service agreement between Transco and Sunoco.

8. Transco asserts that the Commission therefore erred in the May 15, 2003 Order when it characterized article II, section A.1 of the 1992 Settlement as establishing a "rate cap" applicable to the services provided to Sunoco. Transco is concerned that the Commission's characterization of that provision, which is reflected in all of Transco's Rate Schedule FT service agreements with former sales customers, could be misapplied in other contexts. Transco argues that it was not necessary for the Commission to so characterize article II, section A.1 of the 1992 Settlement in developing its "equitable

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[6] Transcontinental Gas Pipe Line Corporation, 48 FEERC ¶ 61,399 (1989).

[7] August 7, 1989 Revised Stipulation and Agreement, Docket No. RP88-68, et al., article II, section 8.

[8] Article IV, Term of Agreement, of the Form of Service Agreement for use under Transco's Rate Schedule FT.

remedy." Transco contends that the Commission's remedy is not expressly provided for in the 1992 Settlement, but was derived from article II, section A.1 as part of the Commission's effort "to provide Sunoco with the benefits of the [1992] Settlement." Accordingly, Transco requests that the Commission grant rehearing of the May 15, 2003 Order and eliminate its characterization of article II, section A.1 of the 1992 Settlement as establishing a "rate cap."

9. In its request for rehearing, Transco also asserts that the Commission erred in stating that Transco's existing production area rate design precludes the imposition of a gathering charge in addition to the IT-Feeder maximum rate and that the terms of the April 12, 2002 Stipulation and Agreement in Docket No. RP01-245-000, et al., currently bars Transco from filing to authorize such a rate. Finally, Transco requests that the Commission clarify its May 15, 2003 Order to provide that in the event that Sunoco elects not to pay the rate Transco could charge another shipper for the services on the Central Texas gathering facilities, then the Commission's "equitable remedy" will not apply, and Sunoco will not be eligible to continue to receive service on those facilities unless it negotiates a mutually agreeable non-jurisdictional contract with WGP for gathering services.

10. Like Transco, Sunoco also seeks clarification or, in the alternative, rehearing with respect to the Commission's ruling on the rate applicable to its service. Sunoco states that the May 15, 2003 Order assumed that the rate applicable to Sunoco's service is a rate "no less favorable than Transco is otherwise able to collect from any third-party shipper for such service." Sunoco believes that the Commission inadvertently misquoted language from a provision of the service agreement that does not address the rate to be paid under the contract but, rather, addresses the right of first refusal. Sunoco seeks clarification from the Commission that the applicable rate is Transco's FT tariff rate, as that rate may change from time to time.

11. Sunoco states that it has no objection to the Commission requirement that Transco file a rate calculation for services to be rendered over the Central Texas gathering facilities. However, Sunoco asserts that such a filing is not necessary to establish a "rate cap" for Sunoco because the existing service agreement and the 1992 Settlement have already expressly and unambiguously established the rate Sunoco is to pay during the primary term. Sunoco submits that any rates that might be established under such a calculation could only apply to Sunoco prospectively after the primary term of its agreement which expires in 2012. Sunoco argues that to hold otherwise would subject Sunoco to rates during the primary term that would exceed the rate provided for by the 1992 Settlement. Sunoco contends that this is so because Sunoco presumably would have to pay two separate rates, the applicable FT rate for transportation plus an amount capped at the separate rate to be established for the gathering facilities as a result of Transco's compliance filing in this proceeding. Sunoco argues that this result would be

entirely inconsistent with the Commission's repeated intent to ensure that Sunoco receives the benefit of its bargain under the 1992 Settlement.

12. Sunoco asserts that the language of the 1992 Settlement and Sunoco's service agreement is clear and unambiguous. Sunoco states that if, as the Commission intends, Sunoco is to retain the full benefit of its bargain, Sunoco must be required to pay no more than Transco's FT rates during the primary term of Sunoco's service agreement. Sunoco submits that the new rates to be established as a result of the rate calculation Transco must file could only be applied to Sunoco after the primary term expired in 2012. Sunoco submits that then, in accordance with Sunoco's contract right of first refusal, Sunoco would be entitled to match any competing bids up to the maximum rate if it wished to retain its capacity.

B. Relevant Provisions of the 1992 Settlement and Service Agreement

13. Article II, section A.1 of the 1992 Settlement reads as follows:

> Initial Contract Term and Extensions. 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. (Emphasis added).

This section of the settlement is reflected in article IV, Term of Agreement, of the August 1, 1992 Service Agreement between Transco and Sunoco. Article IV reads as follows:

> This agreement shall be effective as of August 1, 1992 and shall remain in force and effect until 8:00 a.m. Eastern Standard Time August 1, 2012 and thereafter until terminated by Seller or Buyer upon at least three (3) years written notice; provided, however, this agreement shall terminate immediately and, subject to the receipt of necessary authorizations, if any, Seller may discontinue service hereunder if (a) Buyer, in Seller's reasonable judgment fails to demonstrate credit worthiness, and (b) Buyer fails to provide adequate security in accordance with section 8.3 of Seller's Rate Schedule FT. As approved by FERC by order issued June 4, 1992 in Docket Nos. 88-391-009, et al., Seller agrees that pregranted abandonment

> under section 284.221(d) of the FERC's Regulations shall not apply to service hereunder and Seller shall not exercise its right to terminate this service agreement so long as Buyer is willing to pay rates no less favorable than Seller is otherwise able to collect from any other Buyer for such similar service. (Emphasis added).

14. With respect to the rates that Sunoco is required to pay under the service agreement, article V, Rate Schedule and Price reads as follows:

> Buyer shall pay Seller 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. (Emphasis added).

C. Commission Decision

15. Upon further review of the 1992 Settlement and the 1992 service agreement between Transco and Sunoco, the Commission finds that Transco's and Sunoco's interpretation of their contractual rights and obligations is correct. The Commission finds that in order to allow Sunoco to receive the benefit of the bargain it received in the 1992 Settlement, as embodied in its FT service agreement, Sunoco is only required to pay Transco the rates required by the FT Rate Schedule, as those rates may be changed from time to time until the end of the primary term of the contract which is August 1, 2012.

16. Accordingly, the Commission finds that the provision in article II, section A.1 of the 1992 Settlement concerning matching a third party shipper's rate is not applicable to the rates Sunoco is to be charged during the primary term of the contract and does not act as a "rate cap" during the primary term. The applicable rate is the FT rate as that may be changed from time to time. Article III, section A.1 of the 1992 Settlement only establishes Sunoco's contractual right of first refusal and would only apply when the primary term of the contract ends on August 1, 2012. Therefore, Transco's and Sunoco's requests for rehearing on this issue are granted.

17. Further, since the Commission finds that the rate a third party shipper pays does not affect the rate Sunoco must pay during the primary term of the contract, and that Sunoco is only required to pay the FT rate until August 1, 2012, the Commission's discussion concerning how a rate would be calculated for a third party shipper who wanted to receive similar service as Sunoco is no longer relevant. Thus, Transco is not required to file a rate calculation prior to the transfer of the Central Texas facilities as required by Ordering Paragraph (C) of the May 15, 2003 Order, and the Commission

grants rehearing on this issue. Finally, Transco's request for clarification as to what happens if Sunoco failed to match the rate of a third party shipper is also irrelevant because Sunoco is only required to pay the FT rate required by the 1992 contract during the primary term. Accordingly, Transco's request for clarification is dismissed as moot.

The Commission orders:

(A) Sunoco's request for rehearing is granted as discussed above.

(B) Transco's request for rehearing is granted, and its request for clarification is dismissed as moot as discussed above.

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

(S E A L)

Magalie R. Salas,
Secretary.

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(Issued)

Nora Mead BROWNELL, Commissioner, *concurring*:

1. I agree with the order's clarification of the meaning of the 1992 Settlement and the 1992 service agreement. I am writing separately to express my view that the Commission should not have involved itself in this dispute in the first place. As I stated in my dissent to the May 15, 2003 order, I do not believe the Commission has the authority to enforce the provisions of the 1992 Settlement concerning service over Transco's spun-down gathering facilities. Therefore, the Commission should have dismissed Sunoco's complaint leaving Sunoco free to pursue its claim in court.

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Nora Mead Brownell