ARCO Pipe Line Company
66 FERC ¶ 61,159 (1994)

This case concerns a proposal by ARCO Pipe Line Company to cancel service for southbound shipments over one of its pipelines, but to continue service for northbound shipments over that same line. Although the Commission had previously ruled that it does not have jurisdiction over complete abandonments of service over a pipeline, the question of a partial abandonment was raised by Total Petroleum, Inc.

The Commission found that ARCO was discontinuing an entire service, not changing a classification, regulation, or practice. Thus, although the Commission had the authority to consider Total's allegation that ARCO's proposal violated the ICA, it did not have the authority to disapprove of the proposal to discontinue the southbound service.

ARCO Pipe Line Company
Order on Jurisdiction, Lifting Suspension,
and Discontinuing Investigation
66 FERC ¶ 61,159 (1994)

[¶ 61,159]

ARCO Pipe Line Company, Docket Nos. IS93-40-000 and OR93-7-000

Order on Jurisdiction, Lifting Suspension, and Discontinuing Investigation

(Issued February 2, 1994)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On September 8, 1993, the Commission issued an order in the above-captioned dockets in which it accepted and suspended tariff supplements filed by ARCO Pipe Line Company (ARCO), to be effective April 19, 1994, subject to investigation and to refund.[1] In those supplements, ARCO proposed to cancel its rates for service under its FERC Tariff Nos. 1805 and 1806. Under those tariffs, ARCO provides common carrier service, which is used by Total Petroleum, Inc. (Total) for the shipment of refined petroleum products in a southbound direction. ARCO provides that service to Total by reversing the flow of the pipeline that serves shippers moving products northward.[2] Total filed a protest to and a complaint against ARCO's proposal to cancel its southbound service. In its September 8, 1993 order, the Commission concluded that the parties should brief the threshold issue of whether the Commission has jurisdiction over ARCO's proposal to cancel its southbound service.[3] The Commission stated that while it has held that it does not have jurisdiction over complete abandonments of service over a pipeline, it has not considered a situation like here where ARCO is cancelling service for southbound shipments, but is continuing service for northbound shipments.

As discussed below, the Commission concludes that it has no jurisdiction over ARCO's filing, lifts the suspension as of this date and discontinues its investigation into the lawfulness of ARCO's filing.

The Initial Briefs

ARCO first argues that the Commission has no authority under any provision of the Interstate Commerce Act (ICA) over its termination of southbound service regardless of whether it has completely abandoned the physical pipeline facilities. ARCO maintains that, as recognized by the court of appeals[4] and by this Commission,[5] the ICA only provided jurisdiction over the abandonment and discontinue of service by railroads.[6] ARCO adds that this limitation on the Commission's jurisdiction is confirmed by the Commission's express abandonment jurisdiction over both facilities and services under section 7(b) of the Natural Gas Act.

Total maintains that the Commission has jurisdiction over the lawfulness of ARCO's proposal to cancel its southbound service and not its northbound service because, ARCO, as a common carrier, must provide service under section 1 of the ICA to all parties without undue discrimination.[7] It further maintains that ARCO's proposed cancellation of service is a new "regulation" or "practice" and is, therefore, subject to investigation under section

[1] *ARCO Pipe Line Co.*, 64 FERC ¶ 61,281 (1993).

[2] ARCO's northbound shipments start in Houston, Texas and flow to points in Texas, Oklahoma, Kansas, Missouri, and Iowa. ARCO's southbound shipments start in Ardmore, Oklahoma and flow to points in the Dallas/Fort Worth area.

[3] *ARCO Pipe Line Co.*, 55 FERC ¶ 61,420 (1991) (*ARCO*) and *Chevron Pipe Line Co.*, 64 FERC ¶ 61,213 (1993)(*Chevron*).

[4] 21 FERC ¶ 61,260 (1982), *reversed in part on other grounds, Farmers Union Central Exchange v. FERC*, 734 F.2d 1486 (D.C. Cir 1984); *ARCO*, 55 FERC ¶ 61,420 (1991); and *Chevron*, 64 FERC ¶ 61,213 (1993).

[5] The abandonment and discontinuance provision was codified as 49 U.S.C. § 1(18).

[6] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984).

[7] *Citing, United Fuel Gas Co., v. Railroad Commission*, 278 U.S. 300,309 (1928) (United Fuel Gas Co.) "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give.... It goes without saying that it may

15(7) of the ICA.[8] Total further argues that section 1(18) of the ICA, the ICA's abandonment provision for railroads adopted in 1920, was in addition to, and did not impair, the Commission's authority to prevent undue discrimination by railroads or by oil pipelines.

Last, Total argues that the Supreme Court's affirmance, in *Pennsylvania Water and Power Co. v. FERC*,[9] of the Commission's authority over discontinuances of service to some customers under the Federal Power Act eliminated any doubt about the Commission's plenary jurisdiction here to consider the lawfulness of ARCO's proposal to terminate service. It adds that the *Farmers Union*[10] decision is not controlling because the court envisioned abandonment as termination of all service rather than the instant situation of canceling service in one direction.

The Reply Briefs

ARCO first replies that the *Penn Water* case cited by Total does not support its contention that the Commission has jurisdiction over oil pipeline abandonments. In support, ARCO states that the Federal Power Act expressly affords the Commission jurisdiction over any "rate, charge, classification or *service*",[11] while the ICA affords jurisdiction over "rate, fare, charge, classification, regulation or *practice affecting any rate*."[12] ARCO maintains that this is a critical difference in language because an abandonment cannot be described as a "practice or regulation affecting a rate."[13] ARCO adds that the Commission rejected Total's *Penn Water* argument in Opinion No. 154.[14]

ARCO's second point is that the present circumstance is not distinguishable from the Commission's prior decisions in *ARCO* and *Chevron*.[15] ARCO asserts that the "important point is whether a distinct 'service' is being abandoned as to *all* shippers, not whether some facility can be identified that would no longer be used."[16] ARCO notes that it "intends to withdraw from operation the physical facilities required solely to permit the southbound movements (*e.g.*, piping and other assets whose only function is to facilitate the bidirectional flow of products)."[17] ARCO asserts that Total's reliance on the *United Fuel Gas Co.* case is misplaced because that case "turned on a state statute prohibiting any public utility within the state from terminating an established service without the permission of the state Commission... [and], therefore, it is totally irrelevant to ARCO Pipe Line's [common carrier] situation."[18]

Last, ARCO maintains that the nondiscrimination provisions of the ICA do not grant the Commission authority over abandonments. ARCO states that the most important fact is that it is proposing to cancel all southbound transportation so that there is no disparity in treatment among similarly situated shippers. ARCO notes that the *Viscose* case is not on point because, unlike the railroad, ARCO would not be providing southbound service to any shipper or commodity.

In its reply brief, Total refers to the statutory obligation of oil pipelines to operate as common carriers, to *Viscose*, to *United Fuel Gas Co.*, and to *Penn Water* as support for its position. Total maintains that the Commission precedents do not involve denial of service to a shipper and that the 1920 amendment with respect to railroad abandonments did not repeal the ICA's common carrier requirement and discrimination provisions applicable to both railroads and oil pipelines. Total adds that there was no inconsistency in the grant of authority over railroads and not oil pipelines, since Congress may have believed existing authority to be adequate for oil pipelines in that they often transported oil for their owners' use and this would inhibit actions to shut down unprofitable operations entirely.

Discussion

The Commission has previously held that it does not have jurisdiction over complete abandonments of service by oil pipelines which involve taking the particular pipeline facilities

(Footnote Continued)

not use its privileged position, in connection with the demand it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded." (citations omitted).

[8] *Citing, Director General of Railroads v. Viscose Co.*, 254 U.S. 498 (1920) (Viscose) (holding that the carrier's proposal to exclude artificial silk from its services could be investigated under the Act).

[9] 343 U.S. 414 (1952) (Penn Water).

[10] 734 F.2d 1486, 1509 n.51 (D.C. Cir. (1984)).

[11] Section 205, 16 U.S.C. §824d(e) (1988) (emphasis added by ARCO).

[12] Section 15(7) of the ICA (emphasis added by ARCO).

[13] *ARCO Pipe Line Co.*, 55 FERC ¶ 61,204, at p. 62,264 (1991).

[14] *Williams Pipe Line Co.*, 21 FERC ¶ 61,260, at p. 61,690 n.217 (1982).

[15] See n.19, *infra*.

[16] Reply Brief at p. 17.

[17] *Id.* n.12.

[18] *Id.* at p. 19.

totally out of operation.[19] Here, however, ARCO proposes to discontinue its southbound service but to continue to operate the pertinent facilities for northbound service. The question before the Commission is whether it has jurisdiction over ARCO's proposal to discontinue its southbound service. As stated in the September 8, 1993 order, this is a "threshold question of first impression."[20]

Under the ICA, an oil pipeline, as a common carrier, must "provide and furnish transportation upon reasonable request therefore...."[21] on a basis that is not unduly discriminatory at just and reasonable rates pursuant to just and reasonable classifications, regulations, and practices.[22] It is the Commission's duty to ensure that an oil pipeline complies with its obligations under the ICA. If ARCO's proposal to discontinue its southbound service comports with the requirements of the ICA, the Commission has no additional jurisdiction to determine whether or not ARCO's proposal is in the public convenience and necessity. This contrasts with the fact that Congress gave the ICC specific abandonment authority over railroads through the Transportation Act of 1920, codified in section 1(18) of the ICA, which provided, in pertinent part, that

> no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.[23]

ARCO and Total disagree over the Commission's jurisdiction to consider service abandonments which do not involve the complete abandonment of the pipeline facilities used in furnishing the service. ARCO and Total differ about whether ARCO's discontinuance of southbound service is subject to and contravenes the ICA and about the relevance of certain court cases to resolving that issue.

The Commission must first analyze ARCO's proposal to pinpoint how it fits or does not fit within the statutory scheme. ARCO is not completely retiring its pipeline which furnishes the southbound service. Rather, ARCO is proposing to no longer furnish any service via its pipeline on the southbound routes while continuing its service on its northbound routes. The essential point is not that ARCO is continuing to use its pipeline facilities to provide service on its northbound routes. The essential point is that the services on the northbound and southbound routes are two distinct services. In that light, the Commission concludes that it is without authority under the ICA to disapprove ARCO's proposal to discontinue completely the southbound routes.

First, ARCO's cancellation of its southbound routes does not involve a classification, regulation, or practice over which the Commission has authority under the ICA to consider its reasonableness. Those terms relate to the classification of property carried and to the reasonableness of the service provided.[24] They do not apply when the oil pipeline discontinues service on routes for all shippers and all classes of property.[25] For the same reasons, ARCO's discontinuance of the southbound routes would not violate its duty to furnish transportation upon reasonable request without discrimination. As stated, this is because it is completely discontinuing service on the southbound routes for all shippers. The continuation of service on northbound routes does not require continuation of service on southbound routes under the common carrier duty because the southbound

[19] *ARCO Pipe Line Co.*, 55 FERC ¶ 61,420 (1991) (ARCO's proposal to take a portion of its pipeline facilities out of service and to cancel its transportation rates is not subject to the Commission's jurisdiction under the ICA); *Chevron Pipe Line Co.*, 64 FERC ¶ 61,213 (1993) (Chevron's proposal to suspend its operations at a barge dock to evaluate the safety of continued operations is not subject to the Commission's jurisdiction under the ICA).

[20] *ARCO Pipe Line Co.*, 64 FERC ¶ 61,281, at p. 62,985 (1993).

[21] Section 1(4) of the ICA.

[22] Sections 3(1), 1(5), and 1(6) of the ICA.

[23] Section 1(18) gave the ICC authority to allow the discontinuance of all services on a line of railroad. In 1958, Congress enacted section 13a of the ICA, which authorized the ICC to permit a railroad to discontinue particular trains or services while leaving remaining services in operation. *See Southern Railway Co. v. North Carolina*, 376 U.S. 93 (1964). Prior to section 13(a)'s enactment, the ICC lacked that power and the states supervised train discontinuances. *Id.* and *City of Chicago v. U.S.*, 396 U.S. 162, 164-65 (1969).

[24] Section 1(6) of the ICA provides that: "It is the duty of all common carriers . . . to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs . . . .

[25] *Cf., Lucking v. Detroit Navigation Co.*, 265 U.S. 346, 350-51 (1924) ("The obligation to continue is not imposed by any principle of the common law. Reasonableness of service on a route over which appellee operates boats is not involved. The duty to furnish reasonable service while engaged in a business as a common carrier is to be distinguished from the obligation to continue in business . . . . The obligation to continue service is not imposed by any federal statute").

and northbound routes involve different services, and the continuation of northbound service is not unduly discriminatory because the northbound and southbound shippers are not similarly situated in that different routes are involved.

The cases cited by Total do not require a different result. In *United Fuel Gas Co.*, the Supreme Court held that "[t]he powers of the state, so far as the federal constitution is concerned, were not exceeded by the action of the [state] Commission, in compelling applicants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities."[26] This case, which deals with a state's authority over public utilities, is not pertinent to the Commission's authority under the Act over oil pipelines as common carriers. In *Penn Water*, the Supreme Court stated that the public utility could file under the Federal Power Act to discontinue some or all of its services.[27] However, under the Federal Power Act, the Commission has jurisdiction over public utility services. This contrasts with the ICA, which does not afford the Commission jurisdiction over services. However, once the pipeline elects to provide service, the Commission has jurisdiction over classifications, regulations, and practices. As stated above, the Commission has no jurisdiction over the reasonableness of a proposal to discontinue service because it does not involve a classification, regulation, or practice. If it did, there would have been no need for the Transportation Act of 1920's amendment granting the ICC authority over railroad abandonments.[28] In *Viscose*, the Supreme Court held that the ICC had jurisdiction over the reasonableness of a railroad's proposal to exclude artificial silk from its service because the exclusion was an attempted classification and an attempted change of regulation. The Commission finds that ARCO is discontinuing service and is not changing a classification, regulation, or practice.[29]

Indeed, two cases support the Commission's reasoning. In *Farmers Union*, the court noted that all "pipeline companies may abandon service at will (which would be unlawful for many other utilities)."[30] There is no hint in *Farmers Union* that, as Total claims, the court was referring to the abandonment of all service, i.e., taking the facilities out of service.

The second case is the Supreme Court's decision in *Lucking v. Detroit Navigation Co.*[31] There, the Court, in interpreting the scope of section 1(18), held that a water carrier subject to the Act was not prohibited by any principle of common law or by any provision of the Act from discontinuing operating its boats on its Detroit and Mackinac Island route. The Court stated:

> The imposition of a duty upon a carrier by water to furnish transportation upon reasonable request does not create an obligation to continue to operate boats on a particular route. The provision of subd. (18) [of section 1] above referred to is specifically limited to lines of railroad. This indicates legislative intention that carriers by water are not required to continue and may cease to operate if they see fit.[32]

Hence, Total is right that the railroad abandonment provision was in addition to the Act's discrimination provision, but any inference that the discrimination provision covers complete discontinuances of service is wrong.[33] The abandonment provision gave jurisdiction to determine whether a complete railroad abandonment was in the public convenience and necessity when it would otherwise be lawful under the ICA. As stated by the Interstate Commerce Commission:

> The quoted language [of section 1(18)] was intended to "provide that there shall be some Federal control over the matter of abandonment," (58 Cong. Rec. 8316-8318) and was designed to protect industries or homeowners who had located in reliance on the availability of the railroad line.[34]

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[26] 278 U. S. 300, 309 (1928).

[27] 343 U.S. 414, 423 (1952).

[28] *Williams Pipe Line Co.*, 21 FERC ¶ 61,260, at p. 61,690 n.217 (1982).

[29] Total's argument that the present scenario is like a discontinuation of a distillate is thus incorrect. Total also refers to *Cheyenne Pipeline Co.*, 19 FERC ¶ 61,077 (1982), where the Commission asserted authority over a pipeline's proposed termination of a flow reversal service and ordered a hearing about the anticompetitive impact of the proposal. However, in *ARCO*, the Commission viewed that order as "an anomaly with no precedential value." 55 FERC ¶ 61,420, at p. 62,263 (1991). As such, it is disavowed.

[30] 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984).

[31] 265 U.S. 346 (1924).

[32] *Id.* at p. 352. Further, as stated in *McCormick S. S. Co. v. United States*, "[i]t is inconceivable that the Supreme Court could have overlooked [the anti-discrimination] provision of section 3 of the Interstate Commerce Act, upon other provisions of which it relies in determining that there was no obligation on the Detroit Navigation Company to continue its service." 16 F. Supp. 45, 49 (D.C. W.D. Cal, S. D. 1936.

[33] Total's argument that the present scenario is like a discontinuance of a short haul within a long haul is not correct because here ARCO is completely discontinuing service over the southbound routes.

[34] *Boston Terminal Company Reorganization*, 312 ICC 373, 378 (1960) (citation omitted).

Therefore, section 1(18) provided exclusive federal authority over complete railroad abandonments where no federal authority previously existed.[35]

The Commission concludes that while it has the authority to consider Total's allegations that ARCO's proposal violates the ICA, Total has failed to state a claim that warrants relief under the ICA.[36] In addition, because the Commission has no authority under the Act to disapprove ARCO's proposal to discontinue its southbound service, the Commission lifts its suspension of ARCO's cancellation tariffs, rejects Total's protest, and dismisses its complaint. ARCO may discontinue its southbound service upon the effectiveness of the cancellation supplements.[37]

The Commission orders:

(A) The September 8, 1993 order's suspension of Supplements No. 1 to FERC Tariff Nos. 1805 and 1806 are lifted as of the date of this order and that order's institution of an investigation into the lawfulness of those Supplements is discontinued.

(B) ARCO shall file tariff supplements providing for the cancellation of its FERC Tariff Nos. 1805 and 1806, with related supplements, to be effective on the date of this order or thereafter if ARCO's pipeline operational requirements so dictate.