

110 FERC ¶ 61,391

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gulf South Pipeline Company, LP

Docket No. CP04-24-001

ORDER AMENDING ABANDONMENT AUTHORITY

(Issued March 30, 2005)

1. On March 3, 2005, Gulf South Pipeline Company, LP (Gulf South) filed an application requesting that the Commission amend its “Order Approving Abandonment and Determining Jurisdictional Status of Facilities” issued on March 30, 2004, in Docket No. CP04-24-000.¹ The requested amendment would permit a change in the buyer of Gulf South’s Panola County Facilities, located primarily in Panola and Harrison Counties, Texas, and reflect a reduced sales price.

2. Our March 2004 Order found that granting Gulf South’s request to abandon its Panola County Facilities was in the public interest because the primary function of the facilities is and will continue to be gathering; Gulf South no longer needs these facilities for its operations, and Gulf South’s abandonment of the facilities will allow it to focus on its primary business of interstate natural gas transportation and storage without the expense of operating the subject facilities. As discussed herein, the Commission’s public interest finding is not changed by Gulf South’s requested amendment of its abandonment authority to permit its sale of the facilities to Duke Energy Field Services, LP (Duke Energy), rather than Prism Gas Systems, Inc. (Prism).

I. Background and Proposal

3. Gulf South’s Panola County Facilities consist of approximately 432 miles of pipelines ranging in size from 1 inch to 20 inches in diameter, two compressor stations, receipt and delivery facilities, and appurtenant auxiliary facilities that gather indigenous, unprocessed gas from hundreds of wells in three local producing regions: the Carthage Field, the Blocker Field and the Bethany Field.

¹ *Gulf South Pipeline Company, LP, and Prism Gas Systems, Inc.*, 106 FERC ¶ 61,323 (2004).

4. Duke Energy is a non-jurisdictional gathering and processing company. Duke Energy, which is not affiliated with Gulf South, owns and operates several gathering systems and the East Texas Processing Plant, which is downstream of the Panola County Facilities.

5. In 1996, Duke Energy's predecessor in interest received a contractual right of first purchase and first refusal for the Panola County Facilities in the event Gulf South decided to seek authority to abandon the facilities. Prior to the filing of the original abandonment application, Gulf South, in compliance with the contractual right of first refusal process, offered the facilities to Duke Energy before entering into a contract for sale to Prism. Duke Energy declined the offer at that time, and Gulf South then entered into an agreement with Prism, another non-affiliated, non-jurisdictional gathering and processing company.

6. Thus, when Gulf South filed its application for abandonment authority, it proposed to abandon the Panola County Facilities by sale to Prism, not Duke Energy. The March 2004 Order found that abandonment of the Panola County Facilities and related services is permitted by the public convenience and necessity, that the primary function of the facilities, as currently owned and operated by Gulf South, is the gathering of natural gas, and that the facilities would continue to perform this function upon transfer to Prism.

7. In view of the above findings, the Commission's March 2004 Order authorized Gulf South to abandon the facilities by sale to Prism.² On March 1, 2005, Gulf South made a limited Natural Gas Act (NGA) section 4 filing in Docket No. RP05-220-000, in accordance with Ordering Paragraph E of the March 2004 Order, to terminate its gathering services on the Panola County Facilities, effective March 31, 2005.

8. Since the issuance of the March 2004 Order, several of Gulf South's major customers served by the Panola County Facilities have left the system and have connected to new gathering pipelines owned by Mark West Energy Partners, L.P. (Mark West), formerly American Central East Texas Gas Company, L.P. Gulf South states that Mark West's new gathering lines will deliver gas to a new 175 MMcfd processing plant being constructed by Mark West. Gulf South states that the customers who left the Panola County Facilities for Mark West's system accounted for approximately half of the throughput on the facilities. The departure of those shippers therefore diminished the economic value of the Panola County Facilities.

² See *id.* at Ordering Paragraph (A).

9. Gulf South states that when a lower price was renegotiated by Gulf South and Prism, Duke chose to exercise its right of first refusal. In order to meet its contractual obligations with respect to Duke Energy's right of first refusal, Gulf South now proposes to sell the facilities to Duke Energy at the lower renegotiated price of \$5 million.³

10. The sale to Duke Energy will result in an associated loss of approximately \$4.4 million.⁴ Gulf South states that it will not seek to recover the loss in a future NGA section 4 rate case. Further, Gulf South does not propose to change any of its transportation or gathering rates in this filing.

11. Gulf South asserts that the change in buyer of the Panola County Facilities does not change the basis for the Commission's findings in the March 2004 Order that Gulf South's abandonment of the facilities is permitted by the public convenience and necessity and that the facilities are gathering facilities exempt from Commission jurisdiction. Gulf South states that the facilities are the same, their function is the same, the business purpose of the buyer is the same, and the fact that Gulf South no longer needs such gathering facilities is also unchanged. Further, Gulf South states that any concerns with respect to the competitive circumstances facing existing customers on the facilities should be alleviated by the fact that Gulf South's request for amendment of its abandonment authority is due to competitive forces, *i.e.*, the loss of shippers on the subject facilities to Mark West's new gathering facilities.

II. Notice, Interventions, and Protest

12. Notice of Gulf South's application for amendment of its abandonment authority was published in the *Federal Register* on March 14, 2005, 70 Fed. Reg. 12,466. Prism filed a protest, Gulf South filed an answer to Prism's protest, Prism filed an answer to Gulf South's answer, and Gulf South filed an answer to Prism's answer. Rule 213(a)(2) of the Commission's rules of Practice and Procedure prohibits answers and responses unless otherwise ordered by the decisional authority.⁵ We will accept Gulf South's and Prism's answers because they provide information that assisted us in our decision-making process.

³ The original price for the sale of the facilities to Prism was \$15 million.

⁴ The facilities' net book value, estimated as of September 30, 2004, is \$9,241,558. See Exhibit Y of Gulf South's original application.

⁵ 18 C.F.R. § 385.213 (a)(2)(2004).

13. While Prism does not ask the Commission to deny abandonment authorization, Prism emphasizes that the Commission has found that transfers of gathering facilities from interstate pipelines should promote competition in the gathering industry.⁶ Prism asserts that Duke Energy's ownership of the subject facilities may frustrate competition in the area. In this regard, Prism states that Duke Energy (and its predecessor in interest, Union Pacific Resources Group) has already been found on two occasions to have engaged in anticompetitive behavior with respect to its operation of facilities in the area of the Panola County Facilities. Prism notes that Duke Energy's East Texas Processing Plant is the only processing plant currently connected to the Panola County Facilities. Prism also states that it can find no evidence to support Gulf South's claim that a new Mark West processing plant is currently under construction; thus, Prism argues that the Commission should not rely on these assertions regarding a new plant as evidence that significant competition exists in the area.

14. Prism states that, whereas it responded to Duke Energy's concerns about the original abandonment application by agreeing to transport all gas that was committed to Duke Energy's plant, Duke Energy has only pledged to operate the Panola County Facilities in a non-discriminatory manner. Prism states that it has not been assured that it will be allowed to interconnect its Waskom Processing Plant with the Panola County Facilities. Prism requests that the Commission condition any abandonment authorization on a requirement that Duke Energy permit such interconnection and provide competitive gathering service for Prism and other parties wishing access to Prism's processing plant.⁷

15. In view of Gulf South's decision to sell the Panola County Facilities to Duke Energy instead of Prism, Prism argues that the Commission must reexamine the basis for its finding that the Panola County Facilities will continue to perform a gathering function following Gulf South's abandonment of the facilities. Gulf South emphasizes that the Commission found, based on the physical characteristics of the facilities as currently owned and operated by Gulf South, that the subject facilities are gathering facilities exempt from the Commission's jurisdiction. In any event, since Duke Energy is engaged in the gathering business and intends to use the Panola County Facilities to gather gas, Gulf South asserts that the change in buyer cannot create a basis or need for the

⁶ Citing *ANR Pipeline Company*, 76 FERC ¶61,153 at 61,908 (1996) (citations omitted).

⁷ Prism notes that it does not ask the Commission to address or interpret the underlying commercial agreements between Gulf South and Duke Energy or between Gulf South and Prism, acknowledging that any disputes involving those contracts would fall within the jurisdiction of the courts.

Commission to reconsider its jurisdictional determination regarding these facilities. Gulf South notes that Prism has not cited any precedent where the Commission, in similar circumstances, has reexamined its authorization to abandon facilities by sale to a non-affiliated gathering company. Gulf South further asserts that, as no party sought rehearing of the March 2004 Order, the facilities became exempt from the Commission's jurisdiction on April 30, 2004, and that there is therefore no basis upon which the Commission may now reexamine its jurisdictional findings.⁸

16. Gulf South emphasizes that gathering is expressly excluded from the Commission's jurisdiction under the NGA, and that where there is no connection between an unregulated activity and a jurisdictional company, the Commission has no authority to regulate facilities used for the unregulated activity, condition the sale of the facilities, or assert jurisdiction over the new owner of the facilities.⁹ Accordingly, Gulf South further asserts that there also is no basis for the Commission to entertain Prism's request to condition Gulf South's abandonment authorization based on broad concerns about gathering and processing competition in the area. In this respect, however, Gulf South states that gathering and processing are extremely competitive in the area, as evidenced by Mark West's recent entrance into the market,¹⁰ and that transfer of the Panola County Facilities to Duke Energy will not change the competitive landscape.

III. Discussion

17. As Gulf South emphasizes, the Commission found in its March 2004 Order that, based on the physical characteristics of the Panola County Facilities, gathering is the primary function of the facilities. Since Duke Energy is engaged in the gathering business and intends to use the Panola County Facilities to gather gas, we agree with Gulf South that there is no need to reexamine our finding regarding the jurisdictional status of

⁸ Citing *Greensboro Lumber Co. v. Rayle Electric Membership Corp.*, 40 FERC ¶ 61,283 at 61,918 (1987), finding that the Commission's order is *res judicata*.

⁹ Citing, e.g., *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir 1996); and *Williams Gas Processing – Gulf Coast Co. v. FERC* F.3d 1335 (D.C. Cir 2004).

¹⁰ Gulf South states that whether the Mark West plant is being built is not relevant to its abandonment application, but that, in any event, Mark West has filed a document with the Securities and Exchange Commission containing a statement that such a plant is being built.

the Panola County Facilities following Gulf South's abandonment solely because it now plans to sell the facilities to a different gatherer.¹¹

18. Prism does not request that the Commission deny abandonment authorization in this case. Rather, Prism requests that abandonment authorization be accompanied by conditions placed on Duke Energy's acquisition and use of the subject facilities.

19. Since the Commission has determined that the Panola County Facilities are non-jurisdictional gathering facilities, the Commission cannot not impose any conditions on Duke Energy's or any other non-affiliated gatherer's use of the facilities. Further, Gulf South's decision to sell the facilities to Duke Energy instead of Prism does not change the Commission's finding that the public convenience and necessity permit approval of Gulf South's abandonment of the facilities.

20. Gulf South no longer needs the Panola County Facilities, and we are not convinced by the competitive concerns voiced by Prism that our approval of Gulf South's abandonment of the facilities is contrary to the public interest. As Gulf South argues, the competitiveness of the market is evidenced by Mark West's entrance as a gatherer and processor. Prism does not dispute that it decided not to proceed with its purchase of the facilities at the originally agreed upon price because Mark West's entrance as an additional competitor resulted in the market value of the Panola County Facilities being greatly diminished.

21. In view of the above considerations, we find that Gulf South's decision to sell the Panola County Facilities to Duke Energy instead of Prism does not change our finding that the public convenience and necessity permit approval of Gulf South's abandonment of these facilities and services provided by the facilities. Therefore, we will grant Gulf South's request for amendment of its abandonment authority.

22. Gulf South proposes to account for the sale of the Panola County Facilities to Duke Energy as the disposition of an operating unit or system and recognize a loss of \$4,406,548 in Account No. 421.2, *Loss on Disposition of Property*. Gulf South's proposed accounting is in accordance with Gas Plant Instruction No. 5 and the requirements of the Commission's Uniform System of Accounts. Gulf South must file its

¹¹ The primary function test is primarily a physical test. The business nature of the owner is a secondary consideration that cannot be relied upon to support jurisdictional determination that is inconsistent with physical characteristics of the facilities at issues. See, e.g., *Sea Robin Pipeline Company*, 92 FERC ¶ 61,072 at 61,291 (2000).

actual accounting entries within six months of the sale as required by paragraph B of the instructions to Account 102, *Gas Plant Purchased or Sold*. .

23. Environmental review of this proposal under section 380.4(b) confirms that this action qualifies as a categorical exclusion under section 380.4(a)(31). The determination of whether the subject facilities will remain exempt from the Commission's jurisdiction is an administrative decision.

24. At hearing held on March 30, 2005, the Commission on its own motion received and made a part of the record in these proceedings all evidence submitted, including the applications and petitions and exhibits supporting the approvals sought, and after consideration of the record,

The Commission orders:

(A) Gulf South's abandonment authority granted by the March 30, 2004 Order in this proceeding is amended to authorize Gulf South's abandonment of the Panola County Facilities by sale to Duke Energy, as described in this order and more specifically in the application and amendment.

(B) Gulf South shall notify the Commission within 10 days of the date of abandonment of the facilities described above.

(C) Gulf South is instructed to file its actual accounting entries clearing Account 102 within six months of the sale.

(D) Prism's protest is denied.

(E) Gulf South's and Prism's answers are accepted.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.