

129 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Western Refining Southwest, Inc.
and Western Refining Pipeline Company

Docket No. OR09-3-001

v.

TEPPCO Crude Pipeline, LLC

ORDER DENYING REHEARING

(Issued October 22, 2009)

1. On June 22, 2009, the Commission issued an order dismissing a complaint filed by Western Refining Southwest, Inc. (Western Refining) and Western Refining Pipeline Company (Western Pipeline) (collectively Western Parties) against TEPPCO Crude Pipeline, LLC (TEPPCO).¹ The order dismissed the complaint because it concerned a private contract not within the Commission's jurisdiction. Since the order dismissed the complaint, the order also denied a motion to intervene and request to consolidate filed by Resolute Natural Resources Company and Resolute Aneth, LLC (Resolute). Requests for rehearing were filed by the Western Parties and Resolute. For the reasons discussed below, the requests for rehearing are denied.

Background

2. On February 9, 2009, the Western Parties filed a complaint against TEPPCO alleging that TEPPCO violated its statutory, regulatory, and contractual obligations to the Western Parties by reversing the flow of its pipeline, illegally retaining crude oil belonging to the Western Parties, and continuing to demand lease payments. On March 4, 2009, the Western Parties filed an amendment to their complaint alleging that TEPPCO was illegally retaining additional crude oil owned by the Western Parties that was not mentioned in the initial complaint. The Western Parties requested that the

¹ *Western Refining Southwest, Inc. and Western Refining Pipeline Company v. TEPPCO Crude Pipeline, LLC*, 127 FERC ¶ 61,288 (2009) (June 22 Order).

Commission order TEPPCO to pay damages resulting from the lease payments allegedly retained illegally by TEPPCO and the lost value of the crude oil allegedly seized illegally by TEPPCO.

3. Resolute sought to intervene on the ground that they have an interest in the proceeding because they sold crude oil to Western Refining. Resolute also asserted that the complaint proceeding should be consolidated with Western Pipeline's tariff filing in Docket No. IS09-146-000 canceling certain service.

4. On June 22, 2009, the Commission issued an order dismissing the complaint for lack of jurisdiction. The order stated that the facts presented in the case showed that the Western Parties (and their predecessor in interest, Giant Industries) and TEPPCO and its affiliate, entered into a complex business arrangement involving the construction of pipeline facilities, pipeline capacity leases, and crude oil purchase agreements. As pertinent here, the capacity lease agreement recognized that the TEPPCO pipeline facilities would be used to continue existing transportation service between Hobbs, New Mexico and Midland, Texas, and would be used for transportation from Midland, Texas to Hobbs, New Mexico to implement the purpose of the lease. The order stated that the issue before the Commission was whether the dispute arising from their business arrangement, specifically the capacity lease agreement between Western Pipeline and TEPPCO, was within the Commission's jurisdiction over oil pipeline transportation under the Interstate Commerce Act (ICA). The Commission found that the dispute arising from the capacity lease agreement between Western Pipeline and TEPPCO did not involve the Commission's jurisdiction over oil pipeline transportation and was a private contract governing property rights solely within the jurisdiction of the appropriate state court to resolve. Since the Commission dismissed the complaint, the order also denied Resolute's motion to intervene and request for consolidation.

5. On July 20, 2009, and July 21, 2009, respectively, the Western Parties and Resolute filed requests for rehearing of the June 22 Order.

Discussion

6. The Western Parties assert that the Commission is obligated by the ICA to investigate and set for hearing complaints that allege that a common carrier is acting in an unjust, unreasonable or discriminatory manner regardless of whether a private contractual arrangement exists between the carrier and the shipper that relates to that improper behavior. The Western Parties maintain that the Commission acted contrary to the ICA when it dismissed their complaint on the grounds that it did not have jurisdiction over the course of conduct in which TEPPCO engaged.

7. The Commission finds that it did not act contrary to the ICA as alleged by the Western Parties. The Commission investigated the complaint by examining all the pleadings, affidavits and exhibits submitted in the proceeding and properly determined

that the alleged unlawful conduct of TEPPCO did not arise from jurisdictional activity within the Commission's jurisdiction. Rather, the contractual dispute between the Western Parties and TEPPCO arises from a capacity lease agreement concerning pipeline facilities that is a private contract governing property rights that is within the jurisdiction of the appropriate state court. As the Commission stated in the June 22 Order, the fact that the lease agreement concerns pipeline facilities does not provide the Commission jurisdiction because the ICA does not provide the Commission authority over the disposition or leasing of pipeline facilities. Section 1(1)(b) of the ICA states that its provisions apply to common carriers engaged in "the transportation of oil . . . by pipe line. . . ." As the contract in question is for the lease of pipeline facilities and not for the "transportation of oil," the Commission has no jurisdictional authority over the contractual dispute between the Western Parties and TEPPCO.

8. The Western Parties argue that the Commission failed to provide a reasoned decision as to why it did not have jurisdiction over the Western Parties' complaint under the primary jurisdiction doctrine.²

9. In the June 22 Order the Commission stated that since the lease agreement does not implicate oil pipeline transportation under the provisions of the ICA, there are no issues within the Commission's jurisdiction. The Commission further found that there were no combined contractual and regulatory issues that require the Commission's special expertise. While the Commission finds that it adequately explained why it did not exercise jurisdiction, the Commission will further address the points raised by the Western Parties on rehearing concerning the primary jurisdiction doctrine. First, the Commission does not possess some special expertise which makes the case peculiarly appropriate for Commission decision. Even though the lease agreement involves pipeline facilities it is still a private contract governing property rights that is subject to state law. Since the Commission does not have authority over the entry or exit into the oil pipeline business or the disposition of oil pipeline facilities, there is no reason that the contract needs to be interpreted by the Commission rather than the appropriate state court. Second, there is no need for uniformity of interpretation of the type of question raised by the dispute because the contract does not involve oil pipeline transportation or the administration of Commission oil pipeline tariffs. The rights and obligations of the

² Citing, *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979). "Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends . . . on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission."

parties under the contract should be decided according to state contract law concerning the lease of property. Finally, the case is not important in relation to the regulatory responsibilities of the Commission. Since the issues arising from the complaint do not concern oil pipeline transportation and the Commission lacks authority over the disposition of oil pipeline facilities, it is not important to the regulatory responsibilities of the Commission with respect to oil pipelines.

10. The Western Parties contend that the Commission's order erred by failing to recognize that TEPPC acted as a common carrier, and not within the scope of any contract with Western Pipeline, when TEPPCO seized Western Refining's crude oil and transported it to terminals and pipeline facilities that TEPPCO controlled. The Western Parties further assert that TEPPCO acted in the role of a common carrier when it accepted the nominations of Western Refining with respect to pumpover transportation.

11. The Commission finds that the Western Parties are again attempting to artificially create common carrier/shipper relationships where none exist in an effort to create jurisdiction over a private contractual dispute. Even if Western Refining supplied the crude oil to TEPPCO for linefill, it was done to fulfill the contractual obligations of Western Pipeline under the lease agreement and did not create any separate relationship between Western Refining and TEPPCO. Section 5(g) of the lease agreement is clear and states that "Lessee shall be required to supply a pro rata share of crude oil and inventory necessary for pipeline and tankage fill to assure efficient operation of the Pipeline." Further Section 13 of the lease agreement provides that the validity, performance, interpretation and effect of the lease shall be governed by the laws of the State of Texas and any dispute, disagreement, controversy or claim including default, breach or violation of any provision shall be resolved in accordance with Texas law. In addition, the Commission finds that the pumpover transportation provided by TEPPCO did not create a jurisdictional common carrier relationship with Western Refining because that charge was assessed for moving crude locally within Midland to the origin of the pipeline and was computed under a Texas Railroad Commission tariff. Finally, contrary to the Western Parties' argument, TEPPCO did not manipulate its linefill policies in a discriminatory manner because, as already stated, the linefill was provided pursuant to Section 5(g) of the lease agreement rather than TEPPCO's tariff governing oil pipeline transportation. There can be no discrimination because TEPPCO was not applying linefill policies in its tariff to the Western Parties.

12. Western Parties assert that the Commission erred by considering TEPPCO's reversal of the pipeline in which Western Pipeline had leased capacity as an abandonment over which the Commission has no jurisdiction. Western Parties contend that TEPPCO violated its common carrier obligations by failing to provide notice of intent to abandon or reverse its pipeline. Western Parties also assert that TEPPCO cannot legitimately justify arbitrary, sudden and unannounced changes in its service routes by characterizing them as abandonments.

13. Contrary to the Western Parties' argument, neither the Commission nor TEPPCO characterized TEPPCO's actions under the lease agreement as an abandonment of facilities. In the June 22 Order the Commission simply recognized that the Commission's jurisdiction over oil pipelines is more restricted with respect to the construction and disposition of facilities when compared to the Commission's authority over natural gas pipelines and electric utilities. The Commission merely stated the general proposition that "construction, entry and abandonment of service by oil pipelines are not subject to the Commission's jurisdiction."³ TEPPCO was not required to provide any notices of changes in service or routes to its shippers because none occurred. As TEPPCO has stated in this proceeding, "the rerouting of shipments so that they went directly from Hobbs to Midland required no change in TEPPCO's tariffs. TEPPCO was already providing service from Hobbs to Midland, both over the alternative route and over the parallel 8-inch line. Regardless of what facilities were used, these shipments were covered by TEPPCO's FERC Tariff No. 21 (*see Ex. 2*), which offered service from Hobbs to Midland. TEPPCO also continued to offer service from Midland to Hobbs under its FERC Tariff No. 20 (*see Ex. 3*) and would have provided that service if it had been requested by a shipper."⁴ Moreover, none of TEPPCO's shippers has asserted that TEPPCO was offering service under its FERC Tariffs that it was unable to provide. The issue of whether TEPPCO breached its lease agreement with Western Pipeline when it used the capacity that it retained in the Midland to Hobbs line to transport crude from Hobbs to Midland when the line not being used by Western Pipeline pursuant to the lease is not within the Commission's jurisdiction and is subject to determination under Texas state law.

14. Western Parties assert that the Commission has jurisdiction over discriminatory and preferential collusion between a regulated common carrier and its marketing affiliate. Western Parties contend that it was erroneous for the Commission to rule that it has no jurisdiction to consider their complaint that TEPPCO, a common carrier pipeline that is subject to the ICA and the Commission's jurisdiction, seized crude oil in order to pressure the Western Parties to enter into renegotiating a contract with TEPPCO's marketing affiliate.

15. In the June 22 Order the Commission recognized that the Western Parties' alleged that TEPPCO's actions under the capacity release agreement were an attempt to have the Western Parties' renegotiate a separate crude purchase agreement between them and TEPPCO's crude marketing affiliate. The Commission determined that allegations that

³ *Western Refining Southwest, Inc. and Western Refining Pipeline Company v. TEPPCO Crude Pipeline, LLC*, 127 FERC ¶ 61,288, at P 25 (2009), *citing*, *SFPP L.P.*, 86 FERC ¶ 61,022, at 61,077 (1999).

⁴ TEPPCO's March 20, 2009 Answer at P 34.

TEPPCO breached one non-jurisdictional contract, the lease agreement, in order to benefit its affiliate with respect to another non-jurisdictional contract, a crude purchase agreement, does not create jurisdiction and is a matter for the state court. Since there is no common carrier/shipper relationship between the parties and the issues do not arise from the transportation of oil in interstate commerce, it is not within the Commission's authority under the ICA. There is no evidence that TEPPCO is benefiting its marketing affiliate with respect to regulated activities. Further, TEPPCO disputes the Western Parties' allegations. TEPPCO stated that "[b]ecause Western Refining was falling behind on meeting its crude purchase obligations, TEPPCO in February 2008 approached Western Refining to determine if Western Refining would be interested in renegotiating or buying out of its obligations under the crude purchase agreement. Eventually, those discussions were expanded and focused upon a possible renegotiation of Western Pipeline's obligations under the Lease Agreement, which still had about nine years remaining on its terms. At the time the Complaint in this case was filed, the discussions between the parties regarding renegotiation of these contracts were still on-going."⁵

16. Western Parties asserts the June 22 Order erroneously resolved disputed factual issues in the context of a motion to dismiss. Western Parties argue that any justification that the Commission could possibly find in its regulations for resolving disputed factual issues, such as the issues specifically presented in this case, without taking evidence or holding a hearing is contrary to the ICA and due process requirements.

17. The Commission rejects Western Parties' argument that the Commission was required to take evidence or hold a hearing in this proceeding. Contrary to the Western Parties' characterization, TEPPCO did not merely file a motion to dismiss but also filed an answer as required by the Commission's complaint rules that included affidavits and exhibits. The Western Parties characterization on rehearing creates the impression that TEPPCO sought summary dismissal without answering the allegations in the Western Parties' complaint. This is not the case however. Both the Western Parties and TEPPCO filed numerous pleadings in this proceeding including affidavits and exhibits. The Commission analyzed an extensive record in this case and was able to base its decision on the written pleadings. It is well settled that the Commission "is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions."⁶ Accordingly, for the reasons discussed above, the Western Parties' request for rehearing is denied.

⁵ TEPPCO March 20, 2009 answer at P 28.

⁶*Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993), citing, *Boston Carrier, Inc. v. ICC*, 728 F.2d 1508, 1511 n.5 (D.C. Cir. 1984).

18. Finally, Resolute argues that the Commission erred in denying its intervention in this proceeding and its request to consolidate this proceeding with Docket No. IS09-146-000, where Western Pipeline filed tariffs to cancel services over the same pipeline facilities that are the subject of the complaint in Docket No. OR09-3-000.

19. The Commission denies Resolute's request for rehearing. This case involves a private contract dispute between the Western Parties and TEPPCO in which it has no interest. As both the Western Parties and TEPPCO have stated in this case, Resolute is not a party to the lease agreement and does not claim a third-party beneficiary interest that is affected by the lease agreement, and has not shipped any crude oil on the TEPPCO pipeline segments involved in the complaint. Moreover, since this complaint is being dismissed, there is no reason to consolidate it with another Commission proceeding.

The Commission orders:

The requests for rehearing filed by the Western Parties and Resolute are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.