

131 FERC ¶ 61,277
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

TE Products Pipeline Company, LLC

Docket No. IS10-160-002

ORDER DENYING REHEARING

(Issued June 28, 2010)

1. On March 30, 2010, the Commission issued an order, which among other things, accepted tariffs removing propane terminal facilities and charges associated with such facilities from TE Products Pipeline Company, LLC's (TEPPCO) tariff.¹ A request for rehearing of the March 30 Order was filed by CHS Inc., Cress Gas Co., Ferrellgas L.P., and the National Propane Gas Association (collectively the Propane Group). The Propane Group asserts the Commission erred in finding that the terminal facilities are not within the Commission's jurisdiction. For the reasons discussed below, the Commission denies the Propane Group's request for rehearing.

Background

2. On March 1, 2010, TEPPCO filed several tariffs to cancel certain origin and destination points, cancel certain services, and reduce the rates for certain movements of butane and propane. As a result of these tariff changes, TEPPCO's affiliate, Enterprise Terminals & Storage, LLC (ETS) will now provide certain terminalling and odorization services. TEPPCO stated it was appropriately removing non-jurisdictional terminalling and odorization services from its tariffs. TEPPCO stated that while those services were previously provided by the pipeline for the convenience of shippers, they are no longer offered by TEPPCO, are not necessary for pipeline transportation and are not FERC-jurisdictional.

3. A number of parties, including the rehearing petitioners, protested the filing arguing that if the Commission accepted the tariffs, TEPPCO and its affiliate could increase the amount charged for the final step of transportation over its interstate pipeline, and will be free to discriminate among shippers using the pipeline. The protesters argued

¹ *TE Products Pipeline Company, LLC*, 130 FERC ¶ 61,257 (2010) (March 30 Order).

that the terminal facilities form the last step of the interstate transportation function and are an integral part of the overall transmission function without which the system cannot operate.

4. On March 30, 2010, the Commission issued an order accepting the tariffs. The March 30 Order stated that a service is subject to the Interstate Commerce Act (ICA) and the Commission's jurisdiction only if it is "integral" or "necessary" to the pipeline transportation function.² The Commission found the terminalling and odorization services TEPPCO proposed to remove from its tariff are not within the Commission's jurisdiction. The Commission determined the terminalling and odorization services that TEPPCO proposed to remove from its tariff occur at the destination point after TEPPCO completes the transportation of propane and butane products. The March 30 Order stated that the terminalling service, which involves loading propane or butane onto trucks or tanker cars, and the odorization service, a safety measure which involves the addition of a chemical to propane to provide a distinctive smell so that end users can detect leaks if propane is used for heating or cooking, are neither necessary nor integral to the transportation of the propane or similar petroleum products.

5. The Commission found the terminalling and odorization services in this proceeding were unlike the services described in *Lakehead*. In that proceeding, the carrier needed the breakout storage tanks to permit the transfer of petroleum products from a large-diameter pipeline segment to a small-diameter pipeline segment. In *Lakehead*, the Commission found the breakout tank facilities and related services were necessary or integral to transportation because they were the functional equivalent of missing pipe.

6. On April 29, 2010, the Propane Group filed a request for rehearing of the March 30 order.

Request for Rehearing

7. The Propane Group asserts the Commission erred in finding that the terminal facilities removed from TEPPCO's tariff are not "integral" or "necessary" to the pipeline transportation function and thus erred in concluding that these facilities are not within the Commission's jurisdiction. The Propane Group submits the March 30 Order relied on a factual assumption that TEPPCO's terminalling service "involves loading propane or butane onto trucks or tanker cars." The Propane Group contends this definition of TEPPCO's terminal facilities or services is not presented in any affidavit, and it is not accurate. The Propane Group states that TEPPCO's terminal facilities include an array of

² *Lakehead Pipe Line Co., L.P.*, 71 FERC ¶ 61,338, at 62,325 (1995), *order on reh'g*, 75 FERC ¶ 61,181, at 61,601 (1996) (*Lakehead*).

pipe and other infrastructure leading from the TEPPCO mainline all the way to the terminal outlet valve, only after product has moved through these terminal facilities do customers first take control of the product as it is loaded into trucks. The Propane Group states the terminals include sections of pipe extending off the mainline and into the loading area and truck racks, as well as associated valves, tanks and metering facilities. The Propane Group states that truck and tanker loading is merely the final step in the passage of product through these facilities.

8. The Propane Group asserts the factual distinction between a mere truck loading service and the extensive transportation facilities at issue in this case is significant because it changes the result of the application of the Commission's *Lakehead* jurisdictional test. The Propane Group asserts that, as in *Lakehead*, the propane must necessarily move through the facilities in question, i.e., the terminal's pipe, tanks, and related infrastructure leading off of TEPPCO's mainline, before it reaches the truck or tanker loading facilities or racks, where delivery is made and custody first transferred to customers.

9. The Propane Group asserts the March 30 Order erred in failing to recognize that product passes through TEPPCO's terminal facilities before transportation is completed. The Propane Group argues there is no way for a customer to remove product directly from TEPPCO's mainline. Instead, it must first pass through the pipe, tanks, and other infrastructure included in TEPPCO's terminal facilities before TEPPCO can deliver it. The Propane Group concludes that the factual record before the Commission establishes that the terminal facilities and services at issue in this proceeding are physically necessary to the transportation of propane and, accordingly, are subject to the Commission's jurisdiction.

Discussion

10. On rehearing, the Propane Group continues to assert that the terminalling facilities and services TEPPCO removed from its FERC Tariff are within the Commission's jurisdiction. While there may have been some misstatement as to the nature of the facilities in the March 30 Order, upon further review of the record in this proceeding, the Commission continues to find that the terminalling facilities and services that were removed from TEPPCO's tariff are non-jurisdictional.

11. As was stated in the March 30 Order, the jurisdictional test discussed in *Lakehead* focuses on whether the facilities are necessary or integral to transportation. The Commission also finds that the Commission's order in *Kerr-McGee Refining Corporation and Texaco Refining and Marketing, Inc. v. Williams Pipe Line Company*³

³ 72 FERC ¶ 61,274 (1995) (*Kerr-McGee*).

further supports the conclusion that the terminalling facilities at issue here are non-jurisdictional. In *Kerr-McGee*, the issue was whether certain Product Transfer Order (PTO) and Product Authorization (PA) services were within the Commission's jurisdiction under the ICA. The PTO and PA services related to whether barrels of product were transferred to another shipper's account or whether someone other than the shipper was authorized to remove the shipper's product from the system. The Commission determined that transportation services are completed at the time the petroleum product enters the terminal or other facilities. The Commission also found that the PTO and PA services occurred after the pipeline performs the jurisdictional transportation. The Commission also determined that to the extent certain of the PTO services occurred in transit on the pipeline, they were not necessary incidents of transportation.

12. Applying the *Lakehead* and *Kerr-McGee* orders to TEPPCO's facilities, the Commission finds that jurisdictional transportation is completed when the product enters the terminal facilities and these facilities are not integral or necessary to the transportation function. As the Propane Group itself states, the terminal facilities are not on TEPPCO's mainline system and consist of smaller pipes, metering facilities and storage tanks, in addition to the truck unloading facilities. The cancelled tariff also shows there was the possibility of a temporal break between transportation and actual delivery at the terminal because FERC Tariff 119 at Item 35 indicated that delivery occurred during certain hours and TEPPCO was not obligated to deliver less than 6000 gallons into any one tank truck. The fact that storage tanks are also found at the terminal facilities shows that something other than jurisdictional transportation is occurring at these facilities. It is also important to note that throughout the industry and on TEPPCO's system, other entities provide the same or similar terminalling services as TEPPCO and they do not have FERC tariffs on file. Some of the entities providing terminalling services on TEPPCO's system include interveners in this proceeding. The fact that TEPPCO previously provided the terminalling services as part of its tariff in conjunction with jurisdictional services does not make the services jurisdictional. The fact that the services were spun down to an affiliate of TEPPCO also does not provide a basis for asserting jurisdiction over these services. Thus, the physical nature of the terminalling facilities themselves and the fact that these services are provided by non-jurisdictional entities supports the conclusion that they are not integral or necessary for jurisdictional transportation. Accordingly, the Propane Group's request for rehearing is denied.

The Commission orders:

The Propane Group's request for rehearing of the Commission's March 30, 2010 order is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.