

Kenai Pipe Line Company

Tesoro Alaska Company

Tesoro Logistics Operations, LLC

ORDER ON REQUEST FOR JURISDICTIONAL DETERMINATION OR TEMPORARY WAIVER

138 FERC ¶ 61,034 (2012)

In this case, Tesoro Alaska Company and Tesoro Logistics Operations, LLC (jointly Tesoro) requested that the Commission issue an order ruling that certain pipeline spurs that transport crude oil from the production field to Tesoro's Kenai refinery and certain spurs that carry refined petroleum products between the Kenai refinery, the Nikiski dock and the bulk storage Nikiski Tankage, all within the State of Alaska, are outside the Commission's jurisdiction under the Interstate Commerce Act (ICA). The Commission decided that it did not have jurisdiction under the ICA as none of the facilities in question were actually used by any entity other than Tesoro, and that Tesoro used them only to support its refinery operations, not to move product in interstate commerce.

20120115 0911 FERC ED (UNOFFICIAL) 01/19/2012

138 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Kenai Pipe Line Company
Tesoro Alaska Company
Tesoro Logistics Operations, LLC

Docket No. OR11-21-000

ORDER ON REQUEST FOR JURISDICTIONAL DETERMINATION
OR TEMPORARY WAIVER

(Issued January 19, 2012)

1. On September 1, 2011, Kenai Pipe Line Company (Kenai), Tesoro Alaska Company (Tesoro Alaska), and Tesoro Logistics Operations, LLC (Tesoro Logistics) (collectively Tesoro) filed a request that the Commission determine that pipeline routes stated in Kenai's FERC Tariff No. 26.0.0 are not subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA). Tesoro also requests the Commission determine it does not have jurisdiction over a marine dock and storage tanks that are currently being used as an integral part of the operation of a Tesoro Alaska refinery in Kenai, Alaska. In the alternative, Tesoro states that if the Commission finds it does have jurisdiction over the pipelines and spur lines referred to in the Kenai tariff, the Commission should grant temporary waivers from its tariff filing and reporting requirements under the ICA. For the reasons discussed below, the Commission grants the request for jurisdictional determination and finds it does not have jurisdiction over the subject facilities.

Background

2. The request for determination concerns the Nikiski Facilities near the Cook Inlet in Kenai, Alaska. When Kenai filed its tariff in January 1995, two unaffiliated companies, Tesoro Alaska and Kenai, which was then controlled by Chevron Corporation (Chevron), owned different portions of the Nikiski Facilities. Tesoro Alaska owned the Kenai refinery as well as several crude oil and refined product pipeline spurs extending to manifolds at a Kenai fence line that connected the Kenai refinery to the Nikiski Dock and the Nikiski Tankage. Kenai owned the Nikiski Dock, the Nikiski Tankage, and crude oil and product lines from the Nikiski Dock to the connections with the Tesoro Alaska

pipeline spurs. In addition, Kenai owned the two crude oil pipelines that delivered crude oil from Cook Inlet producing fields to the Nikiski Tankage, i.e., the Swanson River line and the line connecting Plants near Section 34 to the Nikiski Tankage. The Kenai tariff reflected six pipeline routes. Two of the routes were from pipelines in the producing area to the Nikiski Tankage. Two other routes were on a pipeline spur between the Nikiski Tankage and the Nikiski Docks that operated bi-directionally. The final two routes were Kenai pipeline spurs used to transport oil between the Nikiski Docks and the Tesoro Alaska spur. The Kenai tariff also included a fee for storing crude oil unloaded from marine vessels to the Nikiski storage tanks.

3. In March of 1995, Tesoro Alaska bought Kenai from Chevron. As a result, all of the facilities previously owned by Kenai (Chevron) are now and have been owned by Tesoro Alaska since that sale. Tesoro states that although Kenai has maintained accounts separate from Tesoro Alaska during the 16-year period from 1995 to 2011, the Nikiski facilities serve a continuous flow of Tesoro Alaska-related crude oil and petroleum products to and from the Kenai Nikiski dock to Kenai Nikiski storage tanks onward to the Tesoro Alaska refinery. Tesoro states, at the present time, there is no company other than Tesoro Alaska that has any real interest in any of the Nikiski facilities or the transportation of the crude oil and petroleum products referred to in the Kenai tariff. Tesoro states that from a financial and management standpoint, there is almost a complete overlap between Kenai and Tesoro Alaska. Tesoro states that for SEC accounting purposes, all of Kenai's revenues are consolidated into Tesoro Alaska and then rolled into Tesoro Corporation. Tesoro states Kenai does not separately report profits and losses, outside of its FERC Form No. 6, and has no employees. Tesoro states all routine Kenai operations are undertaken by the same personnel that perform similar functions for the tank and pipeline operations within the Tesoro refinery. Tesoro maintains all of these individuals are employees of Tesoro Alaska. Moreover, Tesoro states each officer of Kenai is also an officer of Tesoro Alaska.

4. Tesoro did not alter the tariff that Kenai had published with the Commission in January 1995 because a provision of the purchase agreement between Chevron and Tesoro required Tesoro to maintain the original Kenai tariff in effect until March 3, 2005. Tesoro states that perhaps it should have published a new tariff after March 3, 2005 removing all of the assets in the Kenai tariff from interstate common carrier service, but the fact that it did not take such action until recently has not prejudiced anyone. Tesoro states that at no point from 2005 up to and including today has anyone other than Tesoro affiliates requested service on any of the Kenai facilities.

5. On May 18, 2011, Kenai filed the 1995 tariff as a baseline eTariff to comply with the Commission's baseline eTariff filing requirements. Tesoro contends it did not change the 1995 baseline eTariff to reflect current operations, because the Commission's regulations prohibited significant tariff changes in a baseline eTariff filing. However, Tesoro stresses it did not thereby intend to hold itself out as providing common carrier

service from the Nikiski Tanks to the Nikiski Dock, a service it has not been provided in the past 16 years. Tesoro states its original intent was to file the baseline tariff and then immediately cancel it. Tesoro states that in an abundance of caution it instead filed the present request for determination regarding jurisdictional status. Tesoro believes it would have been and still is entirely proper to simply cancel the Kenai tariff since interstate common carrier services are no longer being offered on any of the Kenai pipelines or facilities.

6. Tesoro states the pipeline and pipeline spurs are ultimately owned by Tesoro Alaska but are slated for transfer to its affiliate Tesoro Logistics. Tesoro explains that the facilities are involved in an arrangement for the formation of a Master Limited Partnership (MLP) and the transfer of assets to that MLP.

7. Tesoro submits substantial changes have occurred in the ownership and operation of the routes and facilities specified in the Kenai tariff since it was first published. Tesoro states that after the tariff was originally published, Tesoro Alaska acquired Kenai and all of its related assets. Tesoro states that, at the present time, two of the crude oil pipelines referred to in the Kenai tariff are entirely intrastate. Tesoro states that they deliver crude oil that originates in producing fields in the State of Alaska to a refinery at Kenai, Alaska that is owned and operated by Tesoro Alaska. Tesoro states all of the remaining pipeline routes in the Kenai tariff are short spur lines that for at least the past ten years have been used only to support the operation of the Tesoro Kenai refinery. Tesoro states these lines transport crude oil that Tesoro Alaska owns from a dock that Tesoro Alaska ultimately owns to the Tesoro Alaska refinery. Tesoro states that another spur is used to transport Tesoro's crude oil from the Tesoro dock to Tesoro tankage. Tesoro states that tankage is located less than a half mile from the dock and less than a half mile from the refinery. Similarly, Tesoro states that the short pipeline spurs are used to transport petroleum products between the Tesoro refinery and Tesoro's dock. In short, Tesoro states that all of the pipeline spurs specified in the Kenai tariff as well as the dock and tanks are now an integral part of the Tesoro refinery. Tesoro states that for at least the past ten years, no business entity other than Tesoro has used the dock, tank facilities, or any of the crude oil or petroleum product pipeline spurs referred to in FERC Tariff No. 26.0.0.

Tesoro's Request

8. Tesoro requests the Commission determine it does not have jurisdiction under the ICA over the crude oil and petroleum product pipelines, the related tankage, and the marine dock, which are referred to in Kenai's FERC Tariff No. 26.0.0. Tesoro asserts the pipeline spurs at issue in this request that transport crude oil and petroleum products between the Kenai refinery, Nikiski Dock, and Nikiski Tankage are integral to the operation of Tesoro's refinery and could never be used by a third party. Accordingly, Tesoro contends these pipelines are not involved in any jurisdictional transportation under the ICA.

9. Tesoro submits the Commission already decided it does not have jurisdiction over facilities that are virtually the same as the facilities at issue in this case. Tesoro states that in a case involving Tesoro's Salt Lake City refinery, the Commission held that pipeline spur lines between terminals, tanks, and a refinery are not within its jurisdiction.¹ Tesoro states that the facilities at issue in this case are virtually the same as those involved in the Tesoro Salt Lake City refinery proceeding.

10. Tesoro states that applying the Commission's decision in *TE Products Pipeline Company, LLC*² to the facilities at issue in this case, it is clear the Commission does not exercise jurisdiction over the Nikiski Dock or the bulk storage tanks adjacent to the Dock. Tesoro states that these facilities simply provide terminalling services that are neither integral nor necessary to a transportation function. Tesoro asserts that since the refinery itself is non-jurisdictional, the pipelines between these non-jurisdictional entities are similarly outside the Commission's jurisdiction.

11. Tesoro asserts the petroleum industry never considered it necessary to file tariffs for the short pipeline spurs that transport crude oil into their tank farms or for the short pipeline spurs that they use to transport their products to proprietary terminals. Tesoro contends that some amount of pipe will always be necessary for refinery operations that have not and could not be held out for common carrier service. Tesoro submits that requiring a tariff filing for these types of pipelines would likely require a large number of additional tariff filings throughout the industry which would not protect any third party consumer of interstate pipeline services.

12. For these reasons, Tesoro requests the Commission state that the two intrastate pipelines that deliver crude oil to the Tesoro refinery from producing areas entirely within the State of Alaska, as well as the Nikiski Dock, the Nikiski Tankage, and the pipeline spur lines discussed in this submission, are ancillary facilities to Tesoro's Kenai refinery over which the Commission does not exercise jurisdiction under the ICA.

13. Tesoro believes that the Commission does not have jurisdiction over the two intrastate crude oil pipelines, as well as the Tesoro spur lines at issue in the petition. However, if the Commission finds any of the pipelines are within its jurisdiction, then Tesoro requests the Commission grant a temporary waiver from tariff filing and reporting requirements for these lines. Tesoro submits that under its "Special Permissions" policy,

¹ *Tesoro Refining and Marketing Company*, 135 FERC ¶ 61,116 (2011).

² *TE Products Pipeline Company, LLC*, 130 FERC ¶ 61,257 (2010), *order on reh'g*, 131 FERC ¶ 61,277 (2010) (finding that certain terminalling and odorization services were not integral or necessary to the transportation function and were therefore non-jurisdictional).

the Commission has granted interstate pipelines temporary waivers of the tariff filing and reporting requirements of the ICA when the facts presented demonstrated that maintenance of the ICA requirements were not necessary to protect any third party. Generally, this showing has been made when the pipeline at issue was idle or unlikely to be used, for the transportation of petroleum for any unaffiliated third party.

Public Notice and Interventions

14. Public notice of Tesoro's request was issued on September 14, 2011, providing for motions to intervene and protests to be filed by September 30, 2011. A joint motion to intervene and protest was filed by Union Oil Company of California (Union), Chevron Products Company (Chevron) and Hilcorp Alaska, LLC (Hilcorp). A motion to intervene out-of-time and protest was filed by XTO Energy, Inc. (XTO). The protesters state they have crude oil sales contracts with Tesoro that are either currently being renegotiated or are up for renewal shortly. The protesters state they do not ship on Kenai because Tesoro buys all their production. However, they assert that the possibility of shipping on Kenai is being retained as a competitive alternative to selling the oil to Tesoro. The protesters claim they would ship on the pipelines from the production area, arrange for retention of crude in Kenai's storage tanks and then arrange for subsequent delivery to the marine loading facilities at the Nikiski dock. They assert that the potential of shipping on Kenai limits the power that Tesoro, as the only local customer, can exercise with respect to the pricing of their oil. Accordingly, the protesters request the Commission deny Tesoro's request for jurisdictional determination and alternative request for waiver of the tariff filing and reporting requirements.

15. Tesoro filed answers to the protests. Tesoro asserts that the protesters do not have standing to protest because they have not shipped on Kenai, Tesoro has been the only shipper on Kenai since 1995, and the protesters are merely considering the possibility of shipping but have not made any nominations or otherwise requested access to the Kenai facilities. Tesoro further states that even if the protesters have standing, there is no existing route through which the protesters can feasibly transport crude oil on an interstate basis by using the facilities that are the subject of Tesoro's request.

Discussion

16. In this proceeding, Tesoro seeks a determination that certain pipelines and other facilities in Kenai, Alaska are not within the Commission's jurisdiction since they are not used by other shippers and will only be used by Tesoro to support its refinery operations. The protesters assert that the Commission should deny Tesoro's request because the facilities are in interstate commerce and should continue to be available to other shippers.

17. The protesters state that while they do not currently ship crude oil on the subject pipelines, they have considered the possibility of shipping on Kenai in the event their contracts to sell crude oil to Tesoro are not extended. The protesters state that they would

ship on the pipelines from the producing area to the Nikiski tankage, from the Nikiski tankage on the bi-directional spur line to the Nikiski dock where their crude oil could be loaded on to marine vessels for shipment in interstate commerce. While no entity other than Tesoro has shipped on the Kenai facilities since 1995, and the protesters are not current shippers on Kenai, we will entertain a hypothetical future shipment scenario for purposes of making the jurisdictional analysis.

18. While the current Kenai tariff indicates that there is a pipeline route from the producing fields to the Nikiski dock where crude oil could be loaded on to marine vessels for transportation in interstate commerce, Tesoro stated the Kenai pipeline spur has not operated in the direction of the docks since 1991, and has only been used by Tesoro to transport crude oil from the docks to the tankage for subsequent delivery to the Tesoro refinery. Tesoro states that in 2005, after the agreement to keep the tariffs in effect expired, it could have published a new tariff removing all of the assets from interstate commerce. Tesoro submits the fact that it did not cancel the tariff and publish a new one does not prevent it from doing so now. Tesoro is correct on this point because the Commission has held that it does not have jurisdiction over oil pipeline abandonments.³ Even if Tesoro were only to cancel the route from the tankage to the docks, there would be no alternative route that would allow protesters to transport crude oil in interstate commerce. Since any potential shipper would lack a route to transport oil in interstate commerce, the spur pipelines and related dock facilities could only serve Tesoro's refining operations in Alaska.

19. Further, even if the protesters' statement that they are considering the possibility of future shipments could be construed as a request for service, the Commission could not prevent the cancellation of the pipeline routes that might support such movements, or require Tesoro to reinstitute any cancelled routes. The Commission has held that it cannot compel a pipeline to offer a service it does not provide or require transportation in a direction that the pipeline does not offer.⁴

20. Tesoro states its original intent was to file the Kenai baseline tariff and immediately cancel all of the routes but out of an abundance of caution it filed the request for jurisdictional determination. Tesoro submits it is still proper to cancel the Kenai tariff since no interstate common carrier services are being offered on the Kenai pipeline or related facilities. The Commission finds that whether through a tariff cancellation or this jurisdictional determination, it is clear that Tesoro has not provided interstate common carrier services on the Kenai facilities for some time and does not intend to hold itself out

³ *Arco Pipe Line Company*, 55 FERC ¶ 61,420 (1991).

⁴ *Western Refining Pipeline Company*, 123 FERC ¶ 61,271 (2008); *ConocoPhillips Company*, 134 FERC ¶ 61,174 (2011).

as providing interstate common carrier services in the future. Therefore, consistent with the similar determination concerning pipeline spurs connecting to Tesoro's Salt Lake City refinery, the Commission finds that all the facilities in the subject request are not within the Commission's jurisdiction because they are only being used to support Tesoro's refining operations.⁵ Since the Commission is granting Tesoro's jurisdictional determination, its alternate request for a waiver of the tariff filing and reporting requirements of the ICA is moot.

The Commission orders:

Tesoro's request for a determination that the Commission does not have jurisdiction over the Kenai pipelines, pipeline spurs, tankage, and docks is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵ *Tesoro Refining and Marketing Company*, 135 FERC ¶ 61,116 (2011). On a prospective basis, parties seeking to terminate a controversy or remove uncertainty, which in this case is uncertainty over FERC jurisdiction, should submit a petition under section 385.207 of the Commission's regulations.