

Thrifty Propane, Inc. v. Enterprise TE Products Pipeline, LLC

ORDER ON COMPLAINT

140 FERC ¶ 61,017 (2012)

In this complaint case under the Interstate Commerce Act (ICA), Thrifty Propane, Inc. (Thrifty) sought an order from the Commission compelling Enterprise TE Products Pipeline, LLC (Enterprise) to refrain from closing the delivery terminal at Eagle, Pennsylvania, which was Thrifty's sole pipeline supply point of its propane for its customers. Thrifty contended that it historically relied upon deliveries at the Eagle terminal and if it goes out of service, Thrifty would have to bear prohibitively high costs to replace the service. The Commission denied the complaint and noted that it did not have authority under the ICA over the terminalling services at issue here and could not prevent the closure of the Eagle terminal.

140 FERC ¶ 61,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Thrifty Propane, Inc.

v.

Docket No. OR12-18-000

Enterprise TE Products Pipeline, LLC

ORDER ON COMPLAINT

(Issued July 11, 2012)

1. This order addresses a complaint filed by Thrifty Propane, Inc. (Thrifty) on May 22, 2012, against Enterprise TE Products Pipeline, LLC (Enterprise TEPPCO) alleging that Enterprise Products Partners L.P.'s (Enterprise Products), Enterprise TEPPCO's parent company, announcement to close its Eagle, Pennsylvania propane terminal effective June 30, 2012, is contrary to the terms of Enterprise TEPPCO's tariff and unlawful under the Interstate Commerce Act (ICA). For the reasons discussed below, the Commission denies Thrifty's complaint.

Background

2. Enterprise TEPPCO transports propane and butane from origins in Louisiana, Ohio, Pennsylvania, and Texas to destinations in Arkansas, Illinois, Indiana, Kentucky, Louisiana, Missouri, New York, Ohio, and Pennsylvania. Thrifty is a shipper on Enterprise TEPPCO Pipeline and as part of its business of sales and distribution of propane to residential and agricultural customers, regularly purchases propane at Mt. Belvieu, Texas, and takes delivery of propane at Eagle, Pennsylvania, among other destinations. Thrifty uses the Eagle Terminal as the sole supply point for its product for its customers in Eastern Pennsylvania.

3. On May 10, 2012, Enterprise Products announced the closure of its Eagle propane terminal in Chester County, Pennsylvania, effective June 30, 2012. Customers may continue to load product at the facility until June 29, 2012 at 5 p.m. Enterprise Products stated the decision was reached following careful consideration of various business and

economic factors which do not support continued operation of the terminal. Enterprise Products stated that the 6-inch diameter TE Products Pipeline that serves the facility will not be impacted by the closure and will continue to serve third party terminals in the region. Enterprise Products plans to remove the equipment at the site for future redeployment but will retain ownership of the property and pipeline right-of-way. Enterprise TEPPCO sent its shippers a notice stating that it will be possible to use any allocation earned at Eagle at all destinations on the system in the event that the pipeline goes on allocation during the 2012-2013 heating season.

Thrifty's Complaint

4. Thrifty asserts that it has relied upon the historic and continued future existence of the Eagle destination on the Enterprise TE Products Pipeline, as essential to its business plan. Thrifty submits that premised on that known circumstance and known cost, it was able to build its business and business efficiencies in Eastern Pennsylvania. Thrifty states that it has entered into supply contracts for delivery at the Eagle destination for both the summer months and the high-demand winter months in reliance upon the terms of the existing tariff, which provides for Eagle as a destination for the delivery of propane.

5. Thrifty states that while Enterprise Products stated that there were third-party supply points nearby, such terminals are not subject to any oversight by the Commission, and in at least one instance, the terminal is owned by a competing shipper and used solely by that competing shipper. Thrifty argues that, in the event that the terminal facilities at the Eagle destination are taken out of service and dismantled, the cost of replacing such facilities is prohibitive for smaller shippers such as Thrifty and it is impossible to determine whether or when any terminal could be established to replace the Eagle Terminal which Enterprise Products has announced it will remove.

6. Thrifty asserts that by taking the Eagle destination out of service and permitting the Eagle Terminal to be dismantled by Enterprise Products, Enterprise TEPPCO has changed a material term of the tariff presently in force, without notice to the Commission.

7. Thrifty submits that, in the event that the Eagle destination is taken out of service and the terminal dismantled, it will be forced to obtain its supply from Greensburg, Pennsylvania, which is the next closest destination on the pipeline. Thrifty states that drawing fuel from Greensburg will entail additional round trip transport travel of over 500 miles, which will increase the cost of each gallon delivered by 15 cents, while materially disrupting its day-to-day operations. Thrifty states that since it has no contracts in place for delivery to the Greensburg destination, it is in immediate jeopardy of the loss of a supply point essential to its business. Thrifty further asserts that it may be entirely cut off from supply for its marketing area in Eastern Pennsylvania during the height of the heating season, and therefore unable to honor the contractual obligations it has made with its customers. Thrifty asserts that the financial burden on it will be at least

the cost of transporting no less than 1 million gallons of product from Greensburg, Pennsylvania by truck, at a cost of 15 cents/gallon.

8. Thrifty argues that the proposed closure of the Eagle Terminal by Enterprise Products constitutes an unauthorized and material change to the Enterprise TEPPCO tariff currently in force contrary to the Commission's rules and the ICA. As a consequence of such action, Thrifty submits that it will be irretrievably prejudiced.

9. Thrifty requests Fast Track processing of the complaint because Enterprise TEPPCO has stated a firm intention to close and dismantle the Eagle Terminal by June 30, 2012. Thrifty requests that the Commission issue an order to Enterprise TEPPCO directing it to maintain the full operation of the Eagle Terminal until such time as an appropriate tariff amendment has been approved by the Commission, and to take such steps as are necessary to prevent the unauthorized closure of the Eagle destination and for such other relief pursuant to its statutory authority.

Enterprise TEPPCO's Answer

10. On May 31, 2012, Enterprise TEPPCO filed an answer to Thrifty's complaint. Enterprise TEPPCO asserts that Thrifty's complaint is without merit and should be dismissed. Enterprise TEPPCO states that the Eagle Terminal is not owned by Enterprise TEPPCO, but is instead owned by a non-jurisdictional affiliate, Enterprise Terminals and Storage, LLC (ETS). Moreover, Enterprise TEPPCO submits that the Commission has specifically held that the terminals connected to Enterprise TEPPCO's system, including the Eagle Terminal, are non-jurisdictional. Enterprise TEPPCO contends that the Commission has no authority to regulate a non-jurisdictional facility or require the pipeline to maintain the operations of a facility the pipeline does not own.

11. Enterprise TEPPCO submits that the Commission has specifically held that the destination terminals connected to Enterprise TEPPCO's system, including the Eagle Terminal, are not FERC-jurisdictional.¹ Enterprise TEPPCO states that Thrifty ignores this precedent and does not even attempt to explain how the Commission has authority to require Enterprise TEPPCO to maintain the operations of facilities that the Commission has specifically held to be non-jurisdictional. Instead, Thrifty appears to argue that because the Eagle terminal is listed as a destination in Enterprise TEPPCO's tariff, the closure of the terminal at that destination is an "unauthorized and material change to the tariff." Enterprise TEPPCO states that its tariff currently lists Eagle as a destination, because the terminal remains operational through June 29, 2012. Enterprise TEPPCO

¹ *TE Products I*, 130 FERC ¶ 61,257, *order on reh'g*, *TE Products II*, 131 FERC ¶ 61,277 (2010) (*TE Products II*).

submits that to the extent the Commission dismisses Thrifty's complaint, it anticipates submitting a tariff to remove the Eagle destination.

12. Thrifty notes that on May 21, 2012, Enterprise TEPPCO announced that any volume history earned by shippers from making shipments to Eagle could be used at all destinations on the Enterprise TEPPCO system after the closure of the Eagle Terminal. Enterprise TEPPCO states that such accommodation, which Thrifty does not challenge, reasonably treats shippers that in the past have moved product to the Eagle Terminal. Enterprise TEPPCO contends that the mere fact of its announcement does not confer jurisdiction on the Commission over the closure of the terminal.

13. Enterprise TEPPCO asserts that even if the Eagle Terminal which is owned by its affiliate ETS were owned by Enterprise TEPPCO or otherwise held to be jurisdictional, Enterprise TEPPCO could abandon the service to Eagle at any time. Enterprise TEPPCO asserts that a pipeline's obligation to provide service under the ICA is limited to what it holds itself out to provide.

14. Instead of alleging any specific violation of the ICA or the Commission's regulations, Enterprise TEPPCO states that Thrifty appears to propound general contract law claims based on its alleged reliance on the continued existence of the Eagle Terminal. Enterprise TEPPCO contends that Thrifty fails to set forth any valid basis for this claimed reliance, and indeed there is none. Enterprise TEPPCO submits that Thrifty plainly has no cognizable reliance claim against Enterprise TEPPCO, since the terminal is a non-jurisdictional facility that is not owned by Enterprise TEPPCO. Enterprise TEPPCO asserts that its tariff does not contain anything that would justify Thrifty's claimed reliance. Enterprise TEPPCO contends that nothing in the tariff promises that the current destinations will never change.

15. In short, Enterprise TEPPCO contends that Thrifty's complaint fails to allege any claim upon which relief can be granted. Enterprise argues that Thrifty cites no authority to support its challenge, and the Commission has no jurisdiction to grant the relief that Thrifty seeks. Accordingly, Enterprise TEPPCO concludes that Thrifty's complaint should therefore be dismissed.

Discussion

16. In its complaint Thrifty alleges that the closure of the Eagle terminal constitutes an unauthorized and material change to Enterprise TEPPCO's tariff contrary to Commission regulations and the ICA.

17. In a March 30, 2010 order, the Commission accepted TEPPCO's filing removing terminalling services from its tariff. The Commission found that the terminalling services TEPPCO proposed to remove from its tariff are not within the Commission's

jurisdiction.² The Commission held that it may not exercise jurisdiction over non-jurisdictional services merely because they were owned by a TEPPCO affiliate.

18. The Commission has no jurisdiction to prevent ETS from closing the Eagle propane terminal and dismantling the equipment at this facility. The fact that Eagle will remain a destination in Enterprise TEPPCO's tariff until Eagle's closure on June 29, 2012, does not constitute any violation of the tariff or the ICA and simply reflects the reality that transportation service can be provided by Enterprise TEPPCO until that date. Enterprise TEPPCO's recognition of any shipper's allocation history at Eagle for purposes of applying the prorationing policy at other destinations does not create any jurisdiction over the Eagle terminal, but attempts to accommodate the allocation history a shipper has already established. Finally, to the extent that Thrifty argues that it detrimentally relied on the continued existence of the Eagle terminal, any such breach of contract claim is properly asserted against ETS or Enterprise Product Partners, L.P. in state court.

19. In response to Thrifty's arguments, we are cognizant of the hardship that closure of the Eagle terminal may impose. However, as this result is compelled by our precedent regarding our jurisdiction under the ICA, Thrifty's complaint is denied.

The Commission orders:

Thrifty's complaint is denied.

By the Commission. Commissioner Norris concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

² *TE Products I*, 130 FERC ¶ 61,257, *order on reh'g*, *TE Products II*, 131 FERC ¶ 61,277.

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Thrifty Propane, Inc.

Docket No. OR12-18-000

v.

Enterprise TE Products Pipeline, LLC

(Issued July 11, 2012)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which denies Thrifty's complaint regarding Enterprise's closure of its Eagle propane terminal in Chester County, Pennsylvania. I agree that the Commission should deny the complaint because, under the Interstate Commerce Act (ICA), the Commission does not have the authority to prevent Enterprise from closing the Eagle terminal.

However, I am concerned about the repercussions of the order and the hardship that the terminal closure will place on Thrifty. The outcome here, which is dictated by the limits of the Commission's authority under the ICA, is regrettable. Because of the closure of this terminalling facility, Thrifty states that it will have to draw fuel from hundreds of miles away, forcing it to drive long distances to meet its obligations to its customers and impacting the cost of each gallon of propane delivered. This is not a good outcome for Thrifty or for the end users that it serves.

Supplies of natural gas liquids are growing rapidly, promising lower prices for consumers, provided there is adequate infrastructure to ship those supplies to markets.¹ The outcome here highlights the potential negative impact that a lack of competition in the provision of terminalling and other oil and product pipeline services could have on consumer prices even with growing supplies. I recognize that entities are naturally motivated to maximize their profits, but without adequate competition, the result could be a less efficient system that potentially harms consumers. Despite these significant considerations, the Commission is constrained by the limits of our jurisdiction under the ICA.

¹ See *Federal Energy Regulatory Commission 2011 State of the Markets Report*, Apr. 19, 2012, available at www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/som-rpt-2011.pdf.

For these reasons, I respectfully concur.

John R. Norris, Commissioner