UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Sunoco, Inc. (R&M) — Docket No. RP02-309-006

v.

Transcontinental Gas Pipe Line Corporation

ORDER ON REHEARING

(Issued February 21, 2006)

1. This order denies Transcontinental Gas Pipe Line Corporation's (Transco) request for rehearing of the Commission's June 16, 2005 Order on voluntary remand in which the Commission directed Transco to reimburse Sunoco, Inc. (R&M) (Sunoco) the additional costs that Sunoco would incur as a result of Transco's violation of a 1992 Settlement when it sells certain gathering facilities on which Sunoco was entitled to receive service under the settlement and related service agreement.

I. Background

2. The procedural history of this proceeding spans several orders and will not be repeated in full here.[1] A short summary of events and Commission rulings most relevant to the proceeding on remand is as follows. In 1992, in exchange for the withdrawal of its

---

[1] *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corporation*, 100 FERC ¶ 61,252 (2002), *order on reh'g*, 103 FERC ¶ 61,176 (2003), *order on reh'g and clarification*, 107 FERC ¶ 61,123 (2004), *notice of denial of reh'g by operation of law*, 108 FERC ¶ 61,009 (2004), *appealed sub nom. Transcontinental Gas Pipe Line Corporation v. Federal Energy Regulatory Commission*, No. 04-1234 (D.C. Cir. 2004), *order on voluntary remand*, 111 FERC ¶ 61,400 (2005).

court appeal and signing on to Transco's general take-or-pay settlement,[2] Sunoco entered into a settlement with Transco under which Sunoco obtained a special firm service not otherwise available in the absence of the settlement at a special, reduced rate. Under the settlement, Sunoco obtained a 40,000 Mcf per day firm capacity entitlement for Part 284 transportation service pursuant to a service agreement under Transco's Rate Schedule FT from certain designated receipt points on Transco's "IT-Feeder" lateral system in the Outer Continental Shelf (OCS) in the Gulf of Mexico to certain designated delivery points off of Transco's onshore mainline in Pennsylvania. Because Rate Schedule FT service is limited to its onshore mainline, and only provides interruptible "IT-Feeder" service on the IT-Feeder laterals, the firm service Sunoco obtained on the OCS IT-Feeder laterals under the settlement is not generally available to other shippers.[3] Further, Sunoco received a special, reduced rate for this enhanced service, paying only the maximum FT reservation rate and usage charge at the zone rate for deliveries in Pennsylvania, as that maximum rate may change from time to time, for the entire haul whereas other shippers with OCS receipt points and onshore mainline delivery points are required to pay both an IT-Feeder rate for the IT-Feeder service plus an FT rate for the FT service. In an order issued June 4, 1992, the Commission approved the settlement.[4]

3. On November 20, 2000, Transco submitted an application for abandonment under section 7(b) of the Natural Gas Act (NGA) for the purpose of spinning down certain offshore OCS IT-Feeder pipeline facilities by sale to its affiliate, Williams Gas Processing-Gulf Coast Company L.P. (WGP). The facilities Transco proposed to sell included the pipeline facilities (Central Texas system) on which seven of Sunoco's receipt points under the 1992 Settlement and FT service agreement are located. WGP also submitted an associated petition for a Commission order declaring the facilities to be non-jurisdictional gathering facilities and that, upon their sale to WGP, WGP would be a non-jurisdictional gatherer and not a jurisdictional natural gas company. In an order issued July 25, 2001,[5] the Commission granted both applications over the objections of Sunoco and other shippers. To date, however, Transco has not sold the facilities to WGP.

---

[2] By becoming a "Settling Party" under the take-or-pay settlement, Sunoco became obligated for certain surcharges, including "Producer Settlement Payments" and "Litigating Producer Settlement Payments." 59 FERC ¶ 61,279 at 62,018 note 8.

[3] *See Exxon Mobil Corp.* v. *FERC*, No. 04-1226 (D.C. Cir., Dec. 6, 2005).

[4] *Transcontinental Gas Pipe Line Corporation*, 59 FERC ¶ 61,279 (1992).

[5] *Transcontinental Gas Pipe Line Corporation, et al.*, 96 FERC ¶ 61,115 (2001), *reh'g*, 97 FERC 61,296 (2001).

The effect of the proposed abandonment and sale would be that Transco would unilaterally terminate service from the seven designated receipt points, shifting the point of receipt of Sunoco's volumes under its FT contract to the downstream interconnect of the pipeline facilities to be sold to WGP and Transco's IT-Feeder lateral. Having its access to Transco's system terminated, Sunoco will then be left with obtaining that access through an unregulated monopolist gathering company, WGP. Further, Sunoco will then become subject to a WGP gathering rate for service on WGP's facilities, in addition to remaining liable to Transco for the full 1992 Settlement rate under its FT contract with Transco for the reduced transportation services downstream of WGP's facilities Transco will continue to provide under the FT contract and 1992 Settlement.

4. On May 2, 2002, Sunoco filed a complaint in the instant proceeding, claiming, *inter alia*, that Transco's proposed sale of the Central Texas system facilities is barred by the 1992 Settlement and seeking various forms of relief. Sunoco claimed that the additional charges it might incur from WGP could range from $15 million to $28 million depending on the gathering rate WGP imposes.[6]

5. Through the series of orders in this proceeding, in which the Commission consistently found that Transco's act of selling the subject facilities would violate the 1992 Settlement, the Commission attempted to craft an equitable remedy that would allow Sunoco to receive, in some way, the benefit of the bargain it obtained when it entered into the 1992 Settlement. Throughout this case, however, Transco has argued that once the sale of the facilities occurs, and Sunoco's service from the seven receipt points is provided by WGP and is subject to a WGP non-jurisdictional gathering rate, the Commission will be powerless to provide Sunoco with any remedy because any remedy would indirectly regulate the non-jurisdictional gathering rates, services, and facilities of WGP.

6. The June 16, 2005 Order was the culmination of this series of orders and reflected the Commission's abandonment of certain earlier-directed remedies to ensure that the Commission's action would be both within its NGA jurisdiction and an equitable exercise of its discretion to establish remedies. There, the Commission vacated its prior orders, reviewed all issues anew on a clean slate, and found that the sale of the subject facilities would violate the 1992 Settlement. As the remedy for the violation, the Commission held that Transco would have to reimburse Sunoco for any additional costs incurred from WGP as a result of the sale and transfer of the facilities to WGP.

[6] Sunoco Complaint, Docket No. RP02-309-000, at 11-12.

7. On rehearing of the June 16, 2005 Order, Transco repeats, often verbatim, arguments and characterizations specifically rejected in that order without, in most cases, offering a direct response to the specific discussion and rationale of the Commission in that order. Transco's rehearing request, instead, rests on repeatedly characterizing the Commission's action as a thinly veiled effort to indirectly regulate WGP's non-jurisdictional rates and services, and bases its arguments on that claimed premise. We will endeavor to avoid repetition of discussion in the June 16, 2005 Order and will seek only to address such arguments as may aid in the resolution of the issues raised by Transco's proposed action and to ensure that the Commission's actions are clearly understood. We find that Transco has raised no new arguments or issues that warrant granting rehearing.

II. Discussion

A. Violation of the 1992 Settlement

8. In the June 16, 2005 Order, the Commission addressed the issue of whether Transco's proposed sale of IT-Feeder facilities, on which seven of Sunoco's receipt points under the 1992 Settlement are located, would violate the 1992 Settlement. The Commission held that it would, referring to Article V of the contract executed pursuant to the 1992 Settlement under which Transco expressly agreed to provide Sunoco with firm transportation service under Rate Schedule FT from the subject receipt points on the Central Texas system facilities to delivery points in Pennsylvania at the maximum FT rate, as that rate may lawfully change from time to time.

9. On rehearing, Transco asserts that the spin down will not constitute a breach of either the 1992 Settlement or the FT service agreement because, it asserts, Article IV, Paragraph 3 of the 1992 Settlement explicitly reserved to Transco all of its rights under NGA sections 4 and 7 to make any and all NGA rate, tariff or certificate changes at the Commission. The Commission disagrees that this reservation of rights authorizes the subject spin down.

10. Article IV, Paragraph 3 of the 1992 Settlement states:

> Except as expressly provided by this Stipulation and Agreement, nothing herein is intended, nor shall it be construed, as limiting or affecting in any way Transco's rights under the Natural Gas Act to file and place into effect any changes in rates or modifications, additions, or deletions to its FERC Gas Tariff employing different concepts or methods from those reflected herein. Similarly, except as expressly provided by this Stipulation and Agreement, Sun preserves its rights under the Natural Gas Act.

11. Article IV, Paragraph 3 of the settlement is memorialized in Article V of the FT Service Agreement which governs the rate schedule and price. That section of the Service Agreement states that Sunoco would pay Transco in accordance with the FT rate schedule and the general terms and conditions "as filed with the Federal Energy Regulatory Commission, and as the same may be legally amended or superseded from time to time." The FT Service Agreement is the standard, pro forma, contract set forth in the tariff and which incorporates the FT maximum rate on file and all applicable General Terms and Conditions (GT&C) of the tariff that are applicable to all FT shippers. Thus, Article IV, Paragraph 3 of the 1992 Settlement only reflects Transco's right to file under section 4 of the NGA to propose to implement changes in the generally-applicable Rate Schedule FT maximum rate in its tariff or changes to generally applicable tariff provisions – neither of which relates to or supports Transco's claimed right to unilaterally change receipt points specifically listed in the exhibit to the FT service agreement with Sunoco and guaranteed to Sunoco under the terms of the 1992 Settlement and to sell the related facilities to an entity who would not be subject to the provisions of the 1992 Settlement.

12. Transco claims that the 1992 Settlement reserved to Transco NGA section 7 rights to unilaterally effectuate the spin down without breaching the 1992 Settlement and Sunoco's FT contract thereunder. Transco relies on Article II, section A, Paragraph 2 of the 1992 Settlement which states that "[u]pon its effectiveness pursuant to Article V hereof, FERC approval of this Stipulation and Agreement shall provide that pregranted abandonment under section 284.221(d) of the Regulations will not be applicable to this FT service. As a result, abandonment of this FT service shall occur only in accordance with the procedures and standards set forth in section 7(b) of the Natural Gas Act."

13. The Commission disagrees that Article II, section A, Paragraph 2 of the 1992 Settlement somehow authorizes Transco's unilateral actions here. At the outset, we note that section 284.221(d) only relates to abandonment of service at the end of the contract term, and not to abandonment of facilities. Moreover, this provision of the 1992 Settlement simply appears to reflect one of the special settlement features that differentiates Sunoco's service under the 1992 Settlement from service provided other Part 284 FT shippers. FT service, being subject to Part 284 of the Commission's regulations, normally provides for pre-granted abandonment of service upon expiration of the contract term. The 1992 Settlement reflects the settled agreement not to authorize pre-granted abandonment of service at the end of the 20-year contract term and to require an NGA section 7(b) abandonment application to be filed by Transco to obtain the prior approval of the Commission in order to abandon services relative to Sunoco. However, Transco's section 7 abandonment rights were limited by other provisions of the settlement. Article II, A, Paragraph 1 of the settlement reads as follows:

> The initial contract term (the "primary term"), shall be twenty (20) years from the first day of the first month following the Commission's approval of the Stipulation and Agreement having become effective pursuant to Article V hereof. Upon completion of the primary term, the contract shall be extended from year-to-year thereafter unless Sun or Transco gives written notice of termination not less than three years prior to the requested termination date. Unless Sun provides the appropriate notice to terminate service, Transco shall not take action to terminate service to Sun so long as Sun has agreed to pay rates no less favorable than Transco is otherwise able to collect from any other third-party shipper.

This provision of the settlement is memorialized in Article IV of the FT service agreement, which provides that the primary term of the agreement is until August 1, 2012. Thus, Transco's purported broad section 7 rights were, in fact, severely limited by the ability of Sunoco to continue service through the primary term and even beyond if it matched the rate that Transco could obtain from another shipper. Accordingly, Transco's proposed unilateral abandonment by sale of the seven Central Texas receipt points prior to the end of the primary term of the contract does not appear to be authorized by the reservation of any rights in the settlement. Instead, we believe that its position conflicts with the letter and intent of the 1992 Settlement and FT contract for Sunoco to continue to receive the settlement's transportation service from the settlement's designated receipt points at the settlement's rate for at least 20 years and thereafter so long as Sunoco wishes. Indeed, it is contradictory for Transco to rely on the 1992 Settlement as support for its alleged unilateral right to seek NGA section 7(b) abandonment of the subject facilities, while, at the same time, arguing that neither the NGA nor the 1992 Settlement governs its proposed sale of the subject facilities because the facilities are non-jurisdictional.

14. Transco asserts that Sunoco was not given a special deal in the 1992 Settlement in the sense that Sunoco alone would be insulated from the effects of any necessary Commission actions. Transco contends that the 1992 Settlement specifically made clear that Sunoco was to be "treated as any other FT customer", citing Article II, section C of the settlement. The full quote of that section is as follows:

> Upon effectiveness of this Stipulation and Agreement pursuant to Article V hereof, Sun will become a "Settling Party" to Articles I and II of the revised Stipulation and Agreement in Docket Nos. RP88-68, <u>et</u> <u>al</u>., and a Settling Party to the consolidated Stipulation and Agreements in Docket Nos. RP87-7, CP88-391, and RP90-8. Each of such settlements is incorporated herein by reference. <u>FERC's final and non-appealable ruling or a Court's final ruling (except in D.C. Cir. No 89-1118 which shall be governed by</u>

> Section F.2 hereof) on any outstanding issues in the aforementioned dockets will pertain to Sun so that Sun shall be treated as any other FT customer. Upon the effectiveness of this Stipulation and Agreement pursuant to Article V hereof, Sun shall not contest any provision of those settlements before FERC or the courts and will withdraw all pending filings which contests any such provisions. (Footnotes omitted; emphasis added).

15. The language stating that Sunoco is to be "treated as any other FT customer" does not appear in any way to permit Transco to unilaterally abandon service at the seven receipt points to Sunoco and subject Sunoco to increased charges from a third-party. The language quoted by Transco simply appears to refer to Sunoco's agreement to be subject to any further Commission or court rulings with respect to outstanding issues in the take-or-pay proceedings, just like any other "Settling Party" shipper on Transco's system who signed on to the take-or-pay settlements. This language did not, in our view, trump the special and unique features of Sunoco's separate settlement with Transco, such as the provision of firm FT service on Transco's IT-Feeder system from the designated receipt points and the special reduced rate whereby Sunoco would not pay Transco's IT-Feeder rate, both of which were to be guaranteed for a minimum of twenty years or longer solely at Sunoco's choice.

16. Transco argues that the 1992 Settlement and related FT service agreement were intended by all parties to pertain only to NGA jurisdictional transportation. Transco states that that is why it sought to have the FT service agreement reformed by the Commission as part of Transco's NGA section 7 abandonment application to delete the seven receipt points from the Sunoco FT contract determined by the Commission to be located on non-jurisdictional gathering facilities. It asserts that the Commission's "apparent" reformation of the FT service agreement to delete the subject seven points upon sale of the facilities is consistent with Transco's position. Thus, Transco asserts that, contrary to the conclusions in the June 16, 2005 Order, it simply does not follow that Transco's NGA section 7 application would constitute a breach by Transco of such jurisdictional contracts, upon transfer of the facilities.

17. Transco's argument, that the 1992 Settlement and FT service agreement were intended to pertain to NGA jurisdictional transportation, is simply stating what we have previously assumed. However, that argument begs the question of whether the 1992 Settlement permitted a sale of the subject facilities to a third party who, for whatever reason, would not be bound by the terms of that settlement. Because the Commission regulates gathering rates and services of interstate pipelines under its NGA section 4 "in connection with" jurisdiction, simply refunctionalizing Transco's own facilities as gathering would not affect the Commission's jurisdiction over the rates for services Transco provides with the facilities. Nor do we believe that such a refunctionalization of

facilities would affect Transco's obligations under the 1992 Settlement and FT service agreement to continue to provide service to Sunoco from the settlement's receipt points with no change in the settlement's agreed-to rate. Transco itself has not altered the services or rates charged under the 1992 Settlement in the interim period since the Commission declared that the subject facilities, which Transco still owns as of the date of this order, primarily perform a gathering function. The Commission's rate and service regulation would only be affected by the sale of such facilities and then only if sold to a non-jurisdictional, non-pipeline entity like WGP. As the Commission found in the June 16, 2005 Order, the gathering/non-jurisdiction argument is a red-herring. The key fact is a sale of facilities to a third-party who would not be subject to the 1992 Settlement. If and at such time that Transco sells the facilities, it would be obligated to perform the ministerial act, consistent with the abandonment, of filing under NGA section 4 to delete the listing of the subject receipt points from its FT service agreement with Sunoco. The Commission's acceptance of that ministerial filing would not indicate that the Commission's acquiesced in Transco's claim that the 1992 Settlement would not be breached.

18. Transco argues that the Commission's statement, that the assumption inherent in the 1992 Settlement and service agreement was that Transco would continue to own the facilities, is unsupported. Transco states that the settlement, as embodied in the FT service agreement as originally executed, including the subject seven receipt points, was intended to survive any corporate changes, specifically relying on Article VI, Paragraph 5 of the FT service agreement which states "this agreement shall be binding upon, and inure to the benefit of the parties hereto and their respective successors and assigns" as proof that the parties contemplated a sale of the subject facilities.

19. The Commission does not believe that the succession provision in Article VI, Paragraph 5 of the FT service agreement supports Transco's position. Even assuming, *arguendo*, that the parties contemplated that a corporate succession by sale of a portion of Transco's facilities needed to provide the services agreed to under the 1992 Settlement would occur and would be governed by Article VI, Paragraph 5 of the FT service agreement, then the deal embodied in the FT service agreement and 1992 Settlement *would* survive and *would* apply to the successor entity. Hence, the 1992 Settlement would not be violated *if* the successor entity were to become subject to the 1992 Settlement and FT service agreement. That is not the case here. WGP is not subject to the 1992 Settlement or the related FT service agreement. Moreover, it is disingenuous for Transco to rely on this succession provision to support the claim that the proposed sale was contemplated by the parties, and yet argue that this same provision would have no effect to impose the 1992 Settlement and FT service agreement on the purchaser, its successor, WGP. Thus, because all provisions of the settlement should be given effect and meaning, it appears reasonable to us to assume that the parties, or at least Sunoco, did

not contemplate, and therefore did not agree to, a corporate succession unilaterally undertaken by Transco that would result in Transco's replacement with an entity not subject to the 1992 Settlement and FT service agreement. While the Commission could not prevent Transco's unilateral abandonment and, therefore, could not prevent Transco from upsetting the bargain reached in the settlement, that does not mean that the Commission is powerless to provide Sunoco with a remedy for Transco's breach of the 1992 Settlement. By modifying the net revenues Transco may demand from Sunoco for the jurisdictional services it continues to provide Sunoco, the remedy will make Sunoco whole for the increased third-party costs not contemplated by the 1992 Settlement that Transco will have unilaterally caused Sunoco to incur.

20. Finally, Transco's proposed unilateral deletion of seven of the settlement's designated receipt points would be inconsistent with the terms of Article IV, Paragraph 2 of the 1992 Settlement, which states that "[i]t is specifically understood and agreed that this Stipulation and Agreement is an integrated settlement and that the various parts hereof are not severable without upsetting the balance of consideration achieved between Transco and Sun."

B. **<u>Jurisdiction</u>**

21. In the June 16, 2005 Order, the Commission abandoned previous remedies directed in earlier orders to ensure that our action is both consistent with the Commission's jurisdiction in light of recent court decisions and is equitable. The Commission took this action "to remove any vestige of our prior remedies that may be assailed on grounds that we lack jurisdiction to impose them."[7] The Commission found that, as a remedy for its violation of the 1992 Settlement, Transco should reimburse Sunoco for any WGP charges for gathering services on the basis that these are additional costs that Sunoco would not otherwise be forced to bear under the 1992 Settlement and

[7] 111 FERC ¶ 61,400 at P 14.

are the result of Transco's violation of the 1992 Settlement.[8] Transco has simply relied on the Commission's lack of jurisdiction to prevent Transco from abandoning facilities used to provide the settlement services once those facilities are sold to the non-jurisdictional gatherer, WGP. The Commission distinguished the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Columbia Gas Transmission Corp. v. FERC*,[9] on the basis that the Commission is not attempting to enforce a non-jurisdictional component of an otherwise jurisdictional settlement. The Commission explained that the 1992 Settlement's rate and service provisions related to service from the subject seven receipt points "are not being enforced as that would require Transco to continue to provide service from the subject seven receipt points and to charge the 1992 Settlement rate, *i.e.*, the FT maximum rates, for such service."[10] The Commission observed that WGP would be performing the gathering at whatever rate it wishes to charge and will not be regulated by the Commission.

22. The Commission also addressed Transco's central claim it had previously made throughout the earlier history of these proceedings that previous remedies were attempts to indirectly regulate WGP's non-jurisdictional gathering rates and services. Transco had characterized the Commission's earlier remedies as "indirectly" imposing an illegal "default contract" on WGP, citing *Conoco Inc. v. FERC*.[11] The Commission reasoned that requiring Transco to reimburse Sunoco for additional costs it incurs from WGP does

---

8 111 FERC ¶ 61,400 at P 33. As we found in the June 16, 2005 Order, our remedial power is limited in the instant proceeding to a monetary remedy insofar as we cannot condition abandonment on WGP providing Part 284 services; nor can we restore Transco's obligations to provide service from the subject receipt points once the sale and abandonment of the subject transmission facilities occurs and they begin to be operated as non-jurisdictional gathering facilities by WGP, a non-jurisdictional gathering company, as a part of its non-jurisdictional gathering system. Further, as noted in the June 16, 2005 Order at P15, although arguably having NGA section 4 jurisdiction to reject the change in Transco's FT contract with Sunoco, the Commission has adopted the position that such section 4 authority is trumped by our lack of authority under NGA section 7 to prevent the abandonment of non-jurisdictional gathering facilities. Our actions in this proceeding rest on that policy and are not at issue.

9 404 F.3d 459 (D.C. Cir. 2005) (*Columbia*).

10 111 FERC ¶ 61,400 at P19.

11 90 F.3d 536, 550-53 (D.C. Cir. 1996), *cert. denied sub nom*., *AMOCO Energy Trading Corp. v. FERC*, 519 U.S. 1142 (1997) (*Conoco*).

not, directly or indirectly, create an unlawful "default contract" because the remedy does not regulate, directly or indirectly, WGP's rates or services. The Commission explained that WGP may charge whatever rate it wishes and is not required to disgorge any profits.

23. Finally, the Commission recognized that the Commission's remedy could alternatively be seen as reducing Transco's rate under the 1992 Settlement, *i.e.*, the FT maximum rate, because the rate Sunoco pays Transco for transportation service will be offset by the reimbursement amounts relative to the same gas volumes. In recognition of that alternate view, the Commission found that such a reduction would be authorized under section 5 of the NGA, an act clearly within the Commission's NGA jurisdiction, and that it has met its burden under that section. Accordingly, under this alternative view, the Commission found that the existing rate under the 1992 Settlement will become unjust and unreasonable once Sunoco begins receiving less service at a higher overall cost than as agreed under the 1992 Settlement and its FT service agreement in violation of the 1992 Settlement, and the replacement rate, *i.e.*, the FT maximum rate net of the increased costs from WGP, would be the just and reasonable replacement rate.

24. On rehearing, Transco reiterates essentially the same earlier claims using the same characterizations, as rejected in the June 16, 2005 Order, that the Commission lacks jurisdiction to provide a remedy here. It repeatedly asserts that the Commission is attempting to regulate non-jurisdictional gathering performed by WGP. In its words, Transco asserts that "the Commission is without power or authority under the NGA to order Transco to subsidize Sunoco's gathering costs, *i.e.*, to, in effect, provide for the FT Service Agreement to act indirectly as a 'default' contract, capping (through a Transco subsidy) Sunoco's gathering costs."[12] Transco submits that the Commission's statement in the June 16, 2005 Order, that it was modifying its prior orders "to remove any vestige of our prior remedies that may be assailed on grounds that we lack jurisdiction to impose them," shows that the Commission "continued to try to maneuver around the *Conoco* precedent by highlighting the <u>indirect</u> nature of its latest remedy, notwithstanding the remedy's obvious extra-jurisdictional purposes."[13] It asserts, without further elaboration, that what it alleges is the "indirect nature of the Commission's remedy" does not change

---

[12] Transco Request for Rehearing at 24-25 (emphasis in original). At the outset, we note that Transco's argument muddles together two unrelated issues: (1) its claim that we lack jurisdiction, *i.e.*, the claimed unlawful "default contract," and (2) its claim, rejected in the next section of this order, of a "subsidy." Whether a "subsidy" would result only relates to the matter of whether the Commission's remedy is reasonable; not whether the Commission lacks jurisdiction.

[13] Transco Request for Rehearing at 26 (emphasis in original).

the "legal substance" of the Commission's actions "or devolve upon the Commission's powers it does not have under the NGA."[14] It states that it is well-settled that the Commission may not "by indirection" do what it has no power to do directly.[15] Transco concludes that what it alleges are the "extra-jurisdictional purposes" of our remedy are "obvious" but gives no explanation or support for that conclusion.[16]

25. Contrary to Transco's claims, the Commission has not required, and has no intent to require, a remedy where the "legal substance" will indirectly regulate WGP's gathering rates or services. Our purpose is to provide Sunoco with the benefit of its bargain under the 1992 Settlement in a remedy that has no affect on non-jurisdictional gathering rates or services of WGP. As we previously clarified in the June 16, 2005 Order, and with respect to which Transco provides no response, the Commission is in no way establishing the type of contract that Sunoco may enter into with WGP or in any way regulating, directly or indirectly, the rates WGP may charge Sunoco or any other aspect of WGP's services or facilities. There simply is no "default contract" being imposed on WGP.[17] WGP is free to charge an unregulated rate and can provide services under unregulated terms and conditions agreed to by the parties. There is no cap on what WGP can charge Sunoco because it will charge an unregulated, non-jurisdictional gathering rate; nor are its revenues or profits "appropriated" or in any way affected by our action, contrary to Transco's repeated claims. Our remedy only affects Transco's net charges to

---

14 *Id*.

15 *Id*. *Citing*, *Richmond Power & Light v. FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978) (*Richmond*) and other cases.

16 Transco Rehearing at 26.

17 The "default" contracts, which the court in *Conoco* found the Commission lacked authority to impose, were two-year term contracts the Commission ordered affiliated gatherers in spin-down proceedings to offer the pipeline's existing customers which contained non-discriminatory, open access terms and conditions of service consistent with those included in the existing contracts with the pipeline and at the same rate currently charged by the pipeline. *See Arkla Gathering Services Co.*, 69 FERC ¶ 61,280 at pp. 62,093-62,094 (1994). *See also*, *Conoco*, 90 F.3d 536 at 542.

Sunoco.[18] We are not setting a rate for WGP's services; WGP is setting that rate. If this remedy did, in fact, amount to indirect regulation of WGP's rates, it would have an affect on them; WGP would somehow not be permitted to charge Sunoco anything additional for the services it will provide Sunoco. That is not the case.

26. Moreover, since WGP will be paid by Sunoco in full at whatever rate WGP can obtain, and Transco must operate on an "arm's length" basis with respect to WGP,[19] it should make no difference to WGP that Transco will ultimately reimburse Sunoco for its increased costs in reduced rates. Transco does not claim that Transco and WGP are joint entities. Whether that reimbursement would constitute a "subsidy," which we address in the next section of this order, has no bearing on whether that reimbursement creates, even indirectly, an unlawful "default contract" imposing rate or service obligations on WGP. Nothing we direct Transco to do can have any effect on the rates WGP charges or the profits it may exact from its non-jurisdictional gathering services. By directing Transco to reimburse Sunoco for additional costs caused by Transco's violation of a Commission-approved settlement, there are no indicia of Commission regulation, whether indirect or direct, of WGP's non-jurisdictional gathering rates, services, or facilities.

27. The Supreme Court and Courts of Appeals have delineated the Commission's authority to explore the jurisdictional implications of a non-jurisdictional transaction. As discussed below, the courts have clarified the distinction between allowable actions of the Commission where the Commission has the jurisdiction to modify jurisdictional rates to take into account non-jurisdictional rates, as opposed to actions beyond the Commission's jurisdiction where the Commission attempts to modify or influence non-jurisdictional rates or services by modifying jurisdictional rates or services. Our action, as shown below, falls into the permissible jurisdictional category.

---

[18] Under Transco's theory, the Commission's issuance to its employees of "Metro Checks" giving them a discount for commuter rail service constitutes Commission indirect regulation of commuter rail rates. Merely affecting the net cost a customer incurs for a service does not constitute regulation of the service provider's rate and changes if the service provider's rates and charges remain unchanged.

[19] In its July 25, 2001 Order granting abandonment of the subject facilities, the Commission noted that "Transco already has in its tariff standards of conduct for gathering affiliates that prevent it from acting in a discriminatory manner by guarding against the risk of affiliate abuse and ensuring an arm's length relationship between it and WGP." 96 FERC ¶ 61,115 at p. 61,435.

28. In *FPC v. Conway Corporation*,[20] which Transco cites,[21] the Supreme Court held that the Commission may take non-jurisdictional rates into account in setting jurisdictional rates as long as the rate remedy operates only against the jurisdictional rate.[22] Later, in *Altamont Gas Transmission Co. v. FERC*,[23] the U.S. Court of Appeals for the District of Columbia Circuit, applying *Conway*, found that the Commission lacked jurisdiction to lower the rate of return of a jurisdictional pipeline to influence a state commission to change a Hinshaw pipeline's non-jurisdictional rates. Here, consistent with *Conway*, the Commission's remedy only affects Transco's jurisdictional rates and does not affect WGP's rates or services. Nor does the Commission's remedy attempt to influence or coerce WGP into reducing its non-jurisdictional rates, which would be beyond the Commission's jurisdiction under *Altamont*. Since, as we have noted, Transco must maintain an arms-length relationship with WGP, it should not matter to WGP that Transco must reimburse Sunoco for whatever charges WGP bills it.

---

20 426 U.S. 271 (1976) (*Conway*). In *Conway*, the Supreme Court upheld the Commission's action of reducing the jurisdictional wholesale rates of a regulated company because those rates caused an anticompetitive, discriminatory price squeeze in relation to the company's own lower, non-jurisdictional retail rates. The court found that the authority granted the Commission in section 206(a) of the Federal Power Act to consider "any rule, regulation, practice, or contract affecting such [jurisdictional] rates," which is identical to language in section 5 of the NGA applicable here, is not limited to the jurisdictional context. 426 U.S. 271, 281. *See also, Transcontinental Gas Pipe Line Co. v FPC*, 365 U.S. 1 (1961), where the Supreme Court upheld the Commission's denial of a certificate authorizing transportation of gas to be sold in non-jurisdictional retail sales on the basis, *inter alia*, that the retail sales rates might cause an escalation in wholesale prices that are subject to the Commission's jurisdiction.

21 Transco Request for Rehearing at 21.

22 Similarly, the Commission has the jurisdiction to exclude, as imprudent, non-jurisdictional costs from the cost of service used to compute pipeline jurisdictional rates without indirectly regulating such non-jurisdictional costs. The Commission also has the jurisdiction to reduce a jurisdictional rate to reflect a reduction in non-jurisdictional costs, like compressor fuel or electric power costs, which are recovered in the jurisdictional rates.

23 92 F.3d 1239 (D.C. Cir. 1996) (*Altamont*); *see also Northern States Power Company, et al. v. FERC*, 176 F.3d 1090 (8th Cir. 1999); *cf. North American Electric Reliability Council, et al. v Virginia Electric and Power Co., et al.*, 96 FERC ¶ 61,079 (2001).

29. Accordingly, contrary to Transco's claims, the Commission is not attempting to regulate indirectly that which it may not regulate directly and, therefore, *Richmond* and other cases Transco cites are distinguishable. In *Richmond*, the court rejected the claim that the Commission could require otherwise non-jurisdictional "wheeling" as a condition of jurisdictional rates on the basis that "[w]hat the Commission is prohibited from doing directly it may not achieve by indirection."[24] Here, *Richmond* is not applicable because the Commission is not arriving at an unlawful end result, *i.e.*, a forced change in WGP's gathering rates, through indirect means. That will not occur. Nothing we do to Transco's rates will have any affect on the rates WGP charges Sunoco. The distinction so important to the courts in *Conway* and *Altamont* is that the "end result" of our remedy will *not* be that WGP's rates will be affected; specifically, it will *not* be required to charge Sunoco zero for its gathering services. WGP can charge anything it wants and can keep its revenues and profits. The "end result" effectively achieved here is lawful and within the Commission's jurisdiction because it relates only to the net jurisdictional charges Sunoco pays Transco for jurisdictional transmission service and does not indirectly force or coerce WGP to charge less (*i.e.*, zero) for its non-jurisdictional gathering services than it wishes to charge.[25] Consistent with *Conway*, the Commission is only taking WGP's non-jurisdictional rates and charges into account to establish a remedy that affects only jurisdictional rates. Thus, the remedy is within the Commission's jurisdiction and does not constitute regulation, direct or indirect, of non-jurisdictional rates and charges.

30. Transco's reliance on the 1945 U.S. Supreme Court decision in *Colorado Interstate Gas Co. v. FPC* [26] for the proposition that we may not set jurisdictional rates to appropriate the profits of either the regulated company's or its affiliate's unregulated business begs the issue because there will not be any appropriation of profits from an unregulated business under our remedy. First, Transco will not be gathering Sunoco's gas once the sale of the subject facilities takes place, so our remedy cannot have any

---

24 574 F.2d 610, 619-20.

25 Thus, the fact that our reimbursement remedy places *Sunoco* in the same position, on a net cost basis, it would be in *if* we were to unlawfully assert direct regulation over WGP's rates and order *WGP* to charge Sunoco zero does not constitute the kind of "end result" found to be unlawful indirect regulation in *Richmond*. To be unlawful, the end result here would have to be that *WGP* would be coerced into reducing Sunoco's gathering charge to zero.

26 324 U.S. 635 (1945) (*CIG*).

effect on Transco's profits from unregulated business. [27] Second, again, WGP will not be regulated, and WGP can keep any profits it obtains from the charges it exacts from Sunoco. Therefore, there is no appropriation of WGP's non-jurisdictional profits either. Indeed, the Supreme Court in *Conway, supra*, specifically relied on the court's finding in *CIG* that "[t]he Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction."[28]

31. Transco continues by observing that the court in *Columbia*, *supra*, stated that the Commission cannot acquire jurisdiction merely by agreement of the parties to an agreement before it, that the mere fact that the FT service agreement is on file with the Commission does not give the Commission authority over a purported breach of the FT service agreement, and that the Commission may not condition the abandonment of non-jurisdictional gathering facilities.

32. We are not attempting to acquire jurisdiction over WGP's gathering rates and services by agreement of the parties, or because a contract is on file, or because of abandonment conditions. We are not attempting to acquire jurisdiction over WGP's gathering rates and services at all. Transco's arguments, once again, all mistakenly assume that our remedy indirectly causes regulation of WGP's gathering rates.

33. Further, the Commission affirms its finding that the unlawful scenario that troubled the court in *Columbia* will not be present here. In *Columbia,* the court held that the Commission could not enforce a non-jurisdictional part of a jurisdictional settlement, and, therefore, rejected the Commission's claim that it could enforce on Columbia a tariff obligation to construct non-jurisdictional gathering meters. In explaining its reasoning the court used the hypothetical of the Commission unlawfully attempting to enforce a settlement provision requiring regulation of an otherwise deregulated wellhead sale of natural gas as part of a jurisdictional pipeline settlement. To match that hypothetical here, the Commission would have to enforce the existing settlement as originally drafted, rather than modify it, by requiring Transco to continue to provide service from the

---

[27] It cannot be an indirect regulation of Transco gathering rates because it will not be performing gathering for Sunoco after the sale occurs.

[28] *Conway*, 426 U.S. at 282-283 (*citing CIG*, 324 U.S. at 646).

subject seven receipt points at the settlement rate with no additional charges for gathering. Once again, that will not occur here.[29]

34. Transco states that it recognizes that Sunoco and WGP may be unable to come to an agreement, but, it asserts, that under the NGA this disagreement would be a private contract disagreement beyond the Commission's jurisdiction and asserts that the Commission has a long-standing policy of not involving itself in "such" private contractual matters even where jurisdictional service is involved, citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 (1979) (*Arkla*).

35. Transco incorrectly assumes that the Commission is somehow involving itself in any potential contractual dispute between WGP and Sunoco, which, of course, would be beyond our jurisdiction to resolve. The Commission's remedy has absolutely no impact on such potential contractual disputes. Although that does not preclude Sunoco from separately pursuing state contract law claims in court against WGP, the Commission lacks jurisdiction over WGP and, therefore, from the Commission's standpoint, WGP is free to charge whatever it wishes. Our remedy only affects the jurisdictional transportation rates Transco charges Sunoco. *Arkla* is not relevant to any such potential contract dispute between Sunoco and WGP because *Arkla* relates to whether the Commission should exercise its discretion and defer issues of interpretation of *jurisdictional* contracts to the courts. For the same reason, *Arkla* is inapposite because the issues here involve the interpretation of a Commission-approved settlement, not the interpretation of a private contract under state contract law.[30] The FT service agreement, under which Sunoco receives service, is simply the pro forma FT service agreement of the tariff, the interpretation of which is not open to question. What is at issue is the

---

29 The 1992 Settlement does not apply to WGP, and Transco's and Sunoco's service agreement thereunder will be modified upon the sale of the subject facilities to remove the seven subject receipt points from the Appendix to the agreement. Therefore, because the Commission is not enforcing the former obligation to provide service from those points on Transco or WGP, Commission orders deferring the enforcement of non-jurisdictional components of jurisdictional settlements to local courts, as in *Erie Boulevard Hydropower, L.P.*, 88 FERC 61,176 (1999), are not relevant here.

30 *See, e.g.*, *Williston Basin Interstate Pipeline Co. v. K N Energy, Inc.*, 58 FERC ¶ 61,001 at p. 61,002 (1992)("The Commission agrees with KN that matters of state contract law are best decided in court. However, the Commission also has the authority to interpret the jurisdictional tariff and certificate provisions, even if they are co-extensive with underlying contractual obligations, and need not defer such matters to a court.")

interpretation of a Commission-approved settlement that is solely within the Commission's special expertise to resolve and, with respect to which the courts give deference and great weight.[31] Here, we are called on to interpret how the 1992 Settlement should be applied in light of events and changed circumstances not expressly covered by the 1992 Settlement or the Commission's orders approving the 1992 Settlement. We believe it is appropriate to retain our jurisdiction over that matter.

36. Further, the Commission is fully justified in retaining jurisdiction over the interpretation of the 1992 Settlement under the factors the Commission commonly uses to determine whether to defer contract interpretation issues to the courts as set forth in *Arkla*. The Commission commonly considers the following three factors: (a) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (b) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (c) whether the case is important in relation to the regulatory responsibilities of the Commission.[32] Here, the Commission has special expertise in interpreting the settlements it approved, there is a need for a uniform interpretation of the Commission's jurisdiction, and the case is important in relation to the Commission's regulatory responsibility to uphold the sanctity of contracts and Commission-approved settlements.

37. Transco argues that the Commission's remedy constitutes a "retroactive" amendment of the previously approved settlement that is impermissible under NGA section 5. The Commission disagrees that it is "retroactively" amending the settlement. To the extent the remedy we impose constitutes NGA section 5 action, that action will take effect only prospectively, not retroactively, from the moment the sale of the facilities occurs.

38. In the June 16, 2005 Order, at P18, the Commission stated that the additional costs that Sunoco would incur solely as a result of Transco's violation of the 1992 Settlement would "constitute consequential damages . . . that Sunoco should be permitted to

---

[31] *Lomack Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000) ("To be sure, we need not accept 'an agency interpretation that black means white. However, if the choice lies between dark gray and light gray, the conclusion of the agency, unmistakably possessed as it is of special expertise, in favor of one or the other will have great weight.'").

[32] *Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306 at P 25 (2005) (*citing Arkla*, 7 FERC ¶ 61,175 at 61,322).

recover." In its Request for Rehearing,[33] Transco mischaracterizes this part of the June 16, 2005 Order as awarding "compensatory contractual damages for a purported breach of the FT service agreement."[34] Transco argues that the Commission has no authority under the NGA to award what it asserts are "such compensatory damages."[35]

39. While we agree that the Commission's policy is to defer matters of compensatory damages for breach of private contract claims to the courts, Transco reads too much into the Commission's use of the term "damages" and ignores the actual effect of the Commission's remedy. The Commission did not intend to suggest that its remedy is to award private contract compensatory or consequential damages, which might otherwise suggest deferral to a court to determine. The Commission explained that the remedy ordered was for Transco to reimburse Sunoco for "additional costs" Sunoco will incur due to Transco's violation of the 1992 Settlement.[36] The Commission characterized these "costs" as "consequential damages incurred as a result of the violation of a jurisdictional settlement" only to explain that the monetary injury or harm Sunoco will incur will be the consequence of Transco's unilateral actions in violation of a Commission-approved settlement, nothing more.

40. In any event, we do not concede a lack of jurisdiction to craft the monetary remedy ordered herein, regardless of the terminology used to describe it. In the June 16, 2005 Order, the Commission observed that it may provide such monetary remedies under its equitable powers to remedy violations of settlements, contracts, and regulations that conflict with the purposes of the NGA. The Commission observed that the Commission has broad powers in crafting remedies, citing a number of precedents, including *Coastal Oil & Gas Corp. v. FERC*.[37] On rehearing, Transco cites *VNG*, *supra* note 35, to support

---

33 Transco Request for Rehearing at 23.

34 Citing 111 FERC ¶ 61,400 at P 18.

35 *Citing Wagner & Brown v. ANR Pipeline Co.,* 837 F.2d 199 (5th Cir. 1988) (*Wagner*); *Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp*., 109 FERC ¶ 61,090 at P5 (2004) (*VNG*); *Owens-Corning Fiberglass Corporation v. Transcontinental Gas Pipe Line Corp*., 49 FERC ¶ 61282 at 62,064 (1989) (*Owens-Corning*); and *Kansas-Nebraska Natural Gas Co., Inc* ., 21 FERC ¶ 61,285 (1982) (*KN*).

36 111 FERC ¶ 61,400 at P18.

37 782 F.2d 1249 (5th Cir. 1986) (*Coastal*).

its claim that we should defer the issues here to local courts.[38] However, in *VNG*, as in the instant case, the Commission relied on *Coastal* to clarify that it has broad powers to craft remedies, but not to the point that such remedies constitute civil penalties.[39] In *Coastal*, the court recognized the Commission's authority to impose a monetary remedy to restore the *status quo ante* or to prevent unjust enrichment for the pipeline's injury to its customers attributable to the pipeline's unlawful abandonment of interstate service. It is consistent with *Coastal* and other cases cited to impose a monetary remedy here for Transco's termination of service from the existing receipt points in violation of the 1992 Settlement, which will cause injury to Sunoco in the form of increased costs (gathering charges from WGP). The monetary payment we direct Transco to make if it does go forward with the proposed sale of facilities, to reimburse Sunoco for any such increased costs, acts to restore the *status quo ante* under the 1992 Settlement at least as far as the total costs Sunoco and Transco agreed Sunoco would incur under the settlement.

41. In the June 16, 2005 Order, the Commission cited *Coastal*, among other court decisions, as support for a variety of monetary remedies generally available under the NGA. However, the Commission chiefly relied on *Office of Consumers' Counsel, State of Ohio v. FERC*,[40] where the court held that the Commission had the remedial authority to modify a settlement and condition abandonment authorization on the pipeline paying for the costs of converting to propane service (a non-jurisdictional service) that its customers incurred as a result of the pipeline terminating natural gas service to them.

---

38 In its request for rehearing, Transco asserts that *Coastal* can be distinguished on the basis that it and other cases cited by the Commission "involve actual violations of the NGA." Transco request for rehearing at 18 note 17. However, Transco's proposed actions will result in violation of a settlement approved by Commission order. Therefore, violation of the settlement will constitute a violation of a Commission order issued under the authority of the NGA. The violation at issue here is no less worthy of a remedy than the violation at issue in *Coastal*.

39 In *VNG*, the Commission found that VNG's claim for damages under its contract for firm service not received due to Columbia's negligence was more appropriate for resolution by the state court. The damage claims were varied, complex, and beyond those typically contemplated by the Commission. *See* 108 FERC ¶ 61,086 at p. 61,442 text and note 24. Unlike in *VNG*, the remedy here relates to a violation of a Commission-approved settlement that is within the Commission's special competence to resolve and is limited by jurisdictional constraints not present in *VNG* to a simple monetary remedy of reimbursement for whatever additional costs Sunoco incurs from WGP.

40 808 F.2d 125 at 129-130 (D.C. Cir. 1987) (*Consumers' Counsel*).

Similarly, in the June 16, 2005 Order, the Commission directed Transco to pay Sunoco for the increased non-jurisdictional costs (WGP gathering charges) it will incur as a result of Transco's abandonment of service from the subject seven receipt points. On rehearing, in a footnote, Transco claims that *Consumers' Counsel* is inapposite because the facts were different.[41] There, it points out, the Commission conditioned abandonment on the pipeline's obligation to pay the costs, whereas here the Commission did not so condition abandonment. Transco's effort to distinguish *Consumers' Counsel* is without merit. Here, because the Commission lacks jurisdiction to condition abandonment of gathering facilities, such an abandonment condition is not an option. That fact notwithstanding, *Consumers' Counsel* still upheld the same end result: the pipeline had to pay money to its customers to compensate them for the increased, non-jurisdictional costs they had to bear as a result of unlawful conduct by the pipeline.

42. Finally, Transco claims, without further explanation or support, that the Commission's directives cannot meet the "public interest" requirements of *United Gas Pipe Line Co. v. Mobile Gas Service Corp*.[42] and *FPC v. Sierra Pacific Power Co.*[43] (*Mobile-Sierra*). Transco's *Mobile-Sierra* claim fails because those precedents do not deal with the issue of the appropriate equitable remedy for a violation of a Commission-approved settlement. In any event, the Commission's action here meets the public interest goal of preserving the sanctity of Commission-approved settlements and contracts. The Commission adopted the court's rationale in *Brooklyn Union v. FERC*,[44] that "a strong commitment to preexisting settlements would better serve the public interest than allowing modifications over the objection of one or more parties."[45]

C. <u>Reasonableness of the Commission's Remedy</u>

43. In the June 16, 2005 Order, the Commission exercised its equitable remedial powers by establishing the remedy of reimbursement of all additional costs Sunoco incurs from WGP on the basis that this will preserve the benefit of Sunoco's rate bargain under the 1992 Settlement. The Commission addressed and rejected Transco's prior claims that requiring Transco to reimburse Sunoco for WGP gathering charges would "subsidize"

[41] Transco request for Rehearing at 18, note 17.

[42] 350 U.S. 332 (1956).

[43] 350 U.S. 348 (1956).

[44] 409 F.3d 404 (D.C. Cir. 2005) (*Brooklyn Union*).

[45] 111 FERC ¶ 61,400 at P34, *citing Brooklyn Union*, 409 F.3d 404 at 407.

Sunoco for its gathering costs by establishing a "free" rate for gathering; that WGP would have its non-jurisdictional gathering profits "appropriated," and that Transco would fail to recover the full cost of service for services provided under the 1992 Settlement and that, as a result, it deserved some form of cost-based compensation for gathering costs as a set-off from the amounts it would have to reimburse Sunoco. The Commission explained that the service provided Sunoco under the 1992 Settlement from the subject OCS receipt points never was "free" in that Sunoco paid the maximum FT rate for FT service from the 1992 Settlement's agreed-to OCS receipt points to the Pennsylvania delivery points. The Commission also observed that Transco will not be barred from recovery of any costs because it will not incur the gathering cost once the facilities are sold. Further, the Commission explained that, because WGP is not regulated and can charge Sunoco unregulated rates, WGP's profits will not be appropriated or affected in any way. Thus, the Commission explained that this is not a rate design issue and its decision was simply based on the equitable consideration of requiring Transco to make Sunoco whole for Transco's violation of the 1992 Settlement. In this way, the Commission held, Transco will be required to provide Sunoco with the benefit of its bargain under the 1992 Settlement.

44. On rehearing, Transco repeats its previously-rejected characterizations of the Commission's action, particularly its claim of a "subsidy" and "appropriation" of WGP's profits, generally without specifically responding to the Commission's discussion and reasoning on these same arguments. Transco asserts that the Commission has ignored the fact that, under its rate case settlement in Docket No. RP01-245-000, *et al*., Transco must file to reduce its jurisdictional cost of service, and its rates, to reflect the sale of the subject gathering facilities when that sale occurs.[46] It asserts that this fact, coupled with the Commission's directive that Transco also must reimburse Sunoco for WGP gathering charges, will cause Transco to under-recover its cost-of-service and will assure that Sunoco's post-spin down gathering costs, when added to its reduced post-spin down FT transportation costs, together would be even lower than its total pre-spin down FT transportation costs, yielding an effective gathering cost of less than zero. It is on this

---

[46] Transco's existing general system-wide maximum rates resulted from a partial settlement of its general section 4 rate case in Docket No. RP01-245-000, et al., as approved in an order issued July 23, 2002. *Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,085 (2002). Article V, section B of that settlement established procedures for Transco to file to adjust its system-wide rates to reflect the sale of certain facilities, including the subject facilities.

alleged basis that Transco asserts that the Commission's remedy will require Transco to "subsidize" Sunoco's gathering costs.[47]

45. Transco's argument incorrectly assumes that the 1992 Settlement rate is cost-based and that it includes a cost component for the gathering facilities Transco intends on selling WGP. Transco ignores the fact that the settled rate under the 1992 Settlement was a black-box settlement rate that was not a cost-based rate designed to recover the cost of the transportation services Transco agreed to provide Sunoco under that settlement. As noted earlier in this order, in return for certain agreements and concessions by Sunoco in settlement of other take-or-pay proceedings, Transco agreed to provide Sunoco with FT service from certain OCS receipt points on its offshore IT-Feeder lateral system to delivery points in Pennsylvania, charging only the maximum FT rate for the entire haul despite the fact that FT service otherwise was provided only on the mainline and that other shippers would also have to pay Transco's IT-Feeder rate to bring their gas to Transco's mainline where the FT service begins. Thus, any other shipper tendering gas at those OCS points would be subject to both the IT-Feeder rate and the FT rate, whereas Sunoco only pays the FT maximum rate. Transco cannot complain about the effects of our action on its recovery of costs when the 1992 Settlement rate was not cost-based in that it never included any additional charges for the service provided Sunoco on the OCS IT-Feeder laterals above the FT maximum rate.[48] An adjustment in its generally-applicable system-wide maximum rates to reflect the sale of the subject facilities, which are also black-box settlement rates, only would affect the maximum FT rate Sunoco pays as a settlement rate, which was never intended to reflect the cost of the specific service provided Sunoco under the 1992 Settlement. If, in fact, the adjustment would result in a reduction in the generic maximum rate for FT service, that adjustment is part of the bargain struck in the 1992 Settlement since the 1992 Settlement rate is not fixed; it is whatever the FT maximum rate is as such rate may change from time to time. Moreover, while that adjustment may cause a concomitant reduction in the FT maximum rate Sunoco pays Transco under the 1992 Settlement, that reduction would likely be de minimus due to the relatively small cost of the limited facilities being sold that carry Sunoco's gas vis-à-vis Transco's entire cost-of-service allocable to the FT service, and would not adequately compensate Sunoco for the increased costs it ultimately will incur.

---

[47] Transco Request for Rehearing at 21.

[48] As the Commission observed in the June 16, 2005 Order at note 31, after the sale of the subject facilities to WGP, Transco will continue to charge Sunoco nothing extra beyond the FT maximum rate for the service it will continue to provide Sunoco under the 1992 settlement despite the fact that Sunoco's new receipt point will be located on its OCS IT-Feeder lateral.

46. Accordingly, Transco's argument that its reimbursement pursuant to our June 16, 2005 Order will cause it to under-recover its FT cost of service is misplaced and irrelevant since Transco never recovered costs from Sunoco with a cost-based rate tailored to the services it provides Sunoco under the 1992 Settlement. Consistent with the 1992 Settlement, the Commission's remedy is not to set a cost-based rate for services Transco will continue to provide Sunoco. By requiring reimbursement, Sunoco is provided with an equitable remedy to make it whole for the harm incurred by Transco's unilateral abandonment of IT-Feeder facilities needed to fulfill its service obligation under the 1992 Settlement, which will cause Sunoco monetary harm in the form of increased costs. The remedy measures the difference in costs Sunoco incurs for service before and after the sale of the facilities and directs Transco to make Sunoco whole for the difference.

47. Taking the alternate view that we are ordering a rate reduction under NGA section 5, we are reducing a non-cost based, black box settlement rate for Sunoco. Under view, the purpose and effect of our action is to provide an equitable remedy for Transco's unilateral actions by restoring the rate status quo for Sunoco under the 1992 Settlement that Transco wishes to modify unilaterally. The reduction in Transco's net revenues from its continued transactions with Sunoco is reasonable and equitable in light of the additional costs Transco will be directly, and unilaterally, causing Sunoco to incur.

48. Thus, even if one accepts Transco's mislabeling of our remedy as providing Sunoco with a "cost free" gathering service "subsidy,"[49] that is nothing more than what Transco agreed to in the 1992 Settlement wherein it agreed to charge only the FT maximum rate and to forego additionally charging the IT-Feeder rate which recovers the IT-Feeder system's costs. However, as the Commission discussed in the June 16, 2005 Order, it is a mischaracterization of both the 1992 Settlement and our remedy as somehow parsing out separate cost-based components for gathering, as opposed to transmission, and providing a "free" gathering service. Sunoco pays the FT rate for the entire service from the OCS to Pennsylvania and, thus, no portion of that service can be considered "cost free." That is the bargain Sunoco obtained under the 1992 Settlement and that is the bargain we maintain with our remedy.

49. Transco claims that the Commission's remedy is at odds with the Commission's failure to take similar discretionary action of requiring reimbursement by the pipeline of non-jurisdictional gathering charges in the numerous other gathering spin-down cases previously before the Commission. Other spin-down cases are inapposite because they did not involve violation of a Commission-approved settlement. Here, the underlying

---

[49] Transco Request for Rehearing at 21.

settlement which drives the outcome of this case was a part of the consideration for settling five years of litigation over take-or-pay and service restructuring issues not present in the normal spin-down case.[50] Unraveling this settlement and returning the parties to complex, decades-old take-or-pay litigation that the instant 1992 Settlement resolved raises wholly different administrative and policy issues than in the normal spin-down case.

50. Transco attempts to trivialize the importance to Sunoco of losing service from the seven subject receipt points as if the only effect of selling the facilities would be to slightly shorten the total distance of the transportation service it provides Sunoco under the 1992 Settlement. Transco states that its action will "reduce, by a small portion, the transportation services" under the contract entered into under the 1992 Settlement.[51] It is not so much that the shorter distance of haul harms Sunoco; it is the fact that it will lose its direct access to Transco's system and will have to incur additional costs that will cause significant monetary harm to obtain the same service at the same seven receipt points from a non-jurisdictional gatherer.

51. Finally, Transco asserts that the Commission erroneously suggests that Sunoco's FT contract is for a "fixed rate" that would bar Transco from refunctionalizing its costs and charging Sunoco a gathering rate in addition to the FT maximum rate if no spin-down occurs. Transco asserts that it would have a right under Rate Schedule FT to file to require Sunoco to pay an additional "gathering rate" as reflected on Sheet No. 33 of its tariff.[52]

52. The Commission never suggested that the settlement rate is "fixed"; it is whatever the maximum rate for FT service is as set forth in the tariff and as that rate may change from time-to-time. Further, Sheet No. 33 of its tariff does not give Transco the right to charge Sunoco anything other than that maximum FT rate. As indicated in footnote 2 on that sheet, the maximum gathering rates on that Sheet No. 33 only apply to certain specifically designated receipt points on its system, as listed on Sheets 33A and 33B, neither of which sheet includes the Sunoco receipt points designated in Sunoco's FT service agreement under the 1992 Settlement.[53] Thus, even if Transco decides not to spin

[50] See Sunoco's Complaint, Docket No. RP02-309-000, at 4.

[51] Transco Request for Rehearing at 9.

[52] Transco Request for Rehearing at 22.

[53] See Ninth Revised Sheet No. 33, First Revised Sheet No. 33A, and Second revised Sheet No. 33B to Transco's FERC Gas Tariff, Third Revised Volume No. 1.

down the facilities, refunctionalizes them as gathering, and files revised IT-Feeder rates (to reflect the removal of the costs from the IT-Feeder rates) and separately-unbundled gathering charges to recover the costs of the refunctionalized facilities, the 1992 Settlement still would bar Transco from charging *Sunoco* anything other than the settlement rate, *i.e.*, the FT maximum rate as that rate may change from time to time. Under that hypothetical circumstance, Transco could, however, charge the new gathering rates to other shippers who get service from Transco on the refunctionalized facilities because they are not subject to the 1992 Settlement with Sunoco. Once again, Transco fails to consider that the 1992 Settlement is not cost-based and provides for no additional charges above the FT maximum rate despite the fact that a significant portion of the service provided under the settlement is on Transco's OCS facilities. Irrespective of how Transco designs maximum tariff rates applicable to other shippers for service on such facilities, Transco is not authorized under the 1992 Settlement to carve out a component of the settlement service and charge an additional rate for that component.

D. **Procedural Claims**

53. Transco asserts that Sunoco's complaint was an unlawful collateral attack on the Commission's abandonment orders and was a de facto late-filed request for rehearing of those orders which the Commission should have dismissed under section 19 of the NGA. Transco asserts that it included in its abandonment filing clear references to the seven upstream gathering points in the FT service agreement with Sunoco. Transco asserts that the modification of FT service agreement to delete the seven receipt points was the basis for Sunoco's protest in that very proceeding. Transco further states that it notified the Commission that seven of the upstream points in Exhibit A to the FT service agreement would become non-jurisdictional gathering facilities and no longer subject to the service agreement upon spin-down.

54. The Commission disagrees that Sunoco's complaint was an unlawful collateral attack on the abandonment order or an impermissible late-filed request for rehearing of that order. As the Commission stated in its June 16, 2005 Order, the Commission did not reverse or modify the abandonment order in any way. While the complaint challenged the abandonment, Sunoco also raised issues about the application of the 1992 Settlement that were appropriate for the Commission to review even in light of the Commission's action in granting Transco's request for abandonment. For example, Sunoco's alternative request for relief was to restore the parties to the position they had been in prior to the settlement. As the Commission has noted earlier, while Transco did discuss the removal of the subject receipt points in its abandonment application, it omitted material facts about the existence of the 1992 Settlement and the circumstances under which that settlement was executed. Indeed, because the Commission has found that it lacks jurisdiction to deny abandonment of non-jurisdictional gathering facilities, the abandonment proceeding would have been the wrong forum for Sunoco to raise claims

for monetary relief based on the 1992 Settlement. It necessarily would have had to file a separate complaint to raise these settlement issues. Thus, the Commission finds that it was reasonable to address issues that were not before the Commission in the abandonment proceeding.

E. Policy Claims

55. In the June 16, 2005 Order, the Commission concluded that its action does nothing more than preserve Sunoco's benefit of the rate bargain under the 1992 Settlement and, to accept Transco's arguments, inter alia, would undermine the Commission's jurisdiction to enforce the sanctity of jurisdictional contracts and settlements it approves. Citing the recent Court of Appeals decision in *Brooklyn Union,*[54] the Commission found that its action supports the Commission's goal of encouraging settlements by enforcing the sanctity of such agreements.[55]

56. On rehearing, Transco argues once again that based on its previously-rejected claim that the Commission's remedy requires Transco to "subsidize" Sunoco's non-jurisdictional gathering service from WGP, the Commission has not only undermined and contradicted its prior orders in Transco's abandonment proceeding in Docket No. CP01-34, et al., but has also acted inconsistently with, and undermined, its longstanding pro-competitive policies to unbundle gathering which were developed concurrently with the restructuring and unbundling of the pipeline industry in Order No. 636. Transco asserts that the June 16, 2005 Order would indirectly and needlessly continue Commission regulation of gathering, inviting other complainants to seek de facto exemption from the Commission's policy of unbundling gathering. Finally, Transco claims that *Brooklyn Union* is of no assistance to the Commission because, it claims, it has not violated the 1992 Settlement.

57. The Commission's decision here does not undermine its gathering unbundling policies. The remedy imposed here is unique to Transco and Sunoco because of the violation of a Commission-approved settlement involving only those two parties and should not affect pipeline industry decisions on whether to spin down gathering facilities. Moreover, the Commission granted Transco's request for abandonment and, if and when, it consummates the spin down, the Central Texas facilities will be part of WGP's unregulated gathering operation with respect to which the Commission will assert no jurisdiction. However, the application of the Commission's gathering unbundling and

---

54 409 F.3d 404 (D.C. Cir. 2005).

55 111 FERC ¶ 61,400 at P 34.

spin-down policies to Transco do not appear to have created the opportunity for competitive unregulated gathering services or rates, as hoped, and Sunoco is faced with the unenviable prospect of dealing with an unregulated monopolist for gathering services with no physical alternatives that would afford competitive alternatives. Indeed, the degree of the economic disincentive to Transco to spinning down its gathering facilities to WGP that our remedy may impose on Transco (*i.e.*, reimbursement of WGP charges) is directly correlated to the lack of competitive alternatives Sunoco would have to the unregulated monopolist, WGP, which has no constraints on what it may charge.

58. On balance, consistent with *Brooklyn Union*, the Commission is simply supporting what we believe is, in the circumstances of this case, an important policy of ensuring that parties abide by the deals they enter into in a Commission-approved settlement by preserving the benefit of the bargains reached under the settlement. It is also consistent with the Commission's policy of encouraging settlements to avoid the waste of administrative resources that results from allowing one party to unilaterally unravel existing settlements and cast the parties back into complex litigation over long-settled issues. By providing Sunoco with a remedy, the Commission is not expanding its jurisdiction but is simply ensuring that Sunoco receives the benefit of its rate bargain under the 1992 Settlement despite changed circumstances beyond Sunoco's control brought about by the unilateral actions of the other party to the settlement. To do otherwise would permit one party to render the settlement and associated service agreement meaningless and would substantially undermine the value of the Commission's approval of settlements.

<u>The Commission orders:</u>

Transco's request for rehearing of the June 16, 2005 Order is denied.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sunoco, Inc. (R&M)

v. Docket No. RP02-309-006

Transcontinental Gas Pipe Line Corporation

(Issued February 21, 2006)

Nora Mead BROWNELL, Commissioner, *dissenting*:

I dissent for the reasons set forth in *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corporation*, 103 FERC ¶ 61,176 (2003) and *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corporation*, 111 FERC ¶ 61,400 (2005).

Nora Mead Brownell