

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Sunoco, Inc. (R&M)

Docket No. RP02-309-001

v.

Transcontinental Gas Pipe Line
Corporation

ORDER DENYING REHEARING, CLARIFYING ORDER,
AND REQUIRING FILING

(Issued May 15, 2003)

1. On September 5, 2002, the Commission issued an order¹ granting, in part, a complaint filed by Sunoco, Inc. (R&M) (Sunoco) against Transcontinental Gas Pipe Line Corporation (Transco) for breach of a 1992 Commission-approved settlement. The Commission acted under Section 5 of the Natural Gas Act (NGA) to modify the settlement to require that, upon the sale of certain gathering facilities to its affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP), Transco must acquire capacity at certain receipt points on those facilities from WGP and assign such capacity to Sunoco at rates, terms, and conditions consistent with the settlement. Transco filed a request for rehearing of that order. For the reasons discussed below, the Commission denies rehearing, clarifies Transco's obligations under the September 5, 2002 order, and requires Transco to make a filing to comply with the requirements of this order. This order is in the public interest by ensuring that customers receive the full benefits of settlements approved by the Commission.

¹Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corporation, 100 FERC ¶ 61,252 (2002).

Background

2. On June 4, 1992, the Commission issued an order² which, among other things, approved a settlement filed February 14, 1992 (1992 Settlement) between Transco and Sunoco resolving all outstanding issues between them, including terms and conditions for Rate Schedule FT service for Sunoco, and embodying Sunoco's agreement to join in the relevant provisions of Transco settlements regarding take-or-pay cost recovery, rates, and restructuring of services. As a result of that order, Transco became obligated under a contract with Sunoco to provide firm transportation service under Rate Schedule FT to Sunoco for twenty years at the maximum FT rate from specified receipt points, including the seven points that are the subject of Sunoco's complaint in the instant proceeding, to delivery points in Pennsylvania. The 1992 Settlement also stated that the parties agreed that the various parts of the settlement were not severable without upsetting the balance of consideration achieved between Transco and Sunoco.³ Of particular significance to the instant proceeding, the 1992 Settlement provides that, in the absence of a notice from Sunoco, Transco will take no action to terminate service to Sunoco and establishes a rate cap applicable to Sunoco as whatever rate Transco could charge another shipper for the services provided Sunoco.

3. On July 25, 2001, the Commission issued an order⁴ approving Transco's comprehensive gathering spin-down proposal, wherein the Commission authorized Transco to abandon by sale to its gathering affiliate, WGP, certain OCS facilities on which Sunoco's receipt points under the 1992 Settlement are located and declared the facilities to be non-jurisdictional gathering facilities. Sunoco, among others, protested Transco's gathering spin-down proposal, but did not raise the matter of compliance with the 1992 Settlement. Nor did Transco inform the Commission of the 1992 Settlement. To date, however, Transco has not informed the Commission that it has, in fact, sold the subject facilities to WGP. Accordingly, the abandonment is not yet effective and Transco continues to provide service to Sunoco from the subject receipt points.

4. On September 5, 2002, the Commission issued an order in the instant proceeding addressing Sunoco's complaint, which presented the issue of whether the 1992 Settlement

²Transcontinental Gas Pipe Line Corporation, 59 FERC ¶ 61,279 (1992).

³See Article IV. Section A.2. of the 1992 Settlement. One such consideration included Sunoco's agreement to pay certain take-or-pay surcharges as a settling party in Transco's proceeding in Docket No. RP88-68, et al.

⁴Transcontinental Gas Pipe Line Corporation, 96 FERC ¶ 61,115 (2001), reh'g, 97 FERC ¶ 61,296 (2001).

barred Transco from terminating service for Sunoco at seven specific receipt points on facilities which the Commission authorized Transco to abandon by sale in the July 25, 2001 order. In its complaint, Sunoco alleged that obtaining service from WGP to replace the service abandoned by Transco would cost Sunoco an additional \$15 million to \$28 million. The September 5, 2002 order found that action by Transco to terminate service at the subject receipt points would deprive Sunoco of a part of the bargain it struck with Transco under the 1992 Settlement. To remedy this, the order granted Sunoco equitable relief by modifying the 1992 Settlement to require Transco to obtain the subject upstream capacity from its affiliate and assign it to Sunoco at rates, terms, and conditions consistent with their 1992 Settlement, as approved by the June 4, 1992 order.

Discussion

5. In its request for rehearing, Transco argues that the Commission erred in several respects in granting Sunoco's complaint and granting equitable relief. The arguments Transco puts forth and the Commission's response to them are discussed below. For the reasons below, the Commission denies rehearing of the September 5, 2002 order, as clarified here.

6. Transco argues that its actions to terminate service at the subject receipt points could not be viewed as a breach of the 1992 Settlement or of Sunoco's FT contract which resulted therefrom because the 1992 Settlement was intended only to pertain to transportation service subject to the jurisdiction of the Commission under the Natural Gas Act (NGA) and not non-jurisdictional gathering service. It asserts that what it characterizes as the Commission's "reformation" of Transco's FT contract in the September 5, 2002 order to eliminate the gathering receipt points is consistent with the "NGA-jurisdictional nature of the FT contract itself."⁵ Transco's argument is that once the facilities are abandoned by transfer to its affiliate, they will no longer be jurisdictional, and thus will no longer be covered by the Sunoco FT contract. Accordingly, it asserts, there is no basis for the Commission to grant an equitable contractual remedy.

7. Transco's argument that the Sunoco FT contract only covered jurisdictional facilities and, therefore, does not apply now that the facilities have been found to be primarily performing a gathering function, is off point. In the September 5, 2002 order, the Commission found that it was Transco's sale of the subject facilities and termination of its service at seven of the 1992 Settlement's receipt points that violated the settlement. Moreover, Transco never informed the Commission or Sunoco of the 1992 Settlement in its November 2000 spin-down proposal. It did not matter whether, upon transfer of the

⁵Request for Rehearing at p. 5.

facilities to the recipient entity, the services would be non-jurisdictional because the points were no longer owned by Transco. Its act of selling the facilities would breach the 1992 Settlement even if the facilities were to remain jurisdictional following the sale.

8. Thus, the Commission disagrees with Transco's claim that the reclassification of the subject facilities as gathering somehow trumps the 1992 Settlement. The 1992 Settlement resulted in an obligation on the part of Transco to take Sunoco's gas at a specified set of receipt points in the OCS and to move the gas to delivery points on Transco's system at settled rates. The reclassification of what is, in fact, exactly the same physical services from an operational standpoint from "transmission" to "gathering" is of no consequence. The Commission regulates Transco's gathering services and rates, and, therefore, if the facilities are not spun-down, the Commission would retain its NGA jurisdiction over the Central Texas gathering rates and services despite any such reclassification and Transco still would have its tariff obligation to provide service to Sunoco from the 1992 Settlement's designated receipt points. The only change in circumstances that required a change in the settlement and in Transco's NGA tariff obligation is the fact that it plans to relinquish ownership of the facilities. Rather than undo the abandonment granted in the spin-down orders so as to preclude Transco from selling the facilities because the sale violates the 1992 Settlement, the Commission fashioned an equitable remedy that accommodates both the intent of the 1992 Settlement and the changed circumstances on Transco's system.

9. Further, Transco appears to assume, incorrectly, that the Commission has ordered it to charge a rate for the subject gathering services. First, it is important to note that Transco has provided the Commission with no proffer of a mechanism, and no guidance at all on how to implement enforcement of its obligations under the 1992 Settlement, even on rehearing after it was clear that we intended to hold them to that obligation. In any event, the rate actually charged for the subject services will be non-jurisdictional and will be charged by WGP. The Commission is not asserting jurisdiction over the services or over the rates charged by WGP for the services. Instead the Commission ruled that Transco must acquire the capacity from its affiliate at the seven receipt points and assign it to Sunoco at rates, terms, and conditions consistent with the 1992 Settlement as approved in the June 4, 1992 order. On reconsideration, we clarify that the 1992 Settlement can be met just as well if Sunoco contracts directly with WGP for the subject gathering services and Transco reimburses Sunoco for any charges that exceed the rate Transco could charge under the 1992 Settlement. What this means is that, irrespective of what rate WGP charges for the service, Sunoco is only required to ultimately pay a net rate that complies with the 1992 Settlement, to wit: a rate "no less favorable than Transco is otherwise able to collect from any other third-party shipper for such service." Thus, whether Transco acquires the capacity from WGP and assigns the capacity to Sunoco, or whether Sunoco directly acquires the capacity from WGP and is reimbursed by Transco for any excess charges from

WGP, the net rate Sunoco ultimately pays for the service to the subject points cannot exceed the rate that meets the 1992 Settlement's rate requirement. As we clarify later herein, that rate is the unbundled rate derived from costs and throughput from the filing Transco must make to comply with its rate case settlement in Docket No. RP01-245 at such time that it transfers the Central Texas gathering facilities to WGP.

10. Transco also argues that the 1992 Settlement was "simply the vehicle for the execution of the Sunoco FT contract" and that this proceeding only involves a private contract dispute over non-jurisdictional services that should be for a state court to resolve. Transco incorrectly construes the 1992 Settlement as having no scope or importance beyond the terms of the FT contract. This interpretation of the 1992 Settlement ignores the fact that the settlement resolved a take-or-pay dispute and reflects continuing jurisdiction over Transco. Further, the Sunoco FT contract is not a mere private contract enforceable only in local court; it is a jurisdictional contract that was one feature of a Commission-approved settlement which became binding on Transco by Commission order. As the Commission has previously explained, the Commission is enforcing the 1992 Settlement. The fact that the Commission approved Transco's application to abandon the subject facilities by sale did not modify the 1992 Settlement's rate and service bargain that Transco still owes Sunoco. Finally, in granting abandonment, the Commission did not "reform" the contract to reflect Transco's claimed intent (that the 1992 Settlement does not cover the subject non-jurisdictional gathering services). The fact that the Commission granted abandonment was not intended to reflect a decision on an issue not squarely presented by the abandonment application, *i.e.*, the issue later raised in Sunoco's complaint regarding the 1992 Settlement.

11. Transco next argues that the Commission's equitable remedy is flawed, as a practical matter, because there is no post-spin-down jurisdictional rate structure which can be "mimicked" in a new WGP gathering contract.⁶ Transco states that its jurisdictional rates are based on the cost of service and throughput of its jurisdictional transmission facilities, not WGP's gathering facilities, and Transco's jurisdictional services are subject to future changes in rates, terms and conditions of service under the NGA and various clauses in Transco's rate settlements and contracts. Transco asserts that the September 5, 2002 order is devoid of any guidance as to how Transco or WGP is to develop rates, terms, and conditions of service consistent with the 1992 Settlement.

12. Since the 1992 Settlement establishes the rate cap applicable to Sunoco as whatever rate Transco could charge another shipper for the services it receives from Transco, the rate cap must be determined as if Transco still owns the subject facilities and provides the

⁶*Id.*, at p. 7.

services at regulated rates. Under Transco's existing rate structure, Transco provides Sunoco the services on the subject facilities as just the first part of a lengthy transportation service ending at delivery points in Pennsylvania at the Rate Schedule FT maximum rate.⁷ To get the same overall service, a third-party shipper would have to contract for IT-Feeder service from these points to Transco's mainline (Station 30) and then for FT service to the downstream delivery points. Because IT-Feeder maximum rates are zone rates designed on a bundled, rolled-in cost basis, Transco could not charge a third-party shipper a gathering charge in addition to the IT-Feeder maximum rate for the same service Sunoco receives.⁸ Moreover, Transco's general Section 4 rate case settlement in Docket No. RP01-245 currently bars it from filing to authorize such a rate change under Section 4 of the NGA. However, in light of the Commission's finding in the spin-down orders that the subject facilities primarily perform a gathering function, and because Transco continues to own the subject facilities, it would be consistent with Commission policy for the Commission to use its NGA Section 5 powers to require Transco to file to unbundle the costs of the subject facilities from its existing transmission rates and to file an unbundled gathering rate applicable to the subject gathering services.⁹ While we will not do so at this late juncture, we believe that it is appropriate to apply this rate policy in resolving what rate cap Sunoco should have under the 1992 Settlement. Accordingly, we clarify that, Sunoco is not required to pay a net amount for the subject gathering services that is higher than a cost-based, unbundled gathering charge calculated on an unbundled basis utilizing the costs and throughput attributable to the subject Central Texas gathering facilities. This charge is, of course, in addition to its rate for transportation services otherwise provided by Transco under their 20-year contract.

13. The fact that Transco's current rate structure in the OCS reflects bundled IT-Feeder transportation rates is irrelevant and should not be cause for confusion on Transco's part as

⁷Sunoco's 20-year contract with Transco provides for Transco to take receipt of Sunoco's gas at the designated receipt points and deliver equivalent volumes at designated onshore delivery points off Transco's mainline in Pennsylvania.

⁸Transco could enter into a negotiated rate contract with a third-party shipper to provide for such an additional charge, but Transco has not indicated that it has done so. Accordingly, we will treat the issue of what rate a third-party could be charged for the same service provided to Sunoco as being simply limited to the question of what ceiling rate would apply to such other shipper's service.

⁹See, e.g., *Sea Robin Pipeline Co.*, 93 FERC ¶ 61,287 (2000), reh'g denied, 94 FERC ¶ 61,137 (2001). The Commission could have issued such an order following notice from Transco that it had delayed the date of transfer of the subject facilities, but chose not to do so in light of the then-apparently imminent sale of the facilities.

to how to derive a rate that complies with this requirement. Article V, Section B.1., of the Docket No. RP01-245 Settlement provides that, upon sale and spin-down of the Central Texas facilities, Transco will file a limited Section 4 rate change to adjust its then-effective rates to reflect the removal of all applicable costs of such facilities, and such other adjustments to the cost-of-service, cost allocations, throughput, and throughput mix underlying its rates as determined appropriate, effective upon the effective date of the transfer of the facilities. In that compliance filing, Transco will be obligated to provide all the cost and throughput data that would be necessary to calculate an unbundled gathering charge for purposes of implementing the 1992 Settlement's rate cap as described above.

14. Accordingly, we direct that, within 60 days, but no later than 30 days prior to the effective date of the transfer of the Central Texas facilities, Transco must submit a proposed rate calculation consistent with the foregoing discussion to be used for the purpose of establishing the net maximum amount Sunoco can be required to pay for the subject services after the transfer of the facilities is effective. In light of the fact that almost two years have passed since the approval of the spin-down, we also direct Transco to notify the Commission within 30 days of this order what its plans are with respect to the sale, including when, if at all, it intends to implement the transfer.

15. Next, Transco incorrectly characterizes the September 5, 2002 order as prescribing a default-type contract for WGP containing Commission-regulated rates, terms, and conditions of service which, it asserts, the Commission lacks authority to prescribe.¹⁰ Thus, Transco misconstrues the September 5, 2002 order as indirectly regulating WGP's gathering service. Transco asserts that NGA Sections 1(b) and 7 do not confer on the Commission the authority to regulate gathering services, and that the Commission cannot do indirectly what it has no authority to do directly. Transco argues that the fact that the facilities were previously jurisdictional facilities does not operate to broaden the authority granted to the Commission by the NGA. For the same reason, asserts Transco, the Commission cannot simply direct a jurisdictional company such as Transco to obtain such non-jurisdictional service for itself for the benefit of a third party.

16. The claim of a default contract is off point because it misconstrues the Commission's actions as attempting to regulate WGP by prescribing a default-type contract for WGP. The Commission is not prescribing a default-type contract and is not purporting to regulate WGP in any way. WGP is not subject to the Commission's NGA regulation¹¹

¹⁰Citing Conoco Inc. v. FERC, 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).

¹¹The Commission has found that affiliate gatherers are, nonetheless, subject to the

and it has no obligations under the 1992 Settlement. It is Transco that has a continuing obligation to Sunoco under that settlement. The Commission is simply requiring Transco to fulfill its part of the bargain reached in the jurisdictional settlement of its take-or-pay proceeding. Further, and for the same reasons expressed above in response to "Transco's" default contract argument, Transco's argument that the Commission is attempting to regulate non-jurisdictional facilities is off point. The September 5, 2002 order does not invoke regulation of gathering services that WGP provides to Sunoco. Nor does that order dictate what rate WGP may charge for such services. As such, Transco must ensure that Sunoco is provided service at the subject receipt points at agreed to rates in exchange, in part, for rate concessions by Sunoco with respect to their take-or-pay dispute.

17. Accordingly, by directing Transco to obtain the subject capacity from its affiliate, which we now have clarified is an alternative to Sunoco directly contracting with WGP for the capacity, the Commission is not prescribing any rates, terms, or conditions that would be binding on WGP. WGP will be free to negotiate whatever rates, terms, and conditions it wishes to agree to for the subject gathering service once the transfer is effective. Rather, in the September 5, 2002 order, the Commission invoked its jurisdiction over Transco, consistent with the Commission's NGA authority over Transco to require Transco to ensure that Sunoco continues to receive the benefit of its bargain under the 1992 Settlement. When the Commission approved the 1992 Settlement, the provisions therein became binding on Transco and effectively part of Transco's NGA tariff. In the September 5, 2002 order, the Commission modified the 1992 Settlement only to accommodate the approval of Transco's application to abandon the facilities by sale to WGP. The Commission essentially has directed that Transco must do whatever it takes to see to it that Sunoco is provided the same service at rates, terms and conditions consistent with the 1992 Settlement. For the same reason, contrary to Transco's argument, the Commission does, indeed, have jurisdiction to order Transco to meet the requirements of that jurisdictional settlement by directing it to obtain the capacity and/or reimburse Sunoco so the amount it ultimately pays for the subject capacity does not exceed the rate authorized under the 1992 Settlement. The Commission's order fashions an equitable remedy to uphold the bargain that was struck, and the tariff obligations undertaken by Transco and approved by the Commission in the 1992 Settlement in light of the changed circumstances caused by the spin-down of the facilities.¹² The services and rates which the Commission is directing Transco to continue to ensure are provided to Sunoco are the same services and rates which are the subject of their existing

¹¹(...continued)

open access requirements of Section 5 of the Outer Continental Lands Act (OCSLA). *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al.*, 100 FERC ¶ 61,252 (2002).

¹² Nothing in the record of the instant proceeding indicates that Sunoco did not live up to its end of the 1992 Settlement with respect to resolution of the take-or-pay dispute.

twenty-year contract, the 1992 Settlement, and Transco's tariff. If Transco is unable or unwilling to comply with that directive, it has the option to retain ownership of the Central Texas facilities to the extent necessary to permit it to continue to provide service to Sunoco at the subject points as required by the 1992 Settlement.

18. Transco characterizes that the Commission's action as amending both the 1992 Settlement and the Sunoco contract to encompass non-jurisdictional services and, on that alleged basis, argues that the remedy the Commission imposed cannot meet the public interest requirements for such an amendment.¹³ In addition, Transco contends that this alleged amendment is retroactive, in violation of NGA Section 5, which can only be applied prospectively. The September 5, 2002 order, as clarified herein, does not modify Transco's ongoing contractual obligations to provide FT transportation service for Sunoco under the 1992 service agreement, including service from the subject receipt points.¹⁴ More fundamentally, the Commission's action is intended to uphold, not change, the parties bargain. Transco agreed to provide Sunoco the specified service and cannot nullify its obligation by selling the necessary facilities without identifying to the Commission its ongoing obligation. The Commission's action is intended to provide Sunoco with the service for which Transco remains obligated in light of the impossibility of Transco continuing to render service from those points once the transfer of the facilities is effective. The specific performance required of Transco will ensure that Sunoco continues to receive the benefit of its bargain under the 1992 Settlement.

19. Further, the modification of the 1992 Settlement itself does not raise Mobile-Sierra issues. As the Commission has explained, the provisions of the 1992 Settlement effectively became a part of Transco's tariff. The Commission has authority to act under Section 5 of the NGA to modify tariff requirements of jurisdictional pipelines provided that it makes the requisite Section 5 findings to support such changes; to wit: that the existing provision is unjust and unreasonable and the Commission's replacement provision is just and reasonable. We have met that requirement here. It was unjust and unreasonable for Transco to attempt to avoid its obligation to perform under the 1992 Settlement through the filing of an abandonment application contemplating sale of facilities needed to perform its obligation under the 1992 Settlement, without advising the Commission of what Transco perceived to

¹³Citing United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) (Mobile-Sierra).

¹⁴Contrary to Transco's claim repeated throughout its Request for Rehearing (see, e.g., Request for Rehearing at p. 5), in granting abandonment in the underlying spin-down orders, the Commission did not "reform" Sunoco's FT contract to eliminate the subject receipt points from the contract's list of covered receipt points. Those orders did not act on the contract and, thus, did not order the contract to be modified.

be the impact. The remedy prescribed by the Commission is just and reasonable because it ensures that Sunoco will receive the benefit of the bargain it struck with Transco when it entered into the 1992 Settlement and that Transco will fulfill the service and rate obligations it undertook pursuant to that settlement. In any event, even if the Commission's action were found to raise Mobile-Sierra issues requiring a public interest finding, the Commission finds that it is the public interest to ensure that Sunoco receives the full benefits of the 1992 Settlement approved by the Commission, since Transco obtained authorization to sell the needed facilities without identifying its ongoing obligation to provide service over those facilities. In addition, in claiming that the modifications ordered by the Commission fail to meet the Mobile-Sierra public interest requirement, Transco again assumes, incorrectly, that the Commission's action results in regulation of WGP's non-jurisdictional gathering services. Finally, contrary to Transco, the Commission's modification of the 1992 Settlement, in fact, is to be applied only on a prospective basis as it only applies if and at such time in the future that Transco actually transfers the facilities.

20. Transco argues that Sunoco's complaint constituted either a collateral attack on the July 25, 2001 abandonment order or a late-filed request for rehearing of that order which the Commission has no authority to entertain.¹⁵ Further, Transco states that the July 25, 2001 and related abandonment orders in Docket No. CP01-34-000, et al. are on appeal and the record has been transferred to the U.S. Court of Appeals for the D.C. Circuit.¹⁶ Thus, it asserts, under Section 19(a) of the NGA, the Commission has no authority, even indirectly, to grant equitable relief related to its prior orders in Docket No. CP01-34-000, et al. Accordingly, Transco contends that the Commission's consideration of the complaint was procedural error and that, instead, the Commission should have dismissed the complaint.

21. We do not believe that we are barred from acting on Sunoco's complaint to enforce the 1992 Settlement. The Commission is not persuaded that the procedural stance of the Docket No. CP01-34-000, et al. proceeding (i.e., the fact that the abandonment orders are before the court on appeal) procedurally bars the Commission from acting on Sunoco's complaint here. As noted above, the September 5, 2002 order in this proceeding did not alter the July 25, 2001 spin-down order in any way. Nor can the outcome of the appeal affect the outcome here. The remedy here assumes that the spin-down and abandonment are upheld. If not, then Transco would be in the same position it was in before the spin-down and would have the same obligation, to provide service to Sunoco at rates consistent with the

¹⁵Transco states that the September 5, 2002 order acknowledges that Sunoco should have raised its 1992 Settlement issue in the abandonment proceeding, citing 100 FERC at P 16.

¹⁶Amerada Hess Corp. v. FERC, No. 02-1053 (D.C. Cir. Filed Feb. 11, 2002).

1992 Settlement, as it is required to ensure now under our September 5, 2002 order. Accordingly, the Commission finds that it was not procedurally required to dismiss Sunoco's complaint as either a collateral attack on the July 25, 2001 order or as a late-filed request for rehearing of that order. In any event, the Commission did not modify its July 25, 2001 spin-down order in this instant complaint proceeding. The spin-down and abandonment approved by that order stands.

22. In any event, we find that Transco is barred under principles of equity from raising this procedural argument. While the September 5, 2002 order acknowledges that Sunoco should have raised its issues in the abandonment proceeding, the order also states that Transco should have raised the issue as well. The order states that the Commission's concern about Sunoco's tardiness is outweighed by Transco's breach of a settlement approved by the Commission. With respect to Transco's arguments on rehearing regarding this procedural error, the Commission finds that the equitable principles of estoppel are applicable here. The Commission's regulations require the applicant in an abandonment proceeding to inform the Commission of all material facts relating to the abandonment application. The nexus between the 1992 Settlement and the abandonment application was such a material fact. In the abandonment proceeding, Transco neglected to explain, or even to mention, the nexus between the receipt points included in its application and its obligations to Sunoco under the 1992 Settlement. The Commission finds that, in light of Transco's omission of this information in the abandonment proceeding, the principles of equitable estoppel bar Transco from now raising its arguments with respect to procedural error by the Commission in the consideration of this issue.

23. Finally, Transco argues that the Commission's September 5, 2002 order contradicts and undermines its prior orders in Docket No. CP01-34-000, et al., and is inconsistent with and undermines its long-standing pro-competitive gathering unbundling policies which were developed concurrently with the restructuring and unbundling of the pipeline industry in Order No. 636. Transco notes that the Commission has consistently found numerous off-shore pipeline systems to be non-jurisdictional gathering facilities, and permitted them to be abandoned via the spin-down or spin-off of such facilities. Transco argues that, contrary to these policies, the September 5, 2002 order would indirectly continue Commission regulation of gathering, inviting a host of other complainants seeking exemption from the Commission's gathering unbundling policies. Transco contends that the Commission has departed from its established policy, and that it has done so in a manner that is arbitrary and unsupported, and therefore unlawful.

24. Contrary to Transco's assertions, the Commission is not herein departing from its established policies with respect to gathering facilities. Once again, the Commission is not directly or indirectly regulating the gathering service performed by WGP on the Central Texas facilities; nor did the Commission alter in any way the authorizations or findings of

the spin-down orders. Rather, the Commission's September 5, 2002 order grants Sunoco's complaint and fashions a remedy designed to rectify Transco's breach of the 1992 Settlement, which the Commission approved in a prior order. Accordingly, the Commission is not persuaded that its actions herein were unlawful or contrary to policy.

The Commission orders:

- (A) Transco's request for rehearing is denied.
- (B) The September 5, 2002 order is clarified as set forth in the discussion above.
- (C) Within 60 days, but no later than 30 days, prior to the effective date of the transfer of the Central Texas gathering facilities, Transco must submit a proposed rate calculation consistent with the discussion in the body of this order to be used for the purpose of establishing the net maximum amount Sunoco may be required to pay for the subject gathering services after the transfer of the Central Texas gathering facilities is effective.
- (D) Within 30 days of this order, Transco must notify the Commission what its plans are with respect to the sale of the Central Texas gathering facilities, including when, if at all, it intends to implement the transfer.

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. RP02-309-001

Transcontinental Gas Pipe Line
Corporation

(Issued May 15, 2003)

BROWNELL, Commissioner, dissenting

1. I voted for the September 5 order. Upon further consideration, though, I am persuaded that the Commission should grant rehearing.
2. The September 5 order was motivated by the desire to preserve the bargain that Sunoco and Transco struck, and the Commission approved, in the 1992 Settlement of their take-or-pay disputes. As a strong believer in sanctity of contracts, I share that desire. However, I have concluded that as much as I wish to enforce the 1992 Settlement, the law simply does not grant me the authority to do so. Specifically, I am hard-pressed to distinguish this situation from Conoco, Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996), cert. denied sub nom., AMOCO Energy Trading Corp. v. FERC, 519 U.S. 1142 (1997). In Conoco, the court ruled that the Commission lacked jurisdiction to require a pipeline spinning down its gathering facilities to offer default contracts to its existing gathering customers at rates, terms, and conditions consistent with their existing Commission-approved contracts. Having authorized the facilities to be spun-off, the Commission lost jurisdiction to regulate service on them either directly or indirectly.
3. Once Transco sells these gathering facilities, two things will happen: 1) Transco will be in violation of the provisions of the 1992 Settlement concerning service on these facilities; and 2) those provisions of the 1992 Settlement will essentially become nonjurisdictional. The Commission has addressed the issue of violations of nonjurisdictional provisions of Commission-approved settlements in the hydro context. The Commission has approved hydro licensing settlements that include a mix of jurisdictional and nonjurisdictional provisions; the jurisdictional provisions have been incorporated into the license, and the nonjurisdictional ones have not. In those cases, we

state that we have no authority to enforce the nonjurisdictional provisions but parties are free to pursue private enforcement action in court. See, e.g., Erie Boulevard Hydropower, L.P., 88 FERC ¶ 61,176 (1999). I would follow a similar course here.

4. This order and Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, 103 FERC ¶61,177 (2003), also being issued today, both raise the question of whether the NGA grants the Commission residual authority once it authorizes a pipeline to spin down its gathering facilities. While I disagree with my fellow Commissioners on this question, I share their concern about the possibility of offshore pipelines spinning down their gathering facilities for the purpose evading their contractual obligations or exercising market power. The competitive scheme for regulating the natural gas industry has been working well to this point. However, given the growing divergence of supply and demand for natural gas, it may be time to solicit input from all segments of the industry about what the Commission can do, within our existing jurisdiction, to ensure the maximum exploitation of our offshore gas supplies. I would also welcome a public debate over whether offshore pipelines are, in fact, abusing their ability to spin down gathering facilities and, if so, whether any statutory changes are needed.

Nora Mead Brownell