

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Energy Development Corporation

Docket No. RP03-163-000

v.

Columbia Gas Transmission Company
and
Columbia Natural Resources, Inc.

ORDER DISMISSING COMPLAINT

(Issued June 11, 2003)

1. On December 2, 2002, Energy Development Corporation (EDC) filed a complaint against Columbia Gas Transmission Corporation (Columbia) and one of its intrastate affiliates, Columbia Natural Resources, Inc. (CNR). The complaint is dismissed for failure to meet the legal standards required to sustain it.

I. Background

2. The instant case involves a dispute between the complainant, EDC, and the defendants, Columbia and its affiliate CNR, regarding the level and quality of gas transportation service that EDC believes that it is entitled to based on negotiations between itself and CNR. EDC is a natural gas producer with certain wells located on a gathering line formerly owned by defendant Columbia, the V-33 system, a system that is now owned by defendant CNR. The dispute is grounded in an August 11, 2000 interruptible transportation agreement between EDC and CNR for the transportation of natural gas over the V-33 line. The agreement expired on January 31, 2001, but has been extended by CNR on a month-to-month basis. The V-33 system was spun down by a separate Commission

order in 1997 as part of Columbia's efforts to implement a global settlement related to its Order No. 636 restructuring proceeding.¹

3. EDC also has one well that is located on a line that is still owned by Columbia, the KA-20 gas transmission line, and to which Columbia was providing service before the execution of the August 11, 2000 agreement. The V-33 system on which the remainder of EDC's wells are located does not connect directly with Columbia's KA-20 gas transmission line. To reach Columbia's KA-20 transmission line from the V-33 system all shippers located on that system must transport their gas over an intermediate line owned by the Cranberry Pipeline Corporation (Cranberry) under its rates, terms, and conditions.

4. Cranberry is an intrastate pipeline owned by the Cabot Oil and Gas Company regulated by the Commission pursuant to Section 311 of the Natural Gas Policy Act of 1978 (NGPA).² Cranberry is not affiliated with Columbia or CNR. Cranberry's rate of 72 cents a Dth for the transportation of gas in interstate commerce was accepted as fair and equitable by the Commission in a separate proceeding.³ Thus, the rate for the transportation of EDC's gas over the Cranberry line is not before the Commission in this proceeding. It is the operating and the commercial relationship between EDC, CNR and Cranberry that is at issue here.

II. The Complaint

5. EDC alleges that before drilling the five wells it planned to locate on the V-33 system, it was told by an CNR employee on August 21, 2001, that there was an exchange agreement between CNR and Cranberry for volumes delivered to Cranberry from the V-33 system. EDC further alleges that there was a clear understanding among itself, CNR, and Columbia before it drilled the wells to be located on the V-33 system that EDC would be selling the gas from the new wells to customers located on Columbia's KA-20 transmission line. EDC alleges that on August 21, 2001, CNR agreed to grant EDC 500

¹The Commission granted CNR's and Columbia's request for a declaratory order that the V-33 system and certain other assets to be acquired by CNR were gathering lines and accordingly were not subject to the Commission's jurisdiction upon their acquisition by CNR. See Columbia Natural Resources, Inc. and Columbia Gas Transmission Corporation, 79 FERC ¶ 61,038 (1997).

²See Section 311 of the Natural Gas Policy Act of 1978, P.L. 95-621, as amended, reported at I FERC Stats. & Regs. ¶ 3061 (2003); see also 18 C.F.R. Subpart C, §§ 284.121 - .126 (2002).

³Citing Cranberry Pipeline Corporation, 97 FERC ¶ 61,280 (2001) (Cranberry).

Dth/d of additional capacity for delivery of gas into the V-33 system and for its delivery to the KA-20 line under the extended August 11, 2000 agreement.

6. EDC alleges that in reliance on this agreement, and on the representations of the CNR employee, supra, as well as those of CNR and Columbia, it began to drill the five additional wells. It asserts that three of these wells were completed and placed in production beginning in January 2002. EDC also claims that, after its gas began to flow in January of 2002, on February 21, 2002 EDC received a call from CNR, directing EDC to shut in the three wells it was flowing into the V-33 system. It states that it met with CNR on February 22, 2002, that CNR stated that EDC had failed to arrange for transportation of its gas on Cranberry, and therefore it was not possible to deliver EDC's gas to its customer on Columbia's K-20 line. EDC asserts that CNR also denied the existence of any exchange agreement or that it, CNR, had any obligation to arrange for the transportation of EDC's gas on Cranberry. EDC asserts that, therefore, CNR had mislead EDC about its ability to deliver EDC's gas to its customers on the KA-20 line.

7. EDC states that CNR shut in EDC's three wells on February 28, 2002. EDC claims that it was required to make other arrangements for the transportation and delivery of its gas as a result of CNR's actions. Among these was the sale of its gas to Cabot, owner of the Cranberry system. EDC states that in order to resume production it was forced to either pay Cranberry 72 cents a dekatherm for the transportation of the gas or to sell its gas to Cabot at 85 percent of the Inside FERC West Virginia index price. It further states that once it arranged to sell the gas to Cabot, EDC resumed production on April 16, 2002, having lost some \$38,086.41 in revenue. EDC states that it has had continuing revenue losses due to the exercise of market power by CNR, Columbia, and Cabot.

8. EDC asserts that the Commission should not have permitted Columbia to spin the V-33 system down to CNR in 1997. EDC further alleges that since the spin down of the V-33 system CNR has consistently and sharply raised the rates it charges for gas retainage⁴ and unilaterally raised its gathering fee. EDC further alleges that after the August 11, 2000 gathering agreement between EDC and CNR expired on January 31, 2001, CNR has refused to enter into a new gathering agreement with EDC and other shippers located on the V-33 system.⁵ EDC asserts that Columbia and CNR are unlawfully using market power over the V-33 system to prevent EDC and other shippers from getting their gas to market on reasonable terms. It further claims that CNR has refused to disclose the terms it has for shipping gas over the Cranberry system, that those terms are more favorable terms than

⁴Gas retainage is the gas required to fuel system and to cover gas losses.

⁵ EDC notes that this agreement has been extended a month-to-month by CNR.

EDC was able to obtain, and that this gives CNR an unjustified competitive advantage for the sale of gas CNR produces from its own wells located on the V-33 system.

9. EDC therefore requests the Commission (1) to reassert jurisdiction over the V-33 system; (2) require Columbia to restore the exchange agreement that existed with Cranberry prior to the abandonment if such an agreement is still not in place; (3) protect EDC from losing its essential service on the V-33 system by providing interim relief requiring Columbia and its affiliate CNR to continue service pending resolution of this complaint; and (4) provide permanent relief by restoring the jurisdictional status of the V-33 system, thus allowing EDC free choice of a gas buyer. It asserts that the Commission should decide this case on an expedited basis because CNR is for sale and this fact may affect the Commission's jurisdiction and its ability to provide a remedy.

II. Notice and Interventions

10. Notice of the instant filing was issued on December 3, 2002, providing for the filing of interventions and protests in accordance with Section 154.210 of the Commission's regulations. Pursuant to Rule 214, all timely motions to intervene are granted and any motions filed to intervene-out-of-time are granted as of the date of this order. Granting the late intervention at this stage of the proceedings will not disrupt the proceedings or place undue additional burden on existing parties.

11. A timely motion to intervene was filed by Independent Oil & Gas Association of West Virginia. Columbia and CNR filed a joint answer on December 23, 2002. On January 13, 2003, EDC filed a sworn affidavit in support of its complaint. On February 13, 2003, Columbia requested leave to file a response to EDC's affidavit and included a motion for summary disposition. The Commission will accept both the late filed affidavit and the Columbia's response because of the additional information that both provide.

III. Columbia's Answer

12. Columbia and CNR filed a joint answer to EDC's complaint on December 23, 2002. They assert that there is no evidence on record that there was joint action between them to set the rates that EDC would pay for transportation or that they jointly acted to deprive EDC of access to capacity. Columbia asserts that a diligent search of its records indicates that EDC has never shipped gas on Columbia. It asserts that given this lack of any

concerted anti-competitive action between the parent, Columbia, and its affiliate CNR, this complaint must be dismissed.⁶

13. Columbia further asserts that EDC's real complaint is against Cranberry, which controls the intrastate pipeline that links the V-33 system now owned and operated by CNR to Columbia's KA-20 main gas transmission line. Columbia alleges that EDC was aware that it must transport gas from wells located on the V-33 system over Cranberry at the time CNR committed to provide 500 Dth/d in capacity to EDC on the V-33 system. Columbia also asserts that CNR sells all its gas to Cranberry under the same terms that Cranberry charges EDC, that this can now be demonstrated to EDC, and that even if CNR receives more favorable terms from Cranberry, EDC's issue is with Cranberry, not Columbia and CNR. Columbia alleges that EDC was aware of this at the time CNR committed to provide 500 Dth/d in capacity to EDC on the V-33 system. Columbia also asserts, as was previously noted, that Cranberry's 72 cents a Dth rate EDC claims it would have to pay if its gas is not sold to Cabot was previously approved by the Commission.

14. Columbia further asserts that EDC has not accurately reflected the negotiations between EDC and CNR that established EDC's service over the V-33 system. Columbia states that the 500 Dth/d of capacity agreed to in the extended August 11 agreement reflected the capacity available on Cranberry the day that commitment was made. Columbia asserts that the August 11 agreement also requires EDC to make the downstream arrangements for transportation on other pipelines. Columbia states that CNR never had an exchange agreement with Cranberry, that EDC was warned in August 2001 by the CNR representatives at that meeting that EDC should verify this with Steve McCracken, a CNR officer. Columbia claims EDC failed to do so, and Mr. McCracken later advised EDC on February 26, 2002, that no exchange agreement exists.

15. Columbia also states that on February 6, 2002, EDC requested an increase in deliveries to the CNR system. It asserts that the request was denied on February 11, 2002, because CNR was approximately at full capacity and CNR could not receive more gas unless Cranberry were to increase its compression in order to receive more gas from CNR. Columbia alleges that the reason EDC had its wells shut in was that EDC began tendering gas to CNR without a transportation arrangement with Cranberry, the downstream pipeline. While CNR was able to absorb the gas, on February 25, 2002, Cranberry advised CNR that EDC was tendering unauthorized gas and instructed CNR to shut in the EDC wells to

⁶Citing *Shell Offshore v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,254, P 46 (2002), and *Arkla Gathering Services Co.*, 67 FERC ¶ 61,257 at 61,871 (1994).

protect Cranberry's system. Columbia states CNR advised EDC of this on February 26, 2002, and when EDC failed to respond, its wells were shut in on February 27, 2002.⁷

16. Columbia also states that EDC's excess gas was not confiscated, but was treated as an imbalance and that EDC was permitted to correct it despite the fact that EDC owes CNR substantial gathering fees.⁸ Columbia states that matters between EDC and Cranberry were later resolved and that, while it may not be satisfied with the terms, EDC is now flowing gas over CNR's V-33 system and the Cranberry system. Columbia concludes that the conflict arose in February 2002 because EDC's owners, the Evans, did not understand the commercial and regulatory structure within which they were operating, or the limits that constrained the transportation of gas on the CNR and Cranberry systems. Columbia concludes that given the lack of any evidence of concerted action between CNR and itself, EDC's complaint should be dismissed.

IV. Discussion

17. This case is governed by the standards enunciated in Arkla Gathering Services Co.⁹ In that case the Commission addressed the types of affiliated abuse that would cause the Commission to disregard corporate form and treat affiliated companies as a single entity. As summarized in Shell Offshore, the test provides that:

[T]he Commission may disregard the corporate form and treat the pipeline and gatherer as a single natural gas company if: (1) an affiliated gather acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce; and (2) in a manner that frustrates the Commission's effective regulation of the interstate gas pipeline system.¹⁰

Unless this test is met, the Commission will not treat an affiliated gatherer and the regulated pipeline as a single entity.

18. Given the standards contained in Arkla, the Commission concludes that the complaint in this case should be dismissed. While the record reflects that there may have

⁷Columbia cites the correspondence in Appendix D of its December 23 answer.

⁸Columbia states that as of time of the February 2002 meeting EDC owed CNR \$1,550.96 for gathering services, and as of October 2002, \$24,305.86.

⁹67 FERC ¶ 61,257 (1994)(Arkla).

¹⁰Shell Offshore v. Transcontinental Gas Pipe Line Corp., 100 FERC ¶ 61,254 (2002), citing; Arkla, 67 FERC at 61,871 (1994).

been some miscommunication between CNR and EDC regarding the respective obligations of the parties in arranging the transportation of EDC's gas, this does not rise to the level of the concerted action required for the Commission to reassert jurisdiction over CNR in its operation of the V-33 system. While EDC may have been harmed by the confusion regarding the need to arrange for the downstream transportation on Cranberry, EDC fails to provide any credible basis for its charge that CNR and Columbia acted jointly to deprive it of capacity that was otherwise available on the V-33 system, or that CNR and Columbia sought to injure it by misleading EDC about the availability of downstream transportation on Cranberry. EDC also fails to establish that the rates and charges CNR offered to EDC were any different than those CNR offered to any other third party shipper on the V-33 system. EDC also fails to establish, even at this threshold level, that CNR acted with Cranberry to shut in EDC's wells in a manner that violated Cranberry's obligation as a Section 311 pipeline not to discriminate among its shippers,¹¹ or that Columbia was a party to or benefitted from actions that were taken by CNR.

19. On the merits, certain matters are clear. First, the 72 cent per dekatherm rate charged by Cranberry for Section 311 transportation service has been determined to be fair and equitable by the Commission.¹² Second, Appendix A of the August 11, 2001 agreement, as amended in August 2002, clearly limits EDC to the tender of 500 Dth/d to CNR's V-33 system.¹³ Third, the August 11, 2001 agreement, as extended, between CNR and EDC established that EDC had the obligation to make all arrangements for the transportation of gas by Cranberry, the downstream pipeline whose service is necessary for EDC's gas to reach Columbia's KA-20 line.¹⁴

¹¹For the obligations of Section 311 intrastate pipelines providing interruptible transportation of gas in interstate commerce pursuant to Section 311 of the NGPA, see 18 C.F.R. Part 284, § 249.9(b)(2) and Subpart C, *passim*. (2002).

¹²Cranberry Pipeline Corporation, 97 FERC ¶ 61,280 (2001).

¹³Another 33 Dth/d has been historically delivered by EDC directly to the KA-20 line and a separate meter number is included in Appendix A of the August 11 agreement addressing those volumes. While EDC raises this point, apparently to establish a course of dealing among the parties concerning deliveries to the KA-20 line, given the lack of any direct connection between the V-33 system and the KA-20 line, any volumes delivered directly into the KA-20 line do not establish that EDC had prior delivery arrangements to reach the KA-20 line with volumes to be tendered to the V-33 system.

¹⁴Article IV.6 of the August 11 agreement provides:

(continued...)

20. Thus, the August 11, 2001 agreement provision required EDC to make arrangements for the transportation of its gas on Cranberry. If EDC believes that the rate on Cranberry is too high, the price it receives for its gas from Cabot is too low, or the capacity available on Cranberry has not been fairly allocated, its dispute is with Cranberry or Cabot. While the August 11 agreement originally executed between EDC and CNR expired on January 31, 2001, its essential terms were continued by CNR. In August 2002 the parties modified Appendix A of the August 11, 2000 agreement to permit EDC to tender an additional 500 Dth/d to CNR on the V-33 system. In doing so, they did not re-execute the August 11 agreement, but its generic terms and conditions were carried forward. In fact, EDC refers to the continuation of the existing agreement in its complaint.¹⁵ Thus, any obligations that EDC would have under CNR's gathering agreement were before it when Appendix A of the August 11 agreement was modified to include the 500 Dth/d of additional deliveries by EDC into the V-33 system.

21. The difficulties at issue here arose when EDC attempted to begin delivery of 500 Dth/d of additional gas to CNR for transportation over the V-33 system, and for ultimate delivery downstream on the Columbia system, without making arrangements for the gas to be taken away by the downstream transporter, Cranberry. Columbia included in its December 23 answer an affidavit by Michael J. Akers stating that on February 6, 2002, Mr. Evans of EDC sent an e-mail to Mr. Akers requesting an increase in deliveries to CNR of 1000 Dth/d. Mr. Akers' affidavit states that the request was denied by return e-mail because Mr. Akers knew that the capacity was not available on Cranberry and that CNR was approximately at full capacity. Mr. Akers states he advised EDC that EDC would have to

¹⁴(...continued)

The scheduling, nomination and confirmation on downstream pipelines for Producer's [EDC] gas delivered by Gatherer [CNR] into the facilities of the applicable downstream transporter shall be made by Producer according to the tariffs, terms and/or conditions of the downstream transporter. In the event that the downstream transporter does not confirm acceptance of the Scheduled Daily Delivery Quantity or confirms the acceptance of a quantity less than the Scheduled Daily Delivery Quantity, Gatherer may require producer to reduce deliveries into Gatherer's gathering facilities in order to maintain a concurrent balance between tenders and takes on Gatherer's gathering facilities.

¹⁵See EDC's complaint a 4 in which EDC explains that CNR sends a letter every 30 days extending the gathering agreement and raising its retainage charge in most letters.

make arrangements with Cranberry before any additional gas could flow.¹⁶ CNR's McCracken also advised EDC on February 26, 2002 that there was no exchange agreement between CNR and Cranberry, and that EDC was responsible for assuring that all the downstream arrangements were in place.¹⁷ While this was just before EDC's wells were shut in, the obligation to make arrangements with Cranberry clearly fell on EDC under the extended August 11 agreement.

22. While Columbia has not provided copies of all of its cited documentation, EDC does not challenge the characterization of the correspondence between itself and CNR. What EDC questions is the intent and interpretation of those communications. At bottom, its response here turns on four principal points. First, that CNR should have made the procedures and EDC's obligations clearer sooner. Second, that CNR should not have left EDC with the impression that an exchange agreement existed between CNR and Cranberry, which would have made it unnecessary for EDC to make its own arrangements with Cranberry. Third, that Cranberry took advantage of the situation, in part by stating that it had no regulatory obligation to make capacity available to EDC. Fourth, that in any event CNR and Cranberry's rates and charges are unreasonably high.

23. None of these points avail EDC here. When EDC began tendering gas in January of 2002 without having arranged for downstream transportation on Cranberry, EDC was in default of its obligation to make those arrangements under the terms of its extended August 11, 2000 agreement with CNR. Under that agreement, CNR accepts deliveries based on its estimates of capacity of the downstream transporter rather than on whether the downstream arrangements have actually been made and¹⁸ it is EDC that is obligated to make such downstream arrangements. While this approach may not have been the product of clear communication between the parties, for the purposes of this complaint CNR, and Columbia, may stand on the plain terms of CNR's standard gathering agreement, which EDC had before it in August of 2001. In doing so, they may disclaim any obligation to have made arrangements with the downstream pipeline on EDC's behalf. EDC's failure to appreciate this despite the relevant clause in the August 11 agreement, and/or CNR's failure to adequately explain it before EDC began drilling, constituted a communications lapse that appears to have defeated EDC's expectations of the benefit it would derive from attaching additional wells to the V-33 system.

¹⁶See Ackers Jr. affidavit and related correspondence included in Appendix C of Columbia's December 23 answer to the complaint.

¹⁷See McCracken affidavit, Appendix A to Columbia's December 23 answer.

¹⁸See February 13 Response by Columbia at 4.

24. Thus, while both parties may have had different expectations that were not clearly communicated, nothing on this record supports an inference or a conclusion that there was concerted anti-competitive action involving CNR and Columbia. EDC's frustration with Cranberry's rates, with CNR's gathering charges and retainage, and with the latter's apparent lapse in communicating the necessary arrangements that EDC was required to make with Cranberry is understandable. Even viewing the evidence in a manner most favorable to the complainant, as is customary with motions to dismiss, on this record EDC has provided no evidence that it is shipping on Columbia, that CNR charged a gathering rate or retainage charge that does not accord with the terms of its standard interruptible gathering contract, that CNR discriminated in the award of interruptible capacity among its shippers or, critically for the basic jurisdictional issue involved here, that Columbia had any involvement in any such matters. The most joint activity between CNR and Columbia that EDC has shown is that Columbia performs certain meter reading and repair functions for CNR under a services contract. Cranberry's rates have been accepted as fair and equitable, the price at which Cabot elects to purchase gas is not regulated by the Commission, and neither Cranberry nor Cabot is before the Commission as a defending party. Based on these facts, there is no basis to assert jurisdiction over CNR under the Arkla test.

25. All that EDC clearly established here is that CNR did not meet EDC's expectations of how the Cranberry system would be utilized, an essential link to reach Columbia's main KA-20 main line. Those expectations turned on the existence of a purported exchange arrangement between CNR and Cranberry, for which no documentation exists and which was the subject of an ambiguous conversation. The fact that CNR also sells its gas to Cabot strongly suggests that the exchange agreement does not exist because CNR is not using it to avoid having to sell its gas to Cranberry. Moreover, while CNR did shut in EDC's wells, the August 11 agreement contains a clause stating that if the downstream pipeline states that interruptible volumes are to be interrupted, then CNR must comply.¹⁹ CNR was so directed by Cranberry, and after consultation with EDC, it did so. Thus, the resulting events could have ensued without any concerted action on Columbia's part. A misplaced expectation or a perception with a resulting misunderstanding that lead to an unfortunate situation does not show concerted action on the part of CNR and Columbia.

¹⁹Section 1(c)(2) of the August 11 agreement provides:

(2) Should Gatherer be notified by the applicable downstream transporter that the transportation arrangements Producer has in place with the downstream transporter for the receipt of Producer's Scheduled Daily Delivery Quantity at the Points of Delivery as specified on Exhibit A are being interrupted, Gatherer shall interrupt receipts accordingly.

26. Finally, there is no support in the record for EDC's allegations that Columbia was in part responsible for the fact that EDC must sell its gas to Cabot on unfavorable terms. Columbia asserts that its affiliate CNR has been selling gas to Cabot on the same terms as EDC, an assertion that EDC does not dispute in its late filed affidavit. Since it faces the same downstream rate from Cranberry as EDC, CNR, like EDC, finds it more economical to sell the gas to Cabot than to ship it over the Cranberry system. Columbia also states without contradiction that CNR began accepting, and continues to accept, gas delivered under the terms of the extended August 11 agreement once EDC made arrangements for disposing of its gas downstream of the V-33 system.

27. Thus, on this record EDC has failed to meet the first test contained in Arkla, that the regulated pipeline and its affiliate acted in concert with one another in a manner that frustrates the Commission's regulation of the regulated pipeline.²⁰ There has been no showing here that CNR's conduct was undertaken in concert with Columbia to benefit Columbia in a manner that circumvents the Commission's regulation of Columbia. Moreover, under the Natural Gas Act, the Commission cannot regulate the rates of non-jurisdictional gatherers in the absence of such a showing. Since there is no credible showing that concerted action was involved, the complaint will be dismissed.

²⁰Arkla, 67 FERC at 61,871.

The Commission orders:

EDC's complaint against Columbia Gas Transmission Corporation and Columbia Natural Resources, Inc., in this proceeding is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.