

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Trailblazer Pipeline Company

Docket No. RP03-162-011

ORDER ON REFUND REPORT

(Issued July 13, 2004)

1. On April 23, 2004, Trailblazer Pipeline Company (Trailblazer) filed a refund report pursuant to section 2.4 of an Offer of Settlement and Stipulation and Agreement (Settlement) filed in this proceeding on September 22, 2003. The refund report sets out the refunds paid by Trailblazer on March 26, 2004, to its recourse rate shippers for the period January 1, 2004 through February 29, 2004. The refund report is protested by two parties that were initially contesting parties to the Settlement, and subsequently became consenting parties. The refund report is being rejected as inconsistent with the Settlement and the parties' agreement, and Trailblazer is directed to make a compliance filing consistent with this order. This order is in the public interest since it preserves the benefits of the Settlement for the consenting parties.

I. Background

2. On November 29, 2002, Trailblazer filed a general rate case under section 4 of the Natural Gas Act (NGA) proposing to reduce its rates.¹ On December 31, 2002, the Commission accepted and suspended the filing subject to the outcome of a hearing on the rate issues.²

3. On September 22, 2003, Trailblazer filed the Settlement, intending to resolve all

¹ Trailblazer's proposed rates reflected a decrease in jurisdictional transportation revenues of approximately \$210,000 below its effective recourse rates: \$91,946 for shippers on its existing system and \$117,692 for shippers on an expansion system placed in service in May 2002.

² Trailblazer, 101 FERC ¶ 61,405 (2002).

the issues in its section 4 rate proceeding. The Settlement provided a further almost 25 percent decrease in the reduced rates originally filed by Trailblazer in this proceeding, from 11.95 cents to 9 cents, with a similarly substantial reduction in the incremental recourse rate applicable to expansion shippers, to become effective on January 1, 2004. If the Settlement rates were not implemented by January 1, 2004, then the Settlement required Trailblazer to make refunds back to January 1, 2004 within 30 days of the effective date of the Settlement. The Settlement was structured so that the Settlement rates and refunds would apply only to consenting parties, and provided for the severance of the contesting parties to litigate their “direct interest,” as defined therein. The Settlement provided that it would not become effective unless and until the Commission issued an order approving the Settlement without any conditions unacceptable to Trailblazer and the other consenting parties. Article 8.3 of the Settlement further provided that it would become effective on the first day of the month after an order approving the Settlement was no longer subject to rehearing.

4. The Administrative Law Judge (ALJ) certified the Settlement to the Commission in an order issued October 3, 2003.³ Members of the Indicated Shippers, consisting of Marathon Oil Company (Marathon), BP America Production Company and BP Energy Company (collectively, BP), contested the Settlement. Accordingly, the ALJ held a hearing concerning the rates to be charged the contesting parties. Following the hearing, the ALJ issued an initial decision on January 21, 2004.⁴ On January 23, 2004, the Commission approved the Settlement for consenting parties, subject to modification by expanding the definition of “direct interest” which could be litigated by contesting parties under Article VII of the Settlement.⁵

5. On February 20, 2004, Trailblazer notified the Commission that Trailblazer accepted the Settlement, as modified by the Commission, while reserving the right to reject the settlement if the Commission made further changes on rehearing of the settlement order. Also on February 20, 2004, BP filed a motion to become a consenting party under the Settlement, and to withdraw its comments opposing the Settlement. Trailblazer and Marathon filed exceptions to the initial decision on that same date.

³ Trailblazer, 101 FERC ¶ 61,405 (2002).

⁴ Trailblazer, 106 FERC ¶ 63,005 (2004).

⁵ Trailblazer, 106 FERC ¶ 61,034 (2004) (Settlement Order).

6. On February 23, 2004, Marathon filed a request for rehearing of the Commission's Settlement Order, asking the Commission to either sever all of Marathon's interests, direct and indirect, from the Settlement, or to determine that Marathon's full interests cannot be severed from the Settlement. On February 27, 2004, Trailblazer filed pursuant to NGA section 4 tariff sheets to implement the lower rates in the Settlement, effective March 1, 2004, even though Marathon's pending request for rehearing prevented the Settlement from taking effect until after the issues on rehearing were resolved. The proposed tariff sheets included the different rates for consenting and contesting parties. However, on March 1, 2004, Marathon subsequently filed to become a consenting party to the Settlement, and to withdraw its brief on exceptions from the initial decision and its request for rehearing of the Settlement Order. As a result, the Settlement took effect on April 1, 2004, pursuant to Article VIII, section 8.3.

7. On March 3, 2004, Trailblazer informed the Commission that the Settlement in this proceeding was uncontested, stating that it "has no objection to BP and Marathon becoming consenting parties as of the date of their respective requests." Trailblazer also withdrew its brief on exceptions to the initial decision. Accordingly, on March 10, 2004, Trailblazer filed superseding tariff sheets to implement the lower rates for consenting parties provided for in the Settlement for all shippers and to reflect the fact that the Settlement was no longer contested by removing the rates for contesting parties. On March 11, 2004, BP filed a motion requesting that the Commission vacate the initial decision since the Commission approved the Settlement and the litigating parties have now joined the Settlement. The Commission accepted the superseding tariff sheets, effective March 1, 2004, and dismissed the initial decision as moot.⁶

8. On April 23, 2004, Trailblazer filed a refund report. The report both summarizes and details the refunds Trailblazer made to its non-negotiated rate customers on March 26, 2004, for the period from January 1, 2004 through February 29, 2004. For that period, Trailblazer made refunds amounting to \$921,118, including interest in the amount of \$2,231. The refunds represent the difference (if any) between the rates actually charged by Trailblazer and the Settlement rates, plus applicable interest calculated in accordance with section 154.501(d) of the Commission's regulations. All consenting parties were refunded this difference for the period stated in the Settlement, from January 1, 2004 through February 29, 2004, except that refunds for BP and Marathon were calculated from the time they consented to the Settlement, February 20, 2004, and March 1, 2004, respectively.

⁶ Trailblazer, 107 FERC ¶ 61,008 (2004).

II. Public Notice, Interventions, and Protests

9. Public Notice of Trailblazer's filing was issued on May 6, 2004. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 385.214 (2003)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2003)), all timely filed motions to intervene and motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

10. On May 13, 2004, BP and Marathon filed protests to the refund report, arguing that Trailblazer miscalculated their refunds by not implementing the Settlement rates beginning January 1, 2004, as the effective date provided by the Settlement for consenting parties. On May 21, 2004, Trailblazer filed a response to the protests by BP and Marathon, arguing that the protesting parties are seeking refunds for a period (before March 1, 2004, and February 20, 2004, respectively) during which they were still contesting parties under the Settlement and therefore not entitled to the refunds for consenting parties.⁷ While the Commission's Rules of Practice and Procedure generally prohibit answers to protests,⁸ the Commission will accept the answer to provide a better understanding of the issues in this proceeding.

III. Discussion

11. The Commission finds that Trailblazer miscalculated the refund effective dates for BP and Marathon, and directs Trailblazer to file another refund report showing that it applied the January 1, 2004 effective date for the Settlement rates to BP and Marathon, as provided for consenting parties under the Settlement. We find based on the language of the Settlement, and the record in this case that BP and Marathon have become consenting parties entitled to all the benefits of the Settlement, including refunds of amounts they paid in excess of the settlement rates between January 1, 2004 and March 1, 2004.

12. By its terms, the Settlement divides parties into two categories, consenting and contesting. Consenting parties receive all of the benefits of the Settlement including the lower settlement rates and refunds of any amounts they paid in excess of those rates after January 1, 2004. Contesting parties, on the other hand, are "not entitled to any of the

⁷ Trailblazer states that the amount of the refunds in dispute is approximately \$23,000 for BP and approximately \$49,000 for Marathon.

⁸ 18 C.F.R. § 385.213(a)(2) (2003).

benefits or . . . subject to any of the burdens of the Settlement.” Section 7.2(b) of the Settlement defines these two categories of parties as follows:

[A]ny party which either (i) on or before the date on which initial comments regarding this Settlement are due to be filed with the Commission, files with the Commission and serves on the parties to this proceeding a written notice stating that such party elects to become a Contesting Party; or (ii) does not explicitly make an election, but submits timely comments either opposing any part of this Settlement or requesting any modification to the Settlement that is not acceptable to Trailblazer. Any other party shall be deemed a consenting party.⁹

The Settlement contains no provision permitting a party that has become a contesting party pursuant to section 7.2(b) to subsequently change its status to become a consenting party.

13. BP and Marathon filed comments opposing the Settlement, thereby becoming contesting parties under section 7.2(b). Since the Settlement does not allow contesting parties to change their status, BP and Marathon’s subsequent change in status required a separate agreement with Trailblazer. Therefore, the issue whether BP and Marathon are entitled to refunds for the January 1 to March 1 period turns on an interpretation of the parties’ subsequent agreement that BP and Marathon would be considered consenting parties under the Settlement, notwithstanding that under the provisions of the Settlement the parties clearly fall under the definition of contesting parties.

14. Based on the parties’ correspondence and pleadings in this proceeding, the Commission finds that the most reasonable interpretation of the parties’ agreement is that BP and Marathon are entitled to the same benefits of the Settlement as any other consenting party, including the January 1, 2004 refund effective date given to any other consenting party. On February 20, 2004, BP filed a motion to become a consenting party “under Article VII, section 7.2 of the Settlement,” stating that “Trailblazer has agreed that BP will be treated as a Consenting Party under the Settlement.” Since BP’s motion simply describes an agreement that BP will be treated as a consenting party under section 7.2, we think it clear that BP’s motion contemplated that it would receive the same benefits as any other consenting party under section 7.2. That would include refunds back to January 1, 2004, since the settlement contains no provision that would exclude any consenting party from those refunds.

⁹ Section 7.2(b) of the Settlement.

15. Trailblazer's next pleading after BP's motion was its February 27, 2004 filing to implement the lower rates and refunds for consenting parties (including BP) consistent with the Settlement, even though it recognized that the settlement had not yet been finally approved by the Commission or become effective. In that filing, Trailblazer stated: "Consenting parties are entitled to lower rates under the terms of the Settlement (Marathon) is now the only contesting party."¹⁰ Trailblazer continued that, while the settlement would not require it to lower its rates or make refunds to consenting parties until after the Commission acted on Marathon's request for rehearing: "In order to expedite the benefits of the Settlement for consenting parties and reduce the level of subsequent refunds, however, Trailblazer is filing here to institute the reduced rates for consenting parties effective March 1, 2004. Moreover, Trailblazer will also make refunds rather than waiting for action on rehearing. Under the terms of the Settlement, the lower Settlement rates for consenting parties are to be effective as of January 1, 2004. Within thirty (30) days after the date of the Commission order accepting these tariff sheets, Trailblazer will make early refunds to consenting parties for the period from January 1, 2004 until the effective date of the lower rates in this filing."¹¹

16. This language in Trailblazer's February 27, 2004 filing supports our interpretation that BP was to have the same rights to refunds as any other consenting party. At that stage of the proceeding, Trailblazer clearly considered BP to be a consenting party, since it described the settlement as now being contested only by Marathon. BP could only be a consenting party if Trailblazer had accepted BP's offer to become a consenting party. As discussed above, BP's offer was to become a consenting party with the same rights as any other consenting party, including refunds back to January 1, 2004. There is no hint whatsoever in Trailblazer's February 27 filing that BP is to be subject to a later refund effective date due to the later date when it became a consenting party. The filing simply says that Trailblazer will make refunds to "consenting parties." Nor is there any indication that Trailblazer was rejecting any aspect of BP's offer to become a consenting party with the same rights as all other consenting parties or that Trailblazer disagreed with BP's description, in its February 20 motion, of the agreement between it and Trailblazer. Moreover, BP became a consenting party before the Settlement became effective and before any refunds were due or paid. It was reasonable that it receive the benefit of any performance under the settlement that occurred after it became a consenting party, including the payment of refunds. The Commission thus concludes that the agreement between BP and Trailblazer must be interpreted as making BP a consenting party like any other consenting party, regardless of any subjective intent

¹⁰ Trailblazer's February 27, 2004 filing at 2.

¹¹ *Id.* at 3.

otherwise on Trailblazer's part, since Trailblazer did not communicate any such intent to BP.

17. On March 1, 2004, Marathon filed a letter notifying the Commission that it has agreed to become a consenting party "under the Settlement." As in the case of BP's offer to become a consenting party, Marathon's offer clearly contemplated that it would become a consenting party with the same rights as any other consenting party. On March 3, 2004, Trailblazer filed a letter stating that "Trailblazer has no objection to BP and Marathon becoming consenting parties as of the date of their respective requests." Trailblazer then filed tariff sheets on March 10, 2004 (superseding its February 27, 2004 filing), to implement the lower rates for Trailblazer consistent with the Settlement and "reflect[ing] the fact that the Settlement is no longer contested as of March 1, 2004." The Commission recognizes that Trailblazer contends that its statements concerning the dates on which BP and Marathon became consenting parties mean that those parties would not receive refunds for the period before those dates. However, in the case of BP, the March 3 letter could not restrict its rights as a consenting party, since, as discussed above, the agreement for BP to become a consenting party with a right to refunds back to January 1 had already taken effect.

18. In any event, the Commission interprets Trailblazer's responses that the Settlement is no longer contested "as of March 1, 2004" and that it has no objection to BP and Marathon becoming consenting parties "as of the date of their respective requests," to simply mean that as of those dates, BP and Marathon would be treated as any other consenting party under the Settlement (as characterized by BP and Marathon in their earlier filings), which includes the January 1, 2004 refund effective date. Nothing in the Settlement distinguishes between consenting parties as to when they become consenting. Moreover, this reading is particularly reasonable here since the Settlement itself had not yet become effective and the refunds had not yet been paid. Since the Settlement gave all consenting parties the same rights, if Trailblazer wanted to subsequently distinguish between consenting parties it needed to clearly state so in its February 27, March 3, and March 10, 2004 filings, in order to put BP, Marathon, and the Commission on notice that Trailblazer was not agreeing to give BP and Marathon full consenting party status.

19. Regarding Marathon, it is also significant that Marathon withdrew its request for rehearing of the Settlement Order on March 1, 2004, based upon the agreement that it would become a consenting party entitled to all the benefits and burdens provided by the Settlement, including the January 1, 2004 refund effective date.¹² Marathon's withdrawal

¹² Marathon's March 1, 2004 filing: "Marathon Oil Company (Marathon) has reached agreement with Trailblazer Pipeline Company (Trailblazer) to become a Consenting Party under the Offer of Settlement and Stipulation and Agreement . . ."

of its request for rehearing is significant since it allowed the Settlement to become effective for all parties pursuant to section 8.3.¹³ Until that time, it was not clear that the Commission would approve the Settlement in a manner acceptable to all consenting parties, since the Commission could have granted rehearing and the Settlement would not have been effective.

20. In becoming consenting parties to the Settlement, BP and Marathon also agreed to withdraw their Briefs on Exceptions to the Initial Decision of the Administrative Law Judge issued on January 21, 2004.¹⁴ If Trailblazer subsequently intended its ambiguous language to imply that its agreement with BP and Marathon contained the condition that they would only be entitled to refunds prospectively from the date they consented to the Settlement, Trailblazer should have made this clear before BP and Marathon gave up their rights to pursue litigation of Trailblazer's maximum recourse rates both through exceptions to the initial decision and rehearing of the Settlement Order. Whatever Trailblazer's subjective intentions may have been, since the Settlement does not provide for such a distinction among consenting parties, and Trailblazer did not make this implication clear from its pleadings, the Commission interprets the parties' agreement to provide BP and Marathon rights as consenting parties under the Settlement to include the January 1, 2004 refund effective date. As explained above, if Trailblazer had intended not to accept in full BP and Marathon's offers to become consenting parties as defined under Article VII, section 7.2 of the Settlement, Trailblazer should have clearly stated so in its February 27, March 3, and March 10, 2004 filings, and made an explicit counter offer concerning the terms on which BP and Marathon would join the Settlement.

The Commission orders:

(A) Trailblazer's refund report is hereby rejected as inconsistent with the Settlement and the parties' agreements.

¹³ Article VIII, section 8.3 of the Settlement: "This Settlement shall become effective on the first day of the month immediately following the date that a Commission order which satisfies section 8.1 hereof becomes final, i.e., no longer subject to rehearing.

¹⁴ Trailblazer Pipeline Co., 106 FERC ¶ 63,005 (2004).

(B) Trailblazer is directed to file another refund report within 30 days of the issuance of this order showing that it applied the January 1, 2004 effective date for the Settlement rates to BP and Marathon, as provided for consenting parties under the Settlement.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.