

112 FERC ¶ 61,293
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services Docket No. RP02-99-010

ORDER DENYING REHEARING

(Issued September 15, 2005)

1. This order addresses the request for rehearing filed by Shell Offshore Inc. (Shell) of the Commission's February 15, 2005 Order on Remand¹ in the captioned proceeding. That order, in turn, addressed the July 13, 2004 opinion by the U.S. Court of Appeals for the District of Columbia in *Williams Gas Processing Co., L.P. v. FERC*.² The court vacated Commission orders³ that had granted a complaint by Shell Offshore Inc. (Shell). In those orders, the Commission reasserted jurisdiction over the rates charged for gathering services on Transcontinental Gas Pipe Line Corp.'s (Transco's) North Padre Island gathering facilities, which Transco had spun-down to its affiliate Williams Field Services (WFS), and the Commission directed Transco to file maximum cost-based gathering rates for these services. The court held that the Commission, in granting

¹ *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corporation, Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services*, 110 FERC 61,162 (2005) (February 15 Order).

² 373 F.3d 1335 (2004) (*Williams Gas Processing*).

³ *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,254 (2002) *reh'g denied* 103 FERC ¶ 61,177 (2003).

Shell's complaint, had misapplied the criteria set forth in *Arkla Gathering Service Co.*⁴ for reasserting jurisdiction under the Natural Gas Act (NGA). The *Arkla* test involves a determination that, as a result of the concerted action of the pipeline and the gathering affiliate, the Commission's effective regulation of the pipeline is frustrated. The court found that the actions of WFS in increasing its gathering rates and attaching anti-competitive conditions to its gathering services, such as requiring Shell to commit its remaining reserves to WFS' gathering system after the spin-down, did not warrant a reassertion of jurisdiction over WFS under that test. The court found that the Commission had failed to demonstrate the type of abuses the Commission indicated in *Arkla* would trigger a reassertion of jurisdiction. In particular, the court held that the Commission did not show that it met the requirement of *Arkla*, that the abuse must be directly related to the affiliate's unique relationship with the pipeline such that the affiliate is leveraging its relationship with the pipeline to enhance its market power. The court found that WFS' relationship to Transco was irrelevant in that, as a deregulated monopolist, WFS could have (and likely would have) undertaken the same course of conduct of charging high rates or imposing onerous conditions for service if it were not affiliated with Transco. The court remanded the case for further proceedings consistent with its opinion.

2. The February 15 Order found that, based on the record of these proceedings and the court's interpretation of the Commission's precedent, the Commission lacked sufficient bases to reassert NGA jurisdiction or to assert jurisdiction under the Outer Continental Shelf Lands Act (OCSLA) over the gathering rates and services of WFS' North Padre Island gathering facilities. Accordingly, the Commission reversed the Initial Decision and denied Shell's complaint, and it directed Transco to remove the North Padre Island gathering rate and rate schedule from its tariff. Shell's request for rehearing of the February 15 Order asserts, *inter alia*, that the Commission erred in failing to revise the *Arkla* test for reassertion of jurisdiction over the gathering services of WFS on the spun-down North Padre Island facilities in the circumstances presented in this case. Shell contends that the court only held that the Commission had misapplied its *Arkla* test for reasserting NGA jurisdiction over the services provided on the gathering facilities spun-down to an affiliate of an interstate pipeline. Shell argues that, therefore, the court's decision does not foreclose the Commission from revising the standards on a reasoned basis. The Commission will deny Shell's request for rehearing, as discussed below. In

⁴ *Arkla Gathering Service Co.*, 67 FERC ¶ 61,257 at 61,871 (1994), *order on reh'g*, 69 FERC ¶ 61,280 (1994), *reh'g denied*, 70 FERC ¶ 61,079 (1995), *reconsideration denied*, 71 FERC ¶ 61,297 (1995) (collectively, *Arkla*), *aff'd in part and rev'd in part*, *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (*Conoco*).

addition, in a related proceeding issued contemporaneously with this order, the Commission is initiating a notice of inquiry in Docket No. PL05-10-000⁵ soliciting comments on whether it is appropriate to abandon the *Arkla* test and adopt a new test to govern the circumstances under which the Commission will reassert its NGA jurisdiction over the services provided by the gathering affiliates of natural gas companies.

Discussion

3. Shell does not contest the Commission's determination in the February 15 Order that Shell does not meet the elements of the *Arkla* test. Instead, the essence of Shell's request for rehearing is its assertion that the Commission erred in failing to revise the *Arkla* test and reassert jurisdiction over the gathering services provided by WFS at the North Padre Island facilities, based on the circumstances presented in this case. According to Shell, the Commission has the discretion to revise the *Arkla* test, "provided the new standards are consistent with the Commission's statutory authority and that the departure from Commission precedent is based on reasoned decisionmaking."⁶ According to Shell, "the Commission cannot effectively regulate Transco's interstate pipeline services unless it is able to regulate its affiliate's gathering services in the event the affiliate . . . abuses its market power."⁷ Shell argues that the Commission may disregard corporate form to ensure that its effective regulation under the NGA is preserved. That is, the Commission could reassert jurisdiction "where the gathering services are provided in connection with the interstate pipeline transportation services *and* the Commission's effective regulation of the pipeline would be frustrated in the absence of regulation."⁸

4. Given the focus of Shell's rehearing request on abandoning the *Arkla* test and crafting new criteria for the reassertion of jurisdiction over the gathering services of pipeline affiliates, the Commission does not believe it would be equitable to change the *Arkla* test in the context of the instant proceedings. Whether the circumstances in this case warrant reassertion of jurisdiction under the *Arkla* test has been fully litigated before an administrative law judge and substantial evidence has been presented. Making any change to the *Arkla* test raises industry-wide implications that cannot be fully evaluated

⁵ *Notice of Inquiry on Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, Notice of Inquiry, 112 FERC ¶ 61,292 (2005) (Docket No. PL05-10-000).

⁶ Shell at 40.

⁷ *Id.* at 54.

⁸ *Id.* at 62 (emphasis in original).

based on the instant record. The Commission would not abandon the *Arkla* test and develop new criteria without a better understanding of the implications of such a change on the industry.

5. Thus, the Commission will deny Shell's request for rehearing and terminate the proceedings in this docket. Concurrently, however, the Commission will institute a notice of inquiry in Docket No. PL05-10-000 to evaluate possible changes in the *Arkla* test and the circumstances under which the Commission may invoke its "in connection with" jurisdiction to guard against abusive practices by natural gas companies and their gathering affiliates. After it evaluates the responses to this inquiry, if the Commission determines to abandon the *Arkla* test and adopt a different test for reassertion of NGA jurisdiction, our action today in denying rehearing will be without prejudice to Shell's ability to present evidence that would satisfy a new test.

The Commission orders:

Shell's request for rehearing of the February 15 Order is denied without prejudice, as discussed in the body of this order, and the Docket No. RP02-99-000 proceeding is terminated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary