105 FERC ¶ 61,303
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Gas Company
v.
Viking Gas Transmission Co.

Docket No. RP03-551-000

ORDER DENYING COMPLAINT

(Issued December 18, 2003)

1. On July 21, 2003, Wisconsin Gas Company (Wisconsin Gas) filed a complaint against Viking Gas Transmission Company (Viking) in the instant docket. Wisconsin Gas alleges that Viking unduly discriminated by refusing to provide it with the same rate that a then-Viking affiliate, Northern States Power Company (NSP), received at Marshfield, Wisconsin. Upon review, the Commission concludes that NSP and Wisconsin Gas are not similarly situated shippers at Viking's Marshfield delivery point, the point at which both companies receive firm service, and therefore the complaint is denied.

## I. Background and Findings

2. Wisconsin Gas is a local distribution company that owns an electric generating plant at Marshfield, Wisconsin.[1] Marshfield is the primary delivery point where Viking delivers gas to Wisconsin Gas to supply that plant under Contract 8002. The receipt point for delivery of the gas to Viking is Emerson, Minnesota. Contract 8002, as recently extended, provides that Viking will transport to Marshfield 34,737 Dth/day for a two-year term beginning November 1, 2002, and 35,000 Dth/day for a five year term beginning

[1] Both parties agree on essential facts relating to the identification of the contracts, the volumes involved, and the time frames within which they were executed.

November 1, 2003, both at the maximum rate for firm transportation service to Viking's Zone 2.

3. Contract 8002 between Wisconsin Gas and Viking replaced an earlier contract, Contract 7744, for the same service. In October 1999, Wisconsin Gas notified Viking that Wisconsin Gas would turn back 27,812 Dth/day of a total of 97,649 Dth/day then available to it under Contract 7744, and put the remaining 69,737 Dth/day through the right-of-first refusal process under Viking's FERC Gas Tariff.[2] In March 2000, the parties executed Contract 8002 for 69,737 Dth/day at the maximum rate for Zone 2, with a two-year term beginning November 1, 2000.

4. On July 5, 2002, Viking offered Wisconsin Gas an extension of Contract 8002 of 34,737 Dth/day at the maximum rate for a two year period for Zone 1, and also offered a one year extension of the remaining 35,000 Dth/day, both beginning on November 1, 2002. Wisconsin Gas accepted both offers on August 19, 2002, and Viking signed the contracts on August 28, 2002. The 35,000 Dth/day component of Contract 8002 was further extended, on June 24, 2003, for five years at the maximum rate after the receipt by Viking of a competing five-year maximum rate bid during a ROFR process. Wisconsin Gas matched that bid.

5. Negotiations between Viking and NSP for a gas transportation contract began in January, 2000, after NSP issued a request for proposals for the transportation of gas to NSP's Black Dog plant located at Burnsville, Minnesota. In late June, 2000, Viking and NSP executed Contracts 8007 and 8013, collectively known as the Black Dog contracts. Contract 8007 is a negotiated rate agreement providing for the transportation of 15,600 Dth/day gas between Emerson and the interconnection between Viking and the Minnesota Intrastate Pipeline Company (Minnesota Intrastate) at Cambridge, Minnesota. Both points are located in Viking's Zone 1. From the interconnection Minnesota Intrastate transports the gas to NSP's Black Dog gas-fired plant at Burnsville. Under a related and sharply discounted contract, Contract 8013, Viking also transports 15,534 Dth/day to a primary delivery point at Marshfield, Wisconsin located in Zone 2, with the origin point at Cambridge, Minnesota, located in Zone 1.

6. On July 1, 2002, Viking instituted new rolled-in rates on its system pursuant to a settlement in Docket No. RP98-290-001. While the rate Viking

---

[2] In the same time frame two other customers turned back capacity between Emerson and Marshfield leaving Viking with some 33,000 Dth/day of firm transportation capacity available between those two points.

charged NSP under Contract 8007 exceeded the rolled-in maximum rate for Zone 1 when it was executed in June, 2000, and also exceeded the maximum rate for Zone 1 when it became effective on June 1, 2002, it is now less than the maximum rate for Zone 1 due to rate increases pursuant to the settlement.[3] Viking concedes that the rate under Contract 8013, which provides service between Cambridge and Marshfield, was at all times substantially less than the Zone 2 maximum rate.

7. Under the Commission's policies regarding negotiated rate agreements Viking should have filed a tariff sheet summarizing Contracts 8007 and 8013, or the contracts themselves, not later than May 30, 2001, but it failed to do so.[4] On April 30, 2003, the Commission granted a waiver of its regulations and permitted those two contracts to become effective on June 1, 2002.[5] On May 2, 2003, Wisconsin Gas sent Viking a letter claiming it was similarly situated to NSP with respect to the Black Dog contracts. It demanded that it receive similar contract terms for 13,900 Dth/day of the capacity it was holding on the two year extension of Contract 8002.[6] Viking denied that request on the grounds that Wisconsin Gas's contract was governed by the terms of the April 20, 2001 settlement in Docket No. CP00-391-000.[7]

8. Wisconsin Gas filed its complaint on July 31, 2003, requesting that the Commission direct Viking to enter into a five year contract for 69,937 Dth/day with similar or identical delivery points so that the Wisconsin Gas will reap the same benefits as NSP obtained through the Black Dog contracts. Alternatively, Wisconsin Gas requests that the Commission direct Viking to enter into two contracts similar or identical to the Black Dog contracts, and that Wisconsin Gas be made whole for the difference in the rates it paid since the Black dog contracts

---

[3] The initial contract rate was $0.135 Dth/day compared to the Zone 1-2 recourse rate of $0.1239 Dth/day in July 2000, and $0.1299 Dth/day in June 2002.

[4] See Noram, 75 FERC ¶ 61,091 (1996), order on reh'g, 77 FERC ¶ 61,011 (1996); Alternatives to Traditional Cost-of Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services, Statement of Policy and Comments, 74 FERC ¶ 61,076 (1996), order on clarification, 74 FERC ¶ 61,194 (1996), order on reh'g, 75 FERC ¶ 61,024 (1996).

[5] Unpublished Letter Order dated April 30, 2003, in Docket No. RP97-249-002.

[6] See Exhibit 3 to Wisconsin Gas's complaint.

[7] See Exhibit 4 to Wisconsin Gas's complaint

became effective.

## II. Procedural History

9. Notice of Wisconsin Gas's complaint was issued on July 23, 2003, and was published in the Federal Register on August 11, 2003.[8] Timely motions to intervene were filed by ANR Pipeline Company, J.R. Simplot and RDG Foods Company, CenterPoint Energy Minnegasco, Michigan Consolidated Gas Company, and Xcel Energy Services (Xcel) on behalf of NPS. Xcel included a protest opposing the complaint on the grounds that NSP and Wisconsin Gas are not similarly situated and that granting the complaint would be discriminatory.

10. Viking filed a motion to dismiss and an answer on August 11, 2003. Wisconsin Gas filed an answer to Viking's motion to dismiss on August 26, 2003. Viking also filed a response to a Staff request for information on September 10, 2003. On the same day, Viking filed a motion for leave to answer Wisconsin Gas's answer to the complaint. Wisconsin Gas opposes that request. Viking's September response provides clarifications regarding the relationship between Contracts 8007 and 8013, and useful replies to additional arguments raised by Wisconsin Gas in its August 26 answer to Viking's motion to dismiss. Therefore, the Commission accepts Viking's September 10 filing.

## III. Legal Framework

11. This is a complaint alleging undue discrimination in the provision of gas transportation services in interstate commerce directed at the terms received by NSP in its Black Dog contracts with Viking. The legal issues raised include (1) the relevance of the affiliate relationship between Viking and NSP at the time those contracts were negotiated, and (2) whether a difference in competitive factors justifies different rate levels for shippers receiving service between the same receipt and delivery points.

12. When Viking awarded the Black Dog contracts in June 2000, Viking and NSP were corporate affiliates. Wisconsin Gas argues that NSP was subject to the standards of conduct for interstate pipelines with marketing affiliates under Section 161.3 of the Commission's regulations.[9] Viking replies that the cited section is irrelevant because it applies only to sales [marketing] affiliates, that NSP never sold gas to third parties, and therefore NSP was never a sales affiliate of Viking's. While Viking is correct that the cited section does not apply to an LDC

---

[8] 68 FR 44939.

[9] 18 C.F.R. § 161.3 (2003).

that makes only on-system sales,[10] the Commission need not make a factual determination on that point. Under both the standards of conduct and Part 284 of the Commission's regulations, interstate pipelines must provide transportation service without undue preference or discrimination.[11] Thus, Viking has an obligation not to unduly discriminate regardless of whether NSP was a marketing affiliate at the time the Black Dog contracts were negotiated.

13. The Commission finds that Wisconsin Gas and NPS were not similarly situated shippers, thus justifying the different rate treatment they received from Viking. Regarding the role of competition, Viking asserts that well established Commission policy holds that competition can justify a difference in rates between customers shipping gas between the same receipt and delivery points. Viking cites Order No. 436 and subsequent cases for the proposition that selective discounting in response to competition or differences in elasticity of demand is socially efficient, and that customers facing different competitive situations or elasticities of demand are not similarly situated.[12]

14. Wisconsin Gas does not address this issue as clearly, asserting that differences in competition are no justification for discrimination in favor of an affiliate. Wisconsin Gas further asserts that the CIG/Granite State line of cases[13] holds that shippers at the same delivery points must receive the same discounts. Viking replies that the CIG/Granite State line of cases addresses discounts in the context of a shift in the shipper's primary delivery point and does not apply if service to the delivery point is at the maximum rate. Viking further asserts that recent cases make clear that competitive factors bear directly on whether the CIG/Granite State doctrine applies.[14]

---

[10] 18 C.F.R. § 18 C.F.R. 161.2 (c)(3) (2003).

[11] See 18 C.F.R. § 284.7(a)(4) and (b)(1) (2003).

[12] Citing Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 426, FERC Stats. & Regs. Regulations Preambles ¶ 30,665 at 31,543 (1985); Algonquin Gas Transmission Co., 104 FERC ¶ 61,188 at 61,380 (2003) (Algonquin).

[13] Colorado Interstate Gas Co., 95 FERC ¶ 61,321, order on reh'g, 96 FERC ¶ 61,186 (2001) (CIG); Granite State Transmission, Inc., 96 FERC ¶ 61,237 (2001), order on reh'g, 98 FERC ¶ 61,019 (2002) (Granite State).

[14] Citing Gulf South Pipeline Company, L.P., 104 FERC ¶ 61,160 at 61,571-72 (2003).

15. Viking's interpretation of the law of this case is correct, and its citations to and quotes from Order No. 436, Algonquin, and the CIG/Granite State line of cases are on point. Moreover, in affirming most of Order No. 436, the Court of Appeals directly addressed the Commission's selective discounting policy and noted that differences in elasticity of demand and competition can justify differences in prices.[15] The court further held that simply because an affiliate was involved would not render the discount unlawful if the same discount were given to unaffiliated parties in identical circumstances (emphasis added).[16] The court made similar rulings in its review of Order No. 636 regarding discounting in the context of the Commission's right-of-first refusal program.[17] Thus, the merits determination here turns on whether NSP and Wisconsin Gas faced the same or different competitive circumstances at the Marshfield delivery point, the common delivery point at issue in this proceeding.[18]

## IV. Commission Determination

16. The Commission concludes that NSP and Wisconsin Gas were facing different competitive situations and had different elasticities of demand at Marshfield at all times the various contracts at issue here were negotiated. As such, they were not similarly situated. Their different circumstances are grounded in the different firm transportation services that these two shippers have at the Marshfield delivery point.

17. In its pleadings Wisconsin Gas characterizes NPS's Contracts 8007 and 8013 as a single integrated transaction with Cambridge being an intermediate point for deliveries bound to Marshfield. This argument mischaracterizes the services available under these two contracts. Wisconsin Gas's argument assumes that the contracts involve a regularly scheduled, continuous transportation between Emerson and Marshfield with intermediate firm delivery rights at the Cambridge delivery point. However, this is not case. NSP receives gas for a plant located at

---

[15] Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) at 1011-12.

[16] Id. 1009.

[17] United Distribution Companies v. FERC, 88 F. 3rd 1105 (D.C. Cir. 1996) at 1141.

[18] Viking also argues that Wisconsin Gas has an overwhelming burden of satisfying the Mobile-Sierra doctrine before relief can be granted here. The Commission need not reach this argument given the conclusion here.

Burnsville, near Cambridge, including transportation through that latter point by Viking and Minnesota Intrastate. The Commission therefore finds that since NSP's plant is not located at or near Marshfield, deliveries at that point were not necessary for NSP to operate its gas fired plant.

18. The Commission finds that NSP's Black Dog contracts, while negotiated as a package deal, have distinctly different characteristics and serve different needs. Contract 8007 provides for firm transportation between Emerson and Cambridge (for ultimate delivery at Burnsville) at a rate that exceeded the maximum rate for transportation between these two Zone 1 points when that contract was executed and at the time it became effective on June 1, 2002. Contract 8013 is a discounted contract for transportation between Cambridge and Marshfield, and provides a less valuable service than that provided under Contract 8007. This difference in the contract value reflects a lower need by NSP for Contract 8013.

19. The Commission therefore concludes that Viking's assertion that NPS intended to utilize the Marshfield delivery point for capacity release is credible and reflects the purpose for which NPS entered into Contract 8013. The parties reflected that purpose in the low contract rate for transportation of gas by NSP from Cambridge to Marshfield, which rate operates as an add-on to the rate from Emerson to Cambridge. In contrast, Wisconsin Gas receives gas at Marshfield for a generating plant located at that point. Thus, the point at which each shipper takes delivery from Viking of the gas required to operate its plant is different: Cambridge (via Minnesota Intrastate to Burnsville) in the case of NSP, and Marshfield for Wisconsin Gas.

20. Given that difference in their respective needs at Marshfield, the Commission also finds that Viking's assertions that NSP had competitive alternatives when negotiating its contracts for delivery of gas to its Black Dog plant are credible.[19] As pointed out by Viking, the difference in need and purpose of the two firms at Marshfield is evidenced by the fact that NSP received no deliveries of any kind to Marshfield in 2002 or 2003 to date, while Wisconsin Gas received 12.4 million Dth/day at that point during the same period. Because it had

---

[19] Intervener Xcel describes the alternatives as follows: Northern Natural to the local LDC serving the plant, Reliant Energy Minnegasco, Inc (REM); Northern Natural directly to the Black Dog plant by constructing a one and one-half mile extension; Viking to Minnegasco Intrastate to REM; Viking to NSP Gas. See Xcel's comments, Attachment 1 at 4-5. Viking provides a similar if somewhat less precise description. See Viking August 11 answer, Attachment, Affidavit of Richard T. Rushton at 2-3. Wisconsin Gas does not dispute these specific factual assertions.

alternatives, NSP negotiated a contract with long term rate stability at Burnsville and obtained a significantly reduced rate at Marshfield to facilitate capacity release as an additional element of its contract, even though Marshfield is not essential to the operation of the Black Dog plant.[20] In contrast, if Wisconsin Gas desired or was required to produce power at its Marshfield plant, it had no transportation or other competitive options and therefore had to pay the maximum tariff rate. This demonstrated difference in need is the basis for the Commission's conclusion that the elasticity of demand of the two shippers is different at the Marshfield delivery point.

21. Given the different transportation needs facing NSP and Wisconsin Gas, Wisconsin's other arguments provide it little help. First, Wisconsin Gas argues that Viking's failure to file Contracts 8007 and 8013 in a timely fashion prejudiced its negotiating position in two ways. Wisconsin argues that it did not know of the contracts at the time it agreed to the settlement in Docket No. CP00-391-000, and appears, as Viking notes, to imply that in June 2000 Viking executed a contract that gave its then-corporate affiliate NSP a stable long-term rate in expectation of the settlement.[21] However, the settlement was executed on April 20, 2001, and Viking had no obligation to provide the Commission notice of the contracts until the day before the contracts became effective on June 1, 2002. [22]

22. Wisconsin Gas's second argument addresses the relevance of the April 20, 2001 settlement in Docket No. CP00-391-000. As noted, in July 2002, Viking and Wisconsin Gas extended Contract 8002 as follows: 34,737 Dth/day for two years beginning November 1, 2002, and 35,000 Dth/day for one year beginning the same date. When, on May 2, 2003, Wisconsin Gas demanded the same terms as NSP, Viking declined on the grounds that the extensions of Contract 8002 were governed by the April 20 settlement and that NPS and Wisconsin Gas were not

---

[20] The Commission notes that while NSP has yet to use the Marshfield delivery point, NSP's rate to that delivery point is a firm transportation rate with a demand charge. NSP therefore incurred some cost even if it not use its firm service to Marshfield.

[21] As noted, the rate for Contract 8007 exceeded the maximum rate for Zone 1 in June 2000 and in June 2002, but is now less than the maximum rate for the same zone.

[22] If the standards of conduct applied, the contracts would have had to have been posted on Viking's electronic bulletin board "within 24 hours of the time at which gas first flows under a transportation transaction in which an affiliated marketer receives a discounted rate … See 18 C.F.R. 161.3(h)(2) (2003).

similarly situated shippers. In response, Wisconsin Gas argues that the April 20 settlement is irrelevant because it only gave Wisconsin Gas an option to extend Contract 8002.

23. A review of the April 20 settlement issue supports the Commission's earlier conclusion that Wisconsin Gas and NSP are not similarly situated. The April 20 settlement[23] stemmed from a contested certificate proceeding in which ANR Pipeline sought to obtain 33,000 Dth/day of capacity on Viking in order to serve certain customers located at Marshfield on a reliable basis. As stated in the Commission's letter order approving the April 20 settlement,[24] which was uncontested and Wisconsin Gas supported, the April 20 settlement provided for ANR "to secure-- on a conditional basis, under contracts between Viking and various third-party shippers-- capacity which ANR may require for operational reliability purposes at the Marshfield, Wisconsin receipt/delivery point."[25] The third parties referred to included Wisconsin Gas, which was thus obligated under Article II of the settlement to obtain capacity on Viking to meet ANR's needs if ANR notified Wisconsin Gas that ANR required capacity to Marshfield to maintain system reliability.

24. As documented by ANR's September 28, 2001 letter,[26] ANR notified "both Viking Gas Transmission Company and Wisconsin Gas Company of its requirement for operation purposes of 34,737 Dth/day of capacity related to Contract 8002 for each year during the period November 1, 2002 through October 31, 2004." Thus, the April 20, 2001 settlement required Wisconsin Gas to obtain 34,737 Dth/day on Viking, and to exercise its option for that capacity. Given its contractual obligation to ANR under the April 20 settlement, the Commission concludes that no transportation alternatives were available to Wisconsin Gas for the 34,737 Dth/day referred to in ANR's letter because the April 20 settlement expressly provides that the gas supplies and capacity required by ANR would be delivered off "Viking at Marshfield."[27] Because Viking had no obligation to discount, it was a virtual certainty that Wisconsin Gas would pay the maximum

---

[23] Reproduced as Exhibit B to Wisconsin Gas's July 21, 2003 complaint.

[24] 95 FERC ¶ 61,456 (2001).

[25] Id. 1.

[26] Reproduced in Exhibit 4 to Viking's August 11, 2003 answer to the complaint.

[27] April 20, 2001 settlement, p. 3, Article II, par. 2.

rate for the capacity between Emerson and Marshfield. Under these circumstances there is no merit to Wisconsin Gas's discrimination claim regarding the 34,737 Dth/day for the two year period beginning November 1, 2002.

25. Wisconsin Gas fares no better regarding the 35,000 Dth/day that was extended for one year on November 1, 2002. The Commission has found that Wisconsin Gas's elasticity of demand was different from that of NSP at the Marshfield delivery point because NSP has less need to use that point, and had competitive alternatives at Burnsville at the time it negotiated the Black Dog contracts. Given its lack of alternatives, Wisconsin Gas also paid the maximum rate for this extension. After the expiration of the one year period, Wisconsin Gas's position with regard to that 35,000 Dth/day deteriorated further because it had to match a five-year maximum rate offer from a competing party.[28] Viking's September 10, 2003 letter, filed in response to the Commission's September 10, 2003 inquiry, establishes that the 35,000 Dth/day five-year competing bid did not involve an affiliated party. Thus, there is also no merit to the complaint regarding that capacity.

The Commission orders:

For the reasons stated in the body of this order, Wisconsin Gas's complaint is denied.

By the Commission. Chairman Wood concurring with a separate statement attached.

( S E A L )

Magalie R. Salas,
Secretary.

[28] See Exhibit 5 to Viking's August 11 answer.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Wisconsin Gas Company Docket No. RP03-551-000
v.
Viking Gas Transmission Co.

(Issued December 18, 2003)

WOOD, Chairman, concurring:

While I recognize the economic efficiency underlying long-standing Commission policy regarding "similarly situated shippers" that permits price discrimination based on elasticities of demand, I am concerned about the inequity of allowing two shippers to lawfully receive two different rates while shipping gas between the same receipt and delivery points. Because the order and practice complained of are both consistent with a 15-year old policy, I do not seek to change it here, but I would be open to further development of the selective discounting program in a generic docket.

_____
Pat Wood, III
Chairman