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Transcontinental Gas Pipe Line Corporation, Williams Gas Processing–Gulf Coast Company,
L.P.

Docket Nos. CP01–103–001, CP01–104–001

FEDERAL ENERGY REGULATORY COMMISSION – COMMISSION

97 F.E.R.C. P61,300; 2001 FERC LEXIS 2954

ORDER ON REHEARING

December 19, 2001

PANEL:

[**1] Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell

OPINION:

[*62,406]

On August 24, 2001, Transcontinental Gas Pipe Line Corporation (Transco), filed a Request for Rehearing and Limited Stay of the Commission's Order Authorizing Abandonment and Determining Jurisdictional Status of Facilities issued in these dockets on July 25, 2001 (July 25 Order). n1 On August 24, 2001, the Producer Coalition n2 and Indicated Shippers n3 also filed Requests for Rehearing of the July 25 Order. On September 10, 2001, Key Span Delivery Companies, Atlanta Gas Light Company and Virginia Natural Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Philadelphia Gas Works, Public Service Electric and Gas Company and Washington Gas Light Company (KeySpan, et al.) submitted a response in partial opposition to Transco's requests for rehearing and limited stay. n4

n1 Transcontinental Gas Pipe Line Corporation, et al., 96 FERC P61, 118 (2001) (July 25 Order).

n2 The Producer Coalition is an ad hoc group of natural gas producers, made up of Devon Energy Corporation, Dominion Exploration & Production, Inc. Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and Ocean Energy, Inc. These companies have significant investment in oil and gas exploration and production projects in the Gulf of Mexico and are shippers and marketers of gas on numerous OCS pipelines.

[**2]

n3 Indicated Shippers is an ad hoc group of companies having an interest in gas transported on the Transco system. In this case, the members of Indicated Shippers are: Amerada Hess Corporation, Amoco Production Company, BP Energy Company, Burlington Resources Oil & Gas Company, L.P., Chevron U.S.A., Inc., Exxon Mobil Corporation, Occidental Energy Marketing, Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc.

n4 Under the Commission's Rules of Practice and Procedure, there is nothing which forecloses KeySpan, et al. from responding to a request for stay. Under Rule 713(d) of those Rules, parties are normally precluded from responding to a request for rehearing. 18 CFR § 713(d). However, the Commission has determined that for good cause shown it will accept answers to rehearing.

The July 25 Order approved a request by Transco to abandon facilities located largely offshore Texas and Louisiana, which are part of the North High Island/West Cameron **Gathering** System, by transfer to its **gathering** affiliate, Williams Gas Processing–Gulf Coast Company, L.P. (WGP). The July 25 Order also granted, in [**3] part, WGP's request that the Commission declare that the facilities it proposes to acquire from Transco will be, upon abandonment by transfer to WGP, **gathering** facilities and services, exempt from the Commission's jurisdiction under the NGA. The July 25 Order

declared that upon acquisition by WGP, only the North High Island subsystem facilities located at or upstream of the North High Island Block 10 interconnect will be deemed **gathering** facilities exempt from the Commission's jurisdiction under the NGA. The remainder of the North High Island subsystem and all of the West Cameron subsystem are and will be transmission facilities subject to the Commission's NGA jurisdiction. n5 The July 25 Order also directed Transco to adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000. This order denies or grants the requests for rehearing, as discussed below. n6 As noted in the July 25 Order, abandonment serves the public interest by permitting Transco to eliminate unnecessary expenses associated with facilities no longer needed to provide certificated services and enables WGP to make efficient use of these same facilities. [**4] Granting rehearing on the rate issue serves the public interest by assuring that the jurisdictional rates will continue to be just and reasonable while also preserving the integrity of the Commission's ratemaking policies.

n5 96 FERC at 61,461, Ordering paragraph (B).

n6 As the Commission is granting the request for rehearing on the rate issue which is the subject of the motion for stay, the motion is moot.

I. Background

The July 25 Order permitted Transco to abandon, by transfer to its affiliate WGB, approximately 217 miles of 4-inch to 30-inch pipeline and other facilities located offshore, in the Galveston area, the High Island area, and the West Cameron area and onshore, in Cameron [*62,407] and Vermillion Parishes, Louisiana. In response to WGB's request, the July 25 Order sought to determine whether the facilities at issue were used primarily to transport gas, and thereby were subject to our jurisdiction under the NGA, or were used primarily to produce or gather gas, and thereby were [**5] exempt from our NGA jurisdiction. n7

n7 Section 1(b) of the NGA states that "the provisions of this Act . . . shall not apply to . . . the production or **gathering** of natural gas."

To determine the primary function of particular facilities, we consider the criteria articulated in Farmland Industries, Inc., (Farmland). n8 In Farmland, the Commission enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the placement of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures. In addition to these physical and geographic criteria, the Commission also considers the purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination [**6] is consistent with the objectives of the NGA and Natural Gas Policy Act. We do not consider any single factor to be determinative and recognize that all factors do not necessarily apply in all situations.

n8 23 FERC P61,063 (1983).

The Commission has modified this primary function test for facilities located offshore. In 1990, in Amerada Hess Corporation (Amerada Hess), n9 we observed that as a result of "recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections." n10 Given the increasingly remote location of such offshore facilities, we found that offshore pipelines used to produce or gather gas may be larger and longer than onshore pipelines that perform the same function. Therefore, we found it appropriate to modify the application of the primary function test for offshore facilities, stating our intention to, "in effect, apply a sliding scale which will allow the [**7] use of **gathering** pipelines of increasing lengths and diameters." n11

n9 52 FERC P61,268 (1990).

n10 Id., at 61,988.

n11 Id.

In Sea Robin Pipeline Company (Sea Robin), n12 we reformulated the primary function test with respect to offshore facilities by (1) adopting an additional analytical element applicable to systems that contain a centralized aggregation point; (2) adjusting the weight to be afforded the "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors, and; (3) focusing primarily on physical factors.

n12 71 FERC P61,351 (1995), order on reh'g, 75 FERC P61,332 (1996), remanded sub nom. *Sea Robin v. FERC*, 127 F.3d (Fifth Cir. 1997), reh'g denied (February 2, 1998), order on remand, 87 FERC P61,384 (1999), order denying reh'g, 92 FERC P61,072 (2000), order denying stay, 92 FERC P61,217 (2000).

[**8]

The July 25 Order, in considering the primary function of the subject facilities, applied the Farmland test as modified in *Amerada Hess* and as reformulated in *Sea Robin*. As to the North High Island subsystem, the Commission found that: (1) the North High Island subsystem is configured in the shape similar to an inverted "Y" with the legs branching out from the High Island Block 10 central aggregation point; (2) consistent with *Sea Robin*, the legs upstream from the central points intersect with supply laterals throughout their length; (3) the length and diameter of the numerous pipelines are consistent with offshore **gathering** facilities; (5) the wellhead pressures are typical of a **gathering** function; (6) the absence of processing plants is of little value in assessing the primary function of facilities. Accordingly, the Commission concluded that the "primary function" of the facilities located at or upstream of North Padre Block 956 and Brazos Block 538 High Island Block 10 is **gathering**. As to the West Cameron subsystem, the Commission found that: (1) the West Cameron subsystem resembles a transportation mainline that receives gas at one end for delivery at the other, (2) operating [**9] pressure and lack of compression are of little value in assessing the primary function of facilities. Accordingly, the Commission concluded that the "primary function" of the entire West Cameron subsystem is transmission.

II. Requests for rehearing

A. Whether the abandonment of the North High Island and West Cameron facilities is in the public interest.

1. Interests of shippers and the public

Indicated Shippers state that the Commission's finding that it has no discretion to withhold authorization for the transfer of facilities, [*62,408] when it believes that the primary function of the facilities is **gathering**, is not correct. n13 Indicated Shippers state that Section 7 of the NGA makes clear that the Commission's first duty is to protect the interests of shippers and the public, rather than to accommodate Transco's and WGP's corporate objectives.

n13 96 FERC at 61,454.

Indicated Shippers point out that the abandonment would remove certain receipt points from those available to IT-feeder shippers [**10] that ship under Transco's tariff to FT shippers. Indicated Shippers state that the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to an un-regulated affiliate. Indicated Shippers state that producers and other shippers have relied for decades on the Commission's regulation of the entirety of Transco's offshore pipeline system. Indicated Shippers state that the public interest is not served by undermining these expectations by reversing decades of prior regulatory practice. Further, Indicated Shippers state that dividing this operationally integrated system into separate regulated and unregulated parts is not in the public interest because it could undermine the Commission's open access policies.

Indicated Shippers state that Transco's abandonment application is grounded on the theory that, because Transco no longer provides bundled sales service, Transco's **gathering** services must be freed from the Commission's regulations in order to be able to compete with exempt gatherers. Indicated Shippers state that Transco has presented no evidence to support a finding that it has been unable to [**11] compete with non-NGA-regulated **gathering** companies. Indicated Shippers state that Transco is not concerned over whether it will be able to effectively compete in the marketplace with exempt gathers. Rather, Indicated Shippers state that Transco's real concern is over whether it will be able to take advantage of its existing control of the market in order to exact monopoly rents from shippers.

Commission response

We reaffirm our conclusion that the abandonment is required and in the public interest. As stated in the July 25 Order, where facilities are found to be used primarily in production or **gathering**, section 1(b) of the NGA directs that they be excluded from our NGA regulatory jurisdiction. n14 As further stated in the July 25 Order, the abandonment is consistent with unbundling policies of Order No. 636, and should, in the long run, promote competition. n15 Under the Outer Continental Shelf lands Act (OCSLA), n16 WGP will be prevented from discriminating against any shipper that seeks access to these facilities. Further, as noted in the July 25 Order, section 330.2 of our OCSLA regulations requires that WGP report the terms under which it provides service to its shippers. n17 The [**12] Commission will continue to employ its NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable. And, Transco's existing tariff standards prevent it from acting in a discriminatory manner. n18 WGP has agreed to continue to serve Transco's existing customers following the facilities' transfer. This should avoid any abrupt disruption to Transco's customers' expectations.

n14 96 FERC at 61,455.

n15 96 FERC at 61,455.

n16 43 U.S.C. 1301-1356.

n17 96 FERC at 61, 455.

n18 96 FERC at 61,455.

Independent entities engaged in different aspects of gas development, production, **gathering**, transporting, and delivery to end users are able to negotiate and rely on contractual capacity and scheduling commitments to guarantee the efficient movement of gas. Because we expect WGP, like all other offshore gatherers, will prove able to enter into service [**13] agreements with Transco, and any other transmission pipelines it may rely on, to take timely deliveries of its anticipated gas volumes, we see no need for Transco to retain ownership of its upstream **gathering** facilities to ensure the orderly flow of gas into its downstream transmission mainlines.

2. Effect on cost of moving gas to shore

Indicated Shippers complain that the July 25 Order transforms a single IT-feeder rate into rate-stacked charges for WGP's **gathering** and Transco's transmission services. Indicated Shippers state that without the constraint of rate regulation under the NGA, WGP will be able to charge shippers whatever the market will bear. Indicated Shippers state that there are no interconnections with other pipelines at the point at which the Commission finds that **gathering** ends and transmission begins, so shippers using the **gathering** facilities have no choice but to utilize Transco's remaining downstream IT-feeder transmission facilities to access Transco's mainline. Indicated Shippers state that it is not enough to say that the procedural safeguards of the OCSLA will adequately protect shippers from the market power of Transco and WGP.

Commission response

Prior [**14] to abandonment, shippers are effectively paying Transco a transportation rate [*62,409] that includes **gathering**. **That gathering** service will be unbundled and provided by WGP. WGP's acquisition of Transco's facilities will necessarily subject shippers on these facilities to both a **gathering** and a transportation charge, where before such shippers were subject to a single Transco transportation rate. The Commission acknowledges that after the transfer of the facilities, shippers may pay a higher combined **gathering** fee and transportation charge to move gas between specific receipt and delivery points than the rate they now pay for bundled **gathering** and transportation service between the same points. However, this is neither inequitable nor an unwarranted rate stacking. As discussed in Order No. 636, it is appropriate to segregate and charge separate rates for separate services, rather than continue to compel shippers to pay a bundled charge for several distinct services.

The Commission will continue to employ its NGA authority to ensure that Transco's rates remain just and reasonable. Regarding WGP's facilities, although no State agency has authority, these facilities remain subject to federal [**15] oversight under the OCSLA. Though the OCSLA does not provide for rate regulation equivalent to that of the NGA, shippers are assured open and nondiscriminatory access to WGP's facilities. Onshore, and in state waters offshore,

shippers on NGA-exempt facilities can appeal to state authorities to monitor WGP's operations. In the event a shipper believes either Transco or WGP violates its statutory obligations under the OCSLA, the Commission encourages that shipper to submit a complaint to the Commission describing the alleged violation. n19

n19 18 CFR § 385.206 (2001).

B. Challenges to the primary function test

1. Should the Commission apply the OCSLA "feeder line" test instead.

Producer Coalition states that because of the close relationship between the OCSLA, the principal federal statute governing the OCS, and the NGA, the Commission should accord significant weight to legislative intent in formulating the jurisdictional test for OCS pipelines. Producer Coalition states that Congress has addressed the nature of **gathering** [**16] operations on the OCS in the 1978 OCSLA Amendments. n20 Producer Coalition states that, throughout the consideration of OCS pipeline issues, Congress equated "**gathering**" lines with "feeder" lines and concluded that such lines end where gas is "first separated, dehydrated or otherwise processed" on an OCS platform. n21 Producer Coalition states that the Commission erred in failing to accord the definition of **gathering** from the OCSLA Amendments of 1978 significant weight in its jurisdictional test. Producer Coalition states that the North High Island facilities are properly classified as jurisdictional transportation systems under the "feeder line" test.

n20 43 U.S.C. 1301-1356.

n21 43 U.S.C. § 1334(f)(2).

Commission response

The Commission does not consider Congress' discussions of proposals to modify the OCSLA as guidance for jurisdictional distinctions under the NGA. The separate statutes, although complementary, have distinctly different [**17] scopes. The OCSLA applies to the full range of gas exploration, development, production, **gathering**, and transportation activities. n22 This is a broader regulatory sweep than the NGA which explicitly exempts facilities used for production, **gathering**, local distribution, and certain in-state transportation. It would be inappropriate to rely on definitions and terms of art indigenous to one statute to interpret and enforce the other. Accordingly, the Commission rejects the Producer Coalition's effort to use legislative history associated with the 1978 amendment to the OCSLA as a foundation to argue for a new NGA primary function test.

n22 43 U.S.C. 1331(q).

2. Must Transco demonstrate changed circumstances

The July 25 Order stated that "a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for [**18] rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities." n23 In addition, the Commission also stated that it found "no cause to disallow Transco the right to claim its facilities perform a **gathering** function, when in the past it may have advocated the facilities function as transmission." n24

n23 July 25 Order at 61,455, citing Southern Natural Gas Company, et. al., 79 FERC P61,076 at 61,379 (1997).

n24 Id.

Indicated Shippers state that while historical functionalization alone may not be determinative, the prior treatment of the facilities by both Transco and the Commission should be given presumptive effect in the absence of a showing of changed circumstances. Indicated Shippers state that given Transco's prior arguments to the Commission that the facilities [**62,410] were transmission, Transco should be estopped from now arguing that they are **gathering**.

Indicated Shippers state that Transco [**19] has failed to show a change in circumstance that would demonstrate that the subject facilities are now **gathering**. Indicated Shippers state that the Commission offers no reasoned explanation why restructuring served to change the function of Transco's facilities, particularly given that the Commission's prior findings that the facilities are properly treated as transmission was made in conjunction with Transco's restructuring. Indicated Shippers state that Transco itself previously argued that restructuring served to reinforce the fact that all of its pipeline facilities provide a transmission function.

Indicated Shippers state that the Commission's decision here to change the pre-existing functionalization of certified facilities in the shallow waters of the OCS is in direct conflict with the OCS Policy Statement that indicates that the Commission would preserve the existing status of interstate pipeline facilities in the shallow water of the OCS.

Commission response

The OCS Policy Statement was explicit that "existing interstate pipelines and **gathering** facilities would retain their status barring some change in circumstances." n25 Nevertheless, the OCS Policy Statement must [**20] be read in light of the subsequent opinion in *Sea Robin v. FERC*, which determined that nonphysical factors such as ownership and prior certification are considerations secondary to physical factors. n26 In any event, the OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. The July 25 Order accepted Transco's claim that **reclassification** is merited as a response to Order No. 636. As the July 25 Order noted, after Order No. 636 many interstate pipeline companies found portions of their system's facilities were no longer required in order to provide certain certificated services. Where we found such facilities were employed to gather gas supplies needed to ensure a pipeline's capability to fulfill merchant sales obligations, a function that is no longer offered, we permitted pipelines to abandon such facilities. n27

n25 Gas Pipeline Facilities and Services on the Outer Continental Shelf – Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC P61,222 at 61,757 (1996), order dismissing reh'g, 75 FERC P61,291 (1996) (OCS Policy Statement).

[**21]

n26 123 F.3d at 371.

n27 96 FERC at 61,454 (footnote omitted).

Second, Order No. 636 aside, a pipeline company can submit an abandonment application at any time, and the Commission will consider the reasons presented for requesting a review of the company's facilities' classification. We have acknowledged that the facilities were constructed, owned, and operated by Transco, historically an NGA-regulated interstate transportation provider. Nevertheless, we found that changed circumstances, principally Transco's reorganization in response to Order No. 636, tempered this indicator that the facilities were dedicated to interstate transportation.

3. Does the Central point of aggregation factor create a single factor test

As stated earlier, in *Sea Robin*, the Commission reformulated the modified primary function test adding a new "centralized aggregation point" factor for determining the jurisdiction of facilities on the OCS.

In *Sea Robin* the Commission found that **gathering** ends and transmission begins at the point where two or more segments of [**22] an OCS pipeline join for the last time and a single line moves natural gas towards shore. n28 The Commission refers to this as the "centralized collection point," or "central aggregation point," which is the point at which the gas collection/aggregation process on an OCS interstate pipeline ends.

n28 *Sea Robin*, 87 FERC at 62,430–431.

Indicated Shippers complain that the Commission's analysis in *Sea Robin* is inherently flawed. Indicated Shippers state that this new test permits the Commission to find a point on a pipeline where the largest diameter pipeline on the system begins or where all upstream lines converge, and to designate that point as the demarcation point where **gathering** ends and transportation begins. Indicated Shippers state that this test would essentially eliminate any evaluation of the

physical, geographical, and operational factors traditionally considered by the Commission in distinguishing **gathering** from transportation. Indicated Shippers state that in place of the primary [**23] function test, Sea Robin essentially establishes the very type of bright line test for which the Commission was admonished by the Fifth Circuit. n29 Indicated Shippers state that under this test the Commission would look for the central point on a pipeline system without reference to the nature of the upstream facilities and their relationships with producers' wells and other facilities.

n29 Citing, *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989).

[*62,411]

Producer Coalition makes a related argument that because three of the factors contained in the modified primary function test produce three mutually exclusive jurisdictional results, the Commission, by necessity, must select one factor to predominate in order to reach a jurisdictional determination. Producer Coalition state that if the Commission gives principal emphasis to the "behind the plant" location of facilities, all OCS facilities will be declared non-jurisdictional, because all processing plants downstream of OCS pipelines are located [**24] onshore. n30 Alternatively, Producer Coalition state that if the Commission gives principal emphasis to length and diameter of the pipeline, most major OCS systems will be found jurisdictional. Third, Producer Coalition state that if the Commission relies on the "central point of aggregation factor," the great bulk of OCS pipelines will be found non-jurisdictional except for the lines that run from the last major intersection offshore to the onshore terminus of a system. Producer Coalition state that while the other factors contained in the modified primary function test, i.e., (i) location of wells along all or part of the facility; (ii) geographic configuration; (iii) line pressure; and even (iv) the nature of the company that owns and operates the facilities—can be interpreted in a manner to support each of the above jurisdictional results, the results themselves cannot be reconciled with each other. Producer Coalition reason that use of the modified primary function test necessarily involves the selection of one dominant factor, which is determinative of the outcome. Producer Coalition state that that factor, however, becomes the "bright line" standard, which runs afoul of the [**25] Fifth Circuit's conception of reasoned decision-making.

n30 Because of this fact, Producer Coalition state that the Commission has effectively disregarded the behind-the-plant factor in determining the jurisdictional status of OCS facilities. See *Robin II*, 87 FERC P62,428; *Enron Gulf Coast Gathering*, 95 FERC P61,318; *Trunkline Gas Company, et al.*, 95 FERC P61,337 (2001); and *Seahawk Transmission Co.*, 95 FERC P61,342 (2001).

Commission response

The above line of arguments largely represents a collateral attack on the Commission's reasoning in *Sea Robin* and is rejected for that reason. In addition, Indicated Shippers and Producer Coalition misread the July 25 Order. For both the *Sea Robin* and *Transco* systems, all relevant criteria of the *Farmland* test, as modified with respect to offshore facilities, were afforded appropriate consideration. In this case, not all factors pointed to the same primary function — [**26] a result commonly encountered in applying our multi-factor test — thereby compelling the Commission to weigh each factor to balance the conflict presented. In the July 25 Order, in addition to the location of points of aggregation, the Commission found that the configuration of the facilities, the lack of compression, and the size and scope of the pipelines also demonstrated a **gathering** function. n31 The Commission found that the absence of processing plants was of little value in guiding the determination on the primary function of the facilities. n32 Although the Commission did identify a single, central point of aggregation, the primary function finding did not rest solely on this feature (or on any other single factor) of the system. The claim that under our primary function test, the Commission is compelled to select a single factor and let it dominate to determine jurisdiction, is rejected.

n31 96 FERC at 61,459.

n32 *Id.*

C. Challenges to the application of the primary function test [**27]

1. Configuration

Indicated Shippers state that even if the *Sea Robin* "central point of aggregation" analysis is lawful, the Commission's

selection of North High Island Block 10 as the demarcation points is inappropriate. Indicated Shippers states that Map 5W-B reflects the many smaller pipeline facilities forming "Y" configurations along the North High Island system and going out to the actual wells. Indicated Shippers state that the Commission should not ignore the configuration of these upstream facilities, which aggregate gas and provide the **gathering** function on the system. Indicated Shippers state that the facilities downstream of these smaller lines should be treated as transmission.

Indicated Shippers state that the location of wells, for the most part, appear to be remote from Transco's facilities. Indicated Shippers state that production is brought to Transco in smaller **gathering** lines. Accordingly Indicated Shippers state that, the **gathering** function is provided by other parties, whose facilities bring gas to Transco's trunk lines. For example, Indicated Shippers state that the map of the North High Island facilities shows numerous wells, purportedly served by Transco's [**28] facilities, that are located off Transco's lines. n33 Indicated Shippers state that Map 5W-B clearly illustrates the numerous small-diameter lines that actually interconnect the wells with the [*62,412] central line. Although Indicated Shippers agree with the Commission's finding that this alone would not disqualify the lines from a finding of **gathering** this is yet another piece of evidence that supports a finding that the subject facilities are transmission and not **gathering**.

n33 See Abandonment Application, Exhibit Z (map 5W-B).

Commission response

In Sea Robin, the Commission took note of the court's observation that, while the task in a case may be difficult, the Commission must squarely address the fact that the demarcation point between **gathering** and transmission may be located at a point internal to the overall system. n34 The Commission explained that the most logical demarcation point may be the "coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter [**29] line for further delivery to market." n35 As noted by Indicated Shippers, for every offshore system, there are multiple Y junctions, from the first offshore interconnection point to the junction at which the line furthest seaward is tied back in. The task then is to determine which of these several Y interconnects may merit the distinction of being the point of aggregation at which **gathering** ceases and transmission starts. A primary function review of the traits of all potential legs and trunks is required.

n34 92 FERC P61,072 at 61,290.

n35 92 FERC P61,072 at 61,290.

The 24-inch Line C interconnects in High Island Block 10 with a 12 mile 16-inch line and with three short four-inch lines. The Commission found that while Line C retains its 24-inch diameter downstream of this point, it nevertheless serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore. Although [**30] the North High Island Block 10 point does not exhibit as strong an indication of a marked physical change in facilities as was the case in Sea Robin, n36 the Commission found that it functions as an aggregation point that may be interpreted as indicating a demarcation of **gathering** and transmission functions. The configuration of this point implied a transition from **gathering** to transmission, a finding that was accepted only after applying the multi-factor methodology to the rest of Transco's facilities.

n36 In Sea Robin, the central point of aggregation was a manned offshore platform at which two smaller lines merged into a single larger line, significant compression facilities were located on the platform, and the platform was situated as a point geographically central to the Sea Robin system.

2. Size

The North High Island subsystem consists of approximately 174 miles of 4 to 30-inch pipeline. The majority of the facilities are relatively small, with the lines ranging from 4 to 24-inches in diameter. Upstream from [**31] the Block 10 point, the length and diameter of the numerous pipelines are short and small compared to the facilities found to be **gathering** in Sea Robin. The West Cameron subsystem is different than the North High Island subsystem. It consists of a single line made up of approximately 33 miles of 16-inch and 1.75 miles of 12-inch contiguous pipeline.

Indicated Shippers state that although *EP Operating Co. v. FERC*, n37 stands for the proposition that the Commission should not improperly overemphasize the length of the pipeline in its primary function analysis, length is still an important factor to consider. Indicated Shippers complain that in the July 25 Order, the Commission failed to take into account the overall length of the pipeline in its determination that the facilities upstream from the Block 10 are **gathering**. Indicated Shippers state that *Seahawk Shoreline System*, n38 illustrates that 12–24 inch pipeline facilities can qualify as transmission facilities.

n37 876 F.2d 46 (5th Cir. 1989).

n38 93 FERC P61,097 (2000) order denying reh'g, 95 FERC P61,342 (2000).

[**32]

Commission response

The Commission has adopted no bright line test regarding the size of jurisdictional offshore facilities. Although size generally correlates with function, large offshore facilities need not be summarily disqualified from **gathering** status if the other characteristics of the facilities are indicative of a **gathering** function. n39 Facilities as large as typical transmission lines may nevertheless be found to be **gathering** when other primary function factors demonstrate characteristics consistent with **gathering**. n40 Likewise following review of the Farmland factors, we have also determined that systems [*62,413] smaller than these perform a transmission function. n41

n39 See *Amerada Hess*, 52 FERC P61,268 (1990) (discussion of and response to *EP Operating v. FERC*, 876 F.2d 45 (5th Cir. 1989). See also *Viosca Knoll*, (finding a relatively long, large line **gathering**).

n40 Offshore, a 28-inch diameter line has been found to be **gathering**. *Exxon Corporation*, 45 FERC P61,436 (1988). However, that diameter was found in 9.5, 7.9, and 6.1-mile segments of a 36.7-mile system that was producer owned, carried only sour gas, included no compression, and performed production as well as **gathering**.

[**33]

n41 See, e.g., *Louisiana Intrastate Gas Corporation*, 69 FERC P61,022 (1994) (a system composed of 1.34 miles of 4-inch diameter pipe and 21.94 miles of 16-inch diameter pipe that serves to carry gas from OCS production areas to shore).

In this case, the Commission applied the several factors of the primary function test. Not all factors were found to be relevant or uniform, and certain factors exhibited more value or weight than others. The subject lines' large diameters, a usual indicator of a transmission function, was outweighed by other characteristics denoting a **gathering** function. The Commission affirms the prior determination that on balance the factors indicate that the facilities to be abandoned perform primarily a nonjurisdictional **gathering** function.

3. Pressure

Indicated Shippers argue that the pressure ranges of the North High Island facilities located at or upstream of the North High Island Block 10 interconnect, between 800 and 1300 psig, also indicate a transmission function. Indicated Shippers state that these pressure ranges reflect neither the very high [*34] nor low operating pressures frequently seen in **gathering** lines. Indicated Shippers state that the absence of compression does not undermine this view: it simply reflects that compression was unnecessary, and sheds no light on whether the facilities are **gathering** or transmission.

Commission response

There is no compression located along the North High Island facilities located at or upstream of the North High Island Block 10 interconnect, which means that the systems operating pressures are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a **gathering** function, unlike compression, which is typical of a transmission function. While these pressures would indicate a transportation function onshore, they must be viewed, here, in the offshore context. These pressures are consistent with the nature of offshore production and comparable to operating pressures of other offshore facilities found to be **gathering**. n42 Accordingly, the Commission

affirms the prior determination that the pressure factors indicate that the facilities to be abandoned located at or upstream of the North High Island Block 10 interconnect, perform [**35] primarily a nonjurisdictional **gathering** function.

n42 See, e.g., Northern Natural Gas Company, 93 FERC P61,101 (2000) (offshore facilities operating at pressures between 1,050 and 1,200 psig found **gathering**) and Tarpon Transmission Company, 78 FERC P61,278 (1997) (offshore facilities operating at pressures between 1,100 and 1,250 psig found **gathering**).

4. Shallow water factor

Indicated Shippers point out that the OCS Policy Statement n43 provides that new facilities located in water depths of 200 meters or greater will be presumed to be **gathering**. n44 Indicated Shippers state that the Commission failed to give any weight to the fact that the North High Island facilities located at or upstream of the North High Island Block 10 interconnect do not extend to the deep waters of the OCS.

n43 Gas Pipeline Facilities and Services on the Outer Continental Shelf – Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC P61,222 (1996), order dismissing reh'g, 75 FERC P61,291 (1996) (Policy Statement).
[**36]

n44 Id. at 61,757.

Commission response

As noted in the July 25 Order, the OCS Policy Statement added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more. n45 The OCS Policy Statement creates a presumption that these deep water facilities are **gathering** facilities up to the point or points of interconnection with the interstate pipeline grid. There is no corollary rebuttable presumption that facilities located in shallow water are transmission. Rather, the Commission considers a facility's location in shallow water as one among several criteria in assessing the primary function. While almost all NGA-regulated pipe is located in shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and **gathering** facilities. Accordingly, a particular facility's placement in shallow water, standing alone, is a poor predictor of that facility's primary function (in contrast, in deep water, almost all facilities are engaged in production or **gathering**). The shallow water location [**37] must be viewed in the context of a facility's other characteristics in order to reach any meaningful assessment of its primary function. In this case, the shallow water location of the subject facilities was not as substantial a factor as the facilities' other characteristics.

n45 96 FERC at 61,456.

5. Integrated Pipeline System

Indicated Shippers believe that the nature of Transco's integrated pipeline system provides strong evidence in support that the primary [*62,414] function of Transco's entire North High Island System continues to be transmission. Indicated Shippers state that there is no reasoned basis to conclude that the primary function of one portion of an integrated system is **gathering**, and the other is transmission.

Commission response

In Sea Robin the Commission rejected the position that the Commission should consider an entire pipeline system **gathering** if the "integrated" nature of the system, as a whole, is designed to transport gas from production areas to onshore locations. The [**38] Commission explained that such a finding would violate the Commission's responsibility to draw jurisdictional lines, even when the end of **gathering** is not easily located, as for example, when it occurs at a point internal to an overall system. n46 For the same reason, we reject the contention that the integrated nature of Transco's system precludes us from finding that a portion of the system is **gathering**.

n46 92 FERC P61,072 at 61,290.

6. Historical certification and business purpose

Indicated Shippers argue that the Commission erred in its conclusion that the historical certification of Transco's facilities is not relevant to the current primary function of the facilities and in failing to give due weight to the business purpose of the subject facilities. Indicated Shippers are in agreement with the Commission in that the "business purpose" of the subject facilities is only one factor to consider in determining the primary function of the facilities. However, Indicated Shippers argue that [**39] because the business purpose of the pipeline provides strong evidence of a pipeline's functionalization, it should be considered a central factor. Indicated Shippers argue that where the owner of pipeline facilities is in the business of transportation for hire, and has historically operated the pipeline as an integrated interstate pipeline system, the primary function of the pipeline is most likely transmission.

Commission response

In the past, when a pipeline applied for a certificate to construct facilities, the Commission did not inquire into the pipeline's prospective use of the facilities before issuing the certificate. Consequently, many facilities that actually may perform a **gathering** function originally were constructed under NGA section 7 certificates. Therefore, until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined. n47

n47 See, CNG Transmission Corporation, 67 FERC P61,330, at 62,177 (1994).

[**40]

The offshore facilities at issue here were installed under NGA certificate authority and have continued to be functionalized by Transco as transmission for many years. Nonetheless, in making jurisdictional determinations on the OCS, and indeed, onshore as well, the physical characteristics of the particular pipeline systems are the more significant factors, and each determination must be made on the basis of its own specific fact situation. n48 Here, such non-physical aspects are not compelling enough to overcome the overwhelming physical evidence

n48 Sea Robin, 127 F.3d 365 at 371.

D. Challenge to the rate adjustment

Transco seeks rehearing of the requirement that it adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000. n49 Pending the Commission's action on rehearing, Transco also requests that the Commission grant a limited stay of the July 25 Order's rate adjustment requirement. As discussed below, the request for [**41] rehearing on this issue is granted. Therefore, the motion for stay is moot.

n49 96 FERC at 61,461, Ordering paragraph E.

Transco states that having now received the Commission's Order granting abandonment and transfer, Transco and WGP must make the modifications necessary to permit operation of these facilities on a stand-alone basis, and must negotiate contracts to govern post-spin down services on these facilities. Transco states that for a variety of reasons, it does not believe that such transfer will close until well into 2002, at the earliest.

Transco states that the July 25 Order contains no findings under either NGA Sections 4 or 5 that the subject facilities will not be in service through the test period in Docket No. RP01-245-000, or that Transco's rates to be effective September 1, 2001, will be unjust or reasonable. Transco states that Section 5(a) requires such findings before the Commission may lawfully adjust a pipeline's rates. n50 Transco states that to require Transco to [**42] remove the cost of these facilities from jurisdictional rates while such facilities continue to render jurisdictional service would be unlawful under these NGA sections, which require that a pipeline be afforded an opportunity to earn a fair return on its investment in jurisdictional [*62,415] facilities and to recoup its costs in rendering jurisdictional service. n51

n50 15 U.S.C. 717d(a). Transco cites *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578–79 (D.C. Cir. 1993).
n51 Transco cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

KeySpan, et al., argue that the timing of the transfer is a matter within the control of the contracting parties and Transco's customers should not be required to continue to pay for facilities that are not necessary to provide their jurisdictional services simply because the transfer has not occurred as expeditiously as Transco had planned.

Commission response

In its application in Docket No. [**43] CP01–103–000, Transco proposed to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of [the July 25 Order], or at a mutually agreeable date thereafter. Thus, the transfer was expected to occur as early as August 31, 2001. However, the transfer did not take place at that time. The test period in Transco's current general rate proceeding in Docket No. RP01–245–000 expired on August 31, 2001, and the proposed rates became effective on September 1, 2001. n52 The subject facilities continue to be owned by Transco, and are being operated under color of a certificate issued by the Commission. The Commission's regulations only require removal of the costs of facilities that will not be in service as of the end of the test period. n53 Hence, the Commission's regulations and ratemaking policies did not require that Transco remove the cost of those facilities and costs from the rates that went into effect on September 1, 2001, subject to refund. Accordingly, rehearing is granted. The order in Docket No. RP01–245–005, issued concurrently with the instant order, discusses the effect of the refunctionalization [**44] of the subject facilities to **gathering** on Transco's rates.

n52 On March 1, 2001, in Docket No. RP01–245–000, Transco filed revised tariff sheets to reflect a general NGA section 4 rate increase. The Commission exercised its discretion to accept and suspend the rates to take effect on September 1, 2001, subject to conditions and subject to refund and the outcome of a hearing. *Transcontinental Gas Pipe Line Corporation*, 94 FERC P61,360 (2001). On August 31, 2001, in Docket No. RP01–245–003, Transco filed a motion to place the suspended tariff sheets into effect on September 1, 2001. Among other things, Transco stated that it had eliminated the costs associated with facilities not in service as of August 31, 2001, but had not reflected any adjustments in the compliance rates for the subject facilities for which abandonment was granted. By order issued September 27, 2001, the Commission accepted the revised tariff sheets to be effective September 1, 2001, subject to refund, the outcome of the hearing established in Docket No. RP01–245–000, and the certificate proceedings in Docket Nos. CP01–34–000, CP01–103–000 and CP01–368–000. *Transcontinental Gas Pipe Line Corporation*, 96 FERC P61,345 (2001) (September 27 Order). The Commission also directed Transco to file revised tariff sheets, within 15 days of the date of issuance of that order, reflecting the removal of the costs of the facilities abandoned in the certificate proceedings.

On October 9, 2001, in Docket No. RP01–245–005, Transco filed a Request For Clarification Or, In The Alternative, For Rehearing, of the September 27 Order (October 9 Request). Transco also requested a limited stay that sought an extension of time within which to comply with the September 27 Order. The motion states that because Transco's books and records would have to be reconstructed in order to calculate the costs required by the Commission's Order, compliance is not possible within the 15–day deadline. On November 6, 2001, an extension of time was granted until 30 days after the Commission acts on Transco's October 9 Request. The Commission order in Docket No. RP01–245–005 is being issued concurrently with the instant order.

[**45]

n53 Section 154.303(c)(2) of the Commission's regulations states:

When a pipeline files a motion to place the rates into effect, the filing must be revised to exclude the costs associated with any facilities that will not be in service as of the end of the test period . . . At the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service . . .

Nonetheless, the Commission's finding in the July 25 Order that Transco must remove the costs of the facilities that it will abandon from its prospective rates was grounded on the sound ratemaking principal that just and reasonable jurisdictional rates cannot be based on the costs of facilities not owned by the pipeline, not in service, and not needed

to provide service to jurisdictional customers. Thus, it would seem unjust and unreasonable for Transco to continue to charge rates designed to afford Transco the opportunity to recover the cost of and earn a fair return on an investment in the subject facilities at such time that it no longer owns them and no longer uses them to provide jurisdictional [**46] service. Accordingly, we shall direct Transco to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

III. Request for clarification

Indicated Shippers ask that the point at which **gathering** ends and transmission begins be better identified than in the July 25 Order. [**62,416] Indicated Shippers state that simply identifying a particular platform is not sufficient because a more specific identification becomes critical for new interconnections to the platform. Indicated Shippers state that if Transco deems the interconnect to be upstream of the point of demarcation between **gathering** and transmission, the pipeline and its affiliate could argue that a **gathering** fee must be paid for a very short haul of gas from one point on the platform to another. In order to avoid this sort of rate stacking, Indicated Shippers request that the Commission clarify that all of the facilities at the platform at which **gathering** ends [**47] are to be treated as transmission; and, only facilities upstream of the platform should be **gathering**. In this way Indicated Shippers state that, there will be no question that new interconnects at the platform will not bear a **gathering** charge for short hauls on the platform.

Commission response

The Commission clarifies that facilities upstream of the jurisdictional demarcation platform have been found to be **gathering**, and facilities downstream have been found to be transmission. However, the Commission denies the request to clarify that all of the facilities at the jurisdictional demarcation platform are to be treated as transmission. An OCS platform may be constructed to serve many functions, such as an aggregation point for numerous lines, and/or to provide separation, dehydration, and other production and transmission services. Basically, facilities on the platform involved with bringing gas to the platform are **gathering** and facilities involved in sending gas toward shore are transmission. Facilities that separate or dehydrate are also performing production and **gathering** functions. Although unusual in offshore situations, compression facilities would most likely be involved in [**48] transmission. New interconnections to the platform should be functionalized accordingly.

The Commission orders:

(A) The requests for rehearing are granted or denied as discussed in this order.

(B) Pursuant to section 5 of the Natural Gas Act, Transco is directed to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

(C) Within 15 days after WGP acquires the subject facilities deemed **gathering**, WGP must file an OCSLA Reporting Form and the conditions of service for each shipper served with respect to the acquired facilities (and the services rendered through those facilities) and continue to do so thereafter, in accordance with section 330.3 of the Commission's regulations.

By the Commission.