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ARCO Pipe Line Company,
Order on Reconsideration and Dismissing
Motion for Stay as Moot
55 FERC ¶ 61,420 (1991)

In ARCO Pipe Line Company, 55 FERC ¶ 61,420 (1991), the Commission found upon further consideration that it did not have authority over oil pipeline abandonments, and thus, did not have the authority to suspend ARCO's cancellation of tariffs for seven months. (ARCO Pipe Line Company, 55 FERC ¶ 61,153). The Commission stated that it does not have oil pipeline abandonment jurisdiction and, therefore, could not and would not suspend the abandonment filings in this case. (55 FERC at 62,263).

The Commission noted that the Interstate Commerce Act does not grant it any authority over oil pipeline abandonments. In this filing, ARCO proposed abandonment of a segment of its pipeline. The Commission distinguished ARCO from its earlier findings in Cheyenne Pipeline Company, 19 FERC ¶ 61,077 (1982), where it suspended cancelled tariffs for seven months and where the line would remain in operation by another pipeline. (55 FERC ¶ 61,420 at 62,263).

The Commission added that in the Initial Decision in Kuparuk Transportation Company, 45 FERC ¶ 63,006 (1988), the Administrative Law Judge stated that unlike natural gas pipelines, oil pipelines do not need Commission approval to permanently abandon service. (Id. at 65,042).

Accordingly, the Commission vacated its order of April 30, 1991, (55 FERC ¶ 61,153) which had ordered a seven-month suspension period.

ARCO-RECONSIDERATION

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ARCO Pipe Line Company,
Order on Reconsideration and Dismissing
Motion for Stay as Moot,
55 FERC ¶ 61,420 (1991)

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[¶ 61,420]

ARCO Pipe Line Company, Docket Nos. IS91-26-000, IS91-27-000, and IS90-34-000

Order on Reconsideration and Dismissing Motion for Stay as Moot

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(Issued June 13, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

On April 30, 1991, the Commission issued an order which, among other things, accepted for filing and suspended for seven months, to be effective December 1, 1991, subject to refund and investigation, certain tariffs and tariff supplements filed by ARCO Pipe Line Company (ARCO) relating to the termination of service on a certain portion of its petroleum products pipeline system.[1] On May 6, 1991, ARCO filed a petition for review of the April 30, 1991 order with the United States Court of Appeals for the District of Columbia Circuit asserting that the Commission lacks statutory or other authority to regulate oil pipeline abandonments. On May 6 1991, ARCO also filed a motion for stay of the Commission's April 30, 1991 order pending judicial review. Upon further consideration of the jurisdictional issue presented in this case, the Commission finds that it does not have jurisdiction over oil pipeline abandonments, and, thus, did not have the authority to suspend ARCO's cancellation tariffs. Accordingly, this order: (1) vacates the Commission's April 30, 1991 order and (2) dismisses ARCO's motion for stay as moot.

Background

On January 29, 1991, ARCO filed certain tariffs and tariff supplements, to be effective May 1, 1991, to cancel its rates for the transportation of petroleum products by pipeline from: (1) Ardmore, Oklahoma to points in Kansas and Missouri, (2) Irving, Texas to Kansas City Terminal, Kansas and Carrollton Terminal, Missouri, and (3) Houston, Texas to Kansas City Terminal, Kansas, and Carrollton Terminal and Mexico Terminal, Missouri. ARCO filed the tariffs because it proposed to take a portion of its petroleum products pipeline system out of service as of May 1, 1991.

On April 18, 1991, in Docket No. SP91-12-000, ARCO filed an application for special permission to file certain tariff supplements on ten days' notice. ARCO requested special permission to file supplements to postpone the effective date of its tariff cancellations from May 1, 1991, to September 1, 1991, for the purpose of completing the delivery of linefill out of the affected portion of the system. ARCO stated that due to operational constraints it would not be possible to deliver all of the linefill out of the affected portion of the system by April 30, 1991. ARCO also requested special permission to allow less than statutory notice for the filing of an exception to its rules and regulations to provide that ARCO will not accept nominations for movements to the locations to be canceled on or after May 1, 1991. On April 19, 1991, the Oil Pipeline Board issued an order granting ARCO special permission to file these tariff supplements on ten days' notice.[2]

On April 19, 1991, ARCO filed the Postponement Supplements and Exception Supplements for which it was granted special permission to file on less than ten days' notice. Sinclair Oil Corporation (Sinclair), an independent refiner and marketer of motor gasoline and diesel fuel, that is a shipper on ARCO's system, filed protests to ARCO's January 29, 1991 and April 19, 1991 filings requesting that the filings be suspended for seven months.

On April 30, 1991, the Commission issued an order accepting for filing and suspending for seven months, to be effective December 1, 1991, subject to refund and investigation, some of the tariffs and tariff supplements filed by ARCO on January 29, 1991 and April 19, 1991. The order also rejected some of the tariff supplements as moot and consolidated the filings with the ongoing rate increase proceeding in Docket No. IS90-34-000.

In its April 30, 1991 order, the Commission applied the standards in *Buckeye Pipeline Company*[3] and *Cheyenne Pipeline Company*.[4] In *Buckeye* the Commission stated that it generally suspended oil pipeline tariffs for one day. However, the Commission further stated that there may be cases that arise in which an exception to the one day rule is warranted, namely, when the Commission has reason to believe that: (1) the particular unadjudicated oil pipeline rate increase there involved may have significant anticompetitive effects or impose undue hardship on a shipper or a group of shippers, and (2) a suspension for the maximum period permitted by the Interstate Commerce Act might well have sufficient mitigative effect to render such a suspension worthy of consideration.

In *Cheyenne* the Commission suspended the proposed tariff changes and cancellations for seven months based on an analysis of the rele-

[1] *ARCO Pipe Line Company*, 55 FERC ¶ 61,153 (1991).

[2] *ARCO Pipe Line Company*, 55 FERC ¶ 62,057 (1991).

[3] 13 FERC ¶ 61,267 (1980).

[4] 19 FERC ¶ 61,077 (1982).

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vant section of the ICA including sections 1(4), 3(1), 15(1), and 15(7) and in consideration of the claims of unfair and monopolistic practices. The Commission found that "[i]ssues concerning the anticompetitive effect of the proposed change, and potential hardship on the shippers indicate that a longer suspension could provide sufficient mitigative effect to warrant such a suspension."[5] The Commission found that the standards established in *Buckeye* and *Cheyenne* were satisfied in this case where Sinclair asserted that ARCO's proposed tariffs may have serious anticompetitive effects, as well as cause serious economic harm. In view of the potential hardship on Sinclair and the fact that a suspension for the maximum period could provide a sufficient mitigative effect, the Commission suspended some of ARCO's tariffs for seven months.

On May 6, 1991, ARCO filed a motion for stay of the April 30, 1991 order. On May 13, 1991, Sinclair filed an answer opposing ARCO's motion for stay pending judicial review.

ARCO's Motion for Stay

ARCO requests a stay of the Commission's April 30, 1991 suspension order pending judicial review of that order. ARCO requests expedited action on the stay request in view of the ongoing financial injury imposed on it. ARCO asserts that it satisfies the four-part balancing test that has been used to determine whether an administrative agency's order should be stayed. ARCO asserts that the four-part test is: (1) the likelihood of success on the merits, (2) irreparable injury in the absence of a stay, (3) consideration of possible offsetting harm to other parties to the proceeding, and (4) that the public interest favors the stay.[6]

ARCO asserts that there is a likelihood of success on the merits because it claims that the Commission lacks jurisdiction to suspend, disapprove or prevent an abandonment of service by an oil pipeline carrier.

ARCO asserts that not only was the order outside the Commission's statutory jurisdiction, but to the extent it was undertaken without Congressional authorization, it constituted a violation of ARCO's due process and just compensation rights under the Fifth Amendment to the Constitution. ARCO asserts that the order is unlikely to survive judicial review.

In addition, ARCO asserts that it has met the other prerequisites of a stay. ARCO argues that it is clearly faced with serious and irreparable injury if the order is not stayed. ARCO estimates its minimum financial loss from continuing to provide service at almost $190,000 per month. ARCO asserts that, by comparison, the alleged irreparable injury to Sinclair consists of broad, generalized statements about Sinclair's supposed inability to find alternative means of serving its petroleum product facilities in central Missouri. Finally, ARCO asserts that the public interest is not served by enforcing an order that exceeds the Commission's statutory authority and violates the Fifth Amendment to the extent it requires ARCO to continue operating at a severe loss for seven months.

In sum, ARCO asserts, each of the relevant factors supports the issuance of a stay pending judicial review in this case. ARCO asserts that such a stay will, at a minimum, permit ARCO to go forward with its planned termination of this service while the Court of Appeals determines the validity of any further investigation by the Commission into this abandonment.

Sinclair's Answer

On May 13, 1991, Sinclair filed an answer opposing ARCO's motion for stay pending judicial review. Sinclair asserts that the Commission's consideration of motions for stay pending judicial review is governed by section 705 of the Administrative Procedure Act:

> In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, i.e., the stay will be granted if the Commission finds that "justice so requires." Under that standard, we consider whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies.[7]

Sinclair further asserts that with respect to irreparable injury, the Commission has held that:

> It is well settled that in and of itself, economic loss does not constitute irreparable harm, and that monetary loss may constitute irreparable harm, only where the loss threatens the very existence of the movant's business.[8]

Sinclair asserts that ARCO cannot make any of the showings required by the standard discussed above. Sinclair asserts that far from suffering an irreparable injury, the data which ARCO itself has provided in this proceeding indicates that ARCO will continue to engage in profitable activities over the next seven months

[5] 19 FERC ¶ 61,077, at p. 61,122 (1982).

[6] *Citing, Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 842-3 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[7] *Citing, City of Fort Smith*, 47 FERC ¶ 61,116, at p. 61,345 (1989).

[8] *Citing, Iroquois Gas Transmission System, L.P.*, 54 FERC ¶ 61,103 (1991).

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even if the request for stay is denied. In addition, Sinclair asserts that ARCO cannot demonstrate that the alleged loss it claims it will experience, unless a stay is granted, threatens the very existence of its business. Sinclair asserts that on a balancing of harms, the requested stay would result in a cessation of Sinclair's terminal operations and most likely, the end of the case. Sinclair asserts that a stay which awards the losing party a victory on the merits is hardly appropriate.

Finally, as to ARCO's contention that it is likely to succeed on the merits, Sinclair asserts that the antidiscrimination provisions of the Interstate Commerce Act lie at the foundation of the fair regulatory treatment Congress prescribed for interstate common carriers. Sinclair asserts that although ARCO may be free to go out of the pipeline business entirely, so long as it maintains a pipeline system, it is subject to the Commission's jurisdiction and may not discriminate in the terms and conditions through which it provides carriage.

Discussion

Upon further review of the jurisdictional issue presented in this case, the Commission finds that it does not have jurisdiction over oil pipeline abandonments, and, thus, does not have the authority to suspend cancellation tariffs.

The Interstate Commerce Act did not expressly grant the Commission any authority over oil pipeline abandonments. This contrasts with the fact that Congress gave the ICC specific abandonment authority over railroads through the Transportation Act of 1920, codified in section 1(18) of the ICA. Since the ICA did not grant the ICC or the Commission authority over oil pipeline abandonments, the next step is to reanalyze the authority the Commission did use to suspend the tariffs and tariff supplements in *ARCO* for seven months, namely, *Cheyenne Pipeline Company, Buckeye Pipeline Company*, sections 1(5), 2 and 3(1) of the ICA, which are the sections that Sinclair claims the tariff filing violates, and section 15(7), which allows the Commission to suspend tariffs for seven months.

Upon closer examination, the facts in *Cheyenne* can be distinguished from the facts in *ARCO*. In *Cheyenne* the Commission did, among other things, suspend cancellation tariffs for seven months. However, Cheyenne Pipeline Company was canceling service on a portion of pipeline that it was selling to Kaneb Pipeline Company. Kaneb, in turn, filed tariff changes for the portion of Cheyenne's pipeline that it purchased that would result in the reversal of flow on the line. These facts are clearly distinguishable from the facts in *ARCO*. In *ARCO* a certain segment of pipeline is being abandoned completely. No service will be available to any shipper on that segment of line. Moreover, as Commissioner Sheldon stated in a dissenting opinion, "[s]imply because the proposed acquisition and changed operation were timed to occur simultaneously does not bestow upon this Commission the authority to regulate the direction in which the pipeline is to be operated."[9]

All cases decided at the Commission since the *Cheyenne* case have come to a different conclusion. In *Williams Pipe Line Company*, 21 FERC ¶ 61,260 (1982), the Commission stated that "Because control over abandonments is so central a cornerstone of effective regulation, we are loath to confess that we lack it here. Yet it seems clear that we do lack it."[10] In its review of the *Williams* case in *Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission*, 734 F.2d 1486 (1984), *cert. denied, sub nom., Williams Pipeline Company v. Farmers Union Central Exchange, Inc.*, 469 U.S. 1034 (1984), the United States Court of Appeals for the District of Columbia Circuit simply stated that "pipeline companies may abandon service at will (which would be unlawful for many other utilities)."[11]

Further, in an initial decision in *Kuparuk Transportation Company*,[12] the ALJ addressed the issue of oil pipeline abandonments. The ALJ stated that "[u]nlike natural gas pipelines, however, oil pipelines . . . do not need approval to terminate or permanently abandon service."[13] Therefore, the *Cheyenne* case should be treated as an anomaly with no precedential value in light of the subsequent Commission cases and the federal appeals court opinion containing unequivocal statements that the Commission does not have jurisdiction over oil pipeline abandonments.

In addition, a closer examination of the *Buckeye* case discussed above reveals that the test for determining whether tariffs should be suspended for one day or seven months applies only to "unadjudicated oil pipeline rate increases." No rate increase is involved here. ARCO is simply abandoning service.

An analysis of the sections of the ICA cited by Sinclair and relied on by the Commission in its April 30, 1991 order reveals that they do not apply to the circumstances of this case.

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[9] 19 FERC at p. 61,124.

[10] 21 FERC at p. 61,690.

[11] 734 F.2d 1486, 1509, n.51.

[12] 45 FERC ¶ 63,006 (1988), *aff'd in part and modified in part*, 55 FERC ¶ 61,122 (1991).

[13] 45 FERC at p. 65,042.

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Section 1(5) of the ICA requires that a common carrier's charges for transportation must be just and reasonable. This section is not applicable to the *ARCO* case because no charges are involved. ARCO is simply abandoning service. Section 2 of the ICA prohibits a common carrier from giving special rates or rebates to any particular shipper or shippers. Any common carrier that gives special rates or rebates to a shipper is deemed guilty of unjust discrimination. Section 3(1) of the ICA prohibits a common carrier from giving any shipper an undue preference, or subjecting a shipper to any undue prejudice or disadvantage. These two provisions of the ICA are designed to ensure that shippers are not treated in an unduly discriminatory manner. In the *ARCO* case, Sinclair is losing service by the abandonment when the cancellation tariffs take effect. Finally, section 15(7) of the ICA allows the Commission to suspend a rate, or regulation or practicing affecting a rate, for seven months, pending an investigation into the lawfulness of the rate, or the regulation or practice. The section does not apply to cancellation of tariffs resulting in the termination of service. A cancellation tariff is neither a rate nor a practice or regulation *affecting* a *rate*.

Accordingly, for the reasons discussed above, the Commission will: (1) vacate the April 30, 1991 order, (2) dismiss ARCO's motion for stay of the April 30, 1991 order as moot.

The Commission orders:

(A) The Commission's April 30, 1991 order in the above-captioned dockets is vacated.

(B) ARCO's motion for stay of the April 30, 1991 order is dismissed as moot.

Commissioner Moler *dissented* with a separate statement attached.

Elizabeth Anne MOLER, Commissioner, *dissenting*:

Barely six weeks after finding that it has jurisdiction over ARCO's termination of service to Sinclair, the Commission — on pleadings aimed at whether its earlier order should be stayed —reverses itself and finds that it does not have that jurisdiction. Given the importance of the question involved, I would prefer that we follow staff's recommendation and allow the parties an opportunity to fully brief the jurisdictional issue.

The question here — whether and to what extent the Commission may act to prevent the abandonment of service — is of major importance. In these circumstances, I believe that the additional effort to provide parties the time to fully brief the jurisdictional question is warranted. Thus, while expressing no opinion as to the merits of the question before us, I dissent.

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[1] *Process Gas Consumers Group v. FERC*, 930 F. 2d 926 (D.C. Cir., 1991),(PGC II).

[2] Filed, pursuant to 18 C.F.R. § 154.38 (d)(5), on June 3, 1991.

[3] In *Process Gas Consumers Group v. FERC*, 866 F.2d 470 (D.C. Cir. 1989) (PGC I).