

UNITED STATES OF AMERICA 125 FERC ¶ 63,019
FEDERAL ENERGY REGULATORY COMMISSION

Oasis Pipeline, L.P.
Oasis Pipeline Company Texas, L.P.
ETC Texas Pipeline Ltd., Oasis Division

Docket No. IN06-3-008

PARTIAL INITIAL DECISION GRANTING SUMMARY DISPOSITION

(Issued November 18, 2008)

APPEARANCES

William S. Scherman, Esq., John N. Estes III, Esq., David J. Hill, Esq., Gerald Richman, Esq., Jason Fleischer, Esq., Robert S. Fleishman, Esq., William L. Massey, Esq. and Thomas P. Mason, Esq. on behalf of Oasis Pipeline, L.P., Oasis Pipeline Company Texas, L.P., and ETC Texas Pipeline Ltd., Oasis Division

Anna V. Cochrane, Esq., Lee Ann Watson, Esq., John R. Kroeger, Esq., Robert K. Crowe, Esq., Wesley J. Heath, Esq., David Tobenkin, Esq., Nicole Brisker, Esq., Thomas Pinkston, Esq. and Andrej S. Bajuk, Esq. on behalf of Federal Energy Regulatory Commission

BRUCE L. BIRCHMAN, Presiding Administrative Law Judge

1. Consistent with 18 C.F.R. § 385.217(b), (c), and (d), this Initial Decision is a partial Initial Decision and embodies my ruling at oral argument on November 12, 2008 which granted Oasis' motion for summary disposition on stipulated Issue I of the Revised Joint Stipulation of Issues (RJS), FERC (2008). For the reasons set forth below, I find that there is no genuine issue of material fact with regard to stipulated Issue I. I ruled that Oasis demonstrated that in deposition responses to inquiries by Oasis counsel, *and, on redirect, by Staff counsel*, Staff witness Norris agreed that interruptible interstate shippers under dual contracts issued by Oasis, including ETC Marketing Ltd., an affiliate of Oasis, were *not* similarly situated with interstate shippers who did not hold dual contracts. Given this lack of factual similarity which is a prerequisite to the establishment of undue discrimination, no genuine issue of material fact was present with regard to Staff's allegation that Oasis engaged in undue discrimination. In these circumstances, summary disposition is necessary and appropriate.

2. In short, to establish undue discrimination, it must be demonstrated that (1) there are at least two classes of shippers which are similarly situated, and that (2) one class of shippers is unduly preferred and the other class of shippers is unduly discriminated. Stipulated Issue I. under the RJS for adjudication is “Whether Oasis engaged in undue discrimination with respect to the provision of transportation services under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)?” Subparagraph B. further stipulates, “Whether Oasis dual contract arrangements are unduly discriminatory?”

3. In his direct testimony, Exhibit (Ex.) S-1, and his deposition testimony attached to Oasis’ motion for summary disposition, Staff witness Norris compared a class of interstate interruptible shippers under dual contracts executed by Oasis, referred to as “fill-in shippers”, with another class of interstate shippers who do not hold dual contracts, referred to as “stand alone” shippers. In deposition testimony, Norris answered “No” repeatedly to questions by Oasis counsel and, on redirect, by Staff counsel with regard to whether these classes of shippers were similarly situated. Overall and viewed in the light most favorable to Staff, Norris recognized that both classes of shippers were **not** similarly situated to one another. As the classes of shippers which he compared are not similarly situated, the requisite genuine issue of material fact to warrant adjudication is not present. Consequently, summary disposition is appropriate with regard to stipulated Issue I. In the circumstances, the hearing scheduled to commence on December 10, 2008 will adjudicate the remaining two stipulated issues set for hearing.¹

PROCEDURAL BACKGROUND

4. By an Order Establishing Hearing issued on May 15, 2008, 123 FERC ¶ 61, 168 (2008) the Commission established a hearing, *inter alia*, to determine whether Oasis Pipeline, L.P. and Oasis Pipeline Company Texas Ltd. (Oasis) violated Commission regulations governing service under § 311 of the NGPA. On August 4, 2008, the Chief Judge issued a Substitute Designation of Presiding Administrative Law Judge and designated me as the Presiding Judge in this case to take such action as may be required in the premises. At a prehearing conference held on November 8, 2008, I adopted a trial schedule under which Staff filed the direct testimony of expert witness Thomas J. Norris, Oasis filed answering testimony of expert witness Dr. John R. Morris and fact witness Paul McPheeters, and Staff filed rebuttal testimony of Mr. Norris. A Joint Stipulation of Issues (JS) was adopted on October 14, 2008, 125 FERC ¶ 63,003 (2008) and a Revised Joint Stipulation of Issues (RJS) was adopted on November 10, 2008, 125 FERC

¹ Under the RJS, Stipulated Issue II is “Whether Oasis overcharged shippers with respect to 184 interruptible transportation transactions.” Stipulated Issue III. is, “Whether Oasis improperly failed to file with the Commission or reference in its statement of operating conditions a Pipeline Capacity Lease and Commercial Operations Agreement.”

¶ 63,013 (2008). The RJS supersedes the JS and governs adjudication of the issues set for hearing by the Commission and as stipulated in the RJS. At a November 12, 2008 oral argument on Oasis' motion for summary disposition, I granted summary disposition on stipulated Issue 1. Under 18 C.F.R. § 385.217, this partial Initial Decision memorializes that ruling.

5. On October 29, 2008, Oasis filed three motions²: (1) a Motion for Summary Disposition with regard to stipulated Issue 1, which included as an attachment with excerpts from the deposition of Staff witness Norris on September 4, 5, and 8, 2008; (2) a Motion to Compel Production of Information Relating to an Enforcement Hotline Call; and (3) a Motion to Disqualify, or in the Alternative, Strike Portions of Testimony of Staff witness Norris. Staff filed an Opposition to Oasis' motion for summary disposition and answers to the other Oasis motions on November 10, 2008. My Order issued on November 7, 2008 convened an Oral Argument on November 12, 2008 to address these three motions. This partial Initial Decision addresses the Oasis Motion for Summary Disposition. I granted the motion for summary disposition. I also granted the motion under (2) which will be the subject of a forthcoming certification to the Commission with a request under 18 C.F.R. § 385.714 that the Commission authorize the disclosure of the information considered by Staff witness Norris. The motion under (3) was denied as stated below.

6. In the Commission's Order to Show Cause and Notice of Proposed Penalties, 120 FERC ¶61,086 (2007), the Commission found that "To prove the existence of undue discrimination or undue preference, it must be shown: (1) that two classes of customers are similarly situated and (2) that the two classes of customers are treated differently." 120 FERC at 61,485, ¶169, and n. 139 which, *inter alia*, cited Transwestern Pipeline Co. (Transwestern), 36 FERC ¶ 61,275, 61,433 (1986), ("undue discrimination is in essence an unjustified difference in treatment of similarly situated customers.") The Show Cause Order directed Oasis to show cause, *inter alia*, why the Commission should not find that Oasis unduly discriminated against nonaffiliated shippers and unduly preferred affiliated shippers in violation of § 284.9(b) of the Commission's regulations.

7. Staff's Brief Recommending Next Steps and Opposition to Respondents Request for Summary Disposition filed on February 14, 2008 (Staff Brief) alleged that Oasis had unduly discriminated against non-affiliated interruptible interstate shippers and unduly

² Oasis also filed on November 4, 2008, a motion to strike portions of the rebuttal testimony of Staff witness Norris essentially on the grounds that portions of the rebuttal were not proper rebuttal. In light of my ruling granting summary disposition on stipulated Issue I., I cancelled the oral argument scheduled to be convened on November 24, 2008 to ventilate the issues raised by this motion.

preferred affiliated interruptible interstate shippers from crosshaul transportation. Staff Brief at 60. The definition of undue discrimination cited by Staff was that quoted above from the *Transwestern* case. Staff Brief at 62 and n. 126.

8. The Commission's Order Establishing Hearing, 123 FERC ¶61,168 (2008), *inter alia*, established a hearing to determine whether Oasis unduly discriminated against nonaffiliated shippers and unduly preferred affiliated shippers in violation of § 284.9(b) of the Commission regulations governing service provided under §311 of the NGPA.

9. In his direct testimony, Ex. S-1 at 21, Staff witness Norris adopted the definition of undue discrimination set forth in the *Transwestern* case. Staff witness Norris concluded that Oasis allocated pipeline access in an unduly discriminatory manner as follows: "I conclude that Oasis Pipeline, in allocating pipeline access for transportation of interruptible interstate gas, unduly preferred its affiliate to the detriment of other shippers. Oasis Pipeline provided interstate crosshaul for the affiliate at times when it told non-affiliates no such capacity was available. The end result was unjustified disparate treatment that violated the Commission's rules." *Id.* at 22. In part, that conclusion was predicated upon his view that Oasis Pipeline had a "dual contract" program under which "Oasis Pipeline permitted customers with a firm intrastate contract to 'fill in' its contractual demand with transportation under an associated interstate interruptible contract. Oasis Pipeline's dual contract program had multiple ramifications, all of which favored dual contract holders and which worked to the detriment of non-dual contract holders. The result was that in allocating access to its pipeline for purposes of transporting interstate gas, Oasis Pipeline unduly preferred dual contract holders, and in particular, its affiliate to the detriment of non-dual contract holders." *Id.* at 23.

10. At the oral argument on November 12, 2008, I denied Oasis' motion to disqualify Staff witness Norris. I found "on balance that Mr. Norris does possess sufficient expertise to provide helpful testimony to assist the Trier of fact on the issues for which Staff has submitted testimony in this case." Transcript (Tr.) at 433.

11. In its motion for summary disposition, Oasis argues that Mr. Norris made the following four testimonial concessions in a deposition that uncontrovertibly establish that the discrimination issue set for hearing in this case—whether "Oasis Pipeline . . . unduly discriminated against nonaffiliated shippers and unduly preferred affiliated shippers in violation of section 284.9(b) of the Commission's regulations—must fail as a matter of law. Oasis Motion at 10, footnotes omitted.

First, Mr. Norris conceded that dual contract customers are not similarly-situated with customers who do not have dual contracts:

Q: Let's examine your contention that the dual contract arrangements were a form of undue discrimination, if we could for a minute. I

want you to — well, let's go back and establish a foundation. You agreed earlier today — and again, I'm not asking you for legal conclusions, just your understanding. You agreed earlier today that undue discrimination requires customers to be similarly situated; correct?

A: Yes.

Q: *Dual contract holders are not similarly situated with nondual contract holders; right?*

A: *That is correct.*

Norris Dep. Tr. 451:8-21 (emphasis added).

Second, Mr. Norris conceded that it was not unduly discriminatory for Oasis to allow dual contract arrangements:

Q: I want you to assume that dual contracts are available to affiliates and nonaffiliated on equal terms. Okay? [fn omitted]

A: Okay.

Q: *Does it constitute undue discrimination, per se, for a pipeline under those circumstances to allow dual contract arrangements?*

A: *No, it does not.*

Q: So the mere fact that a shipper with a dual contract had an advantage over a shipper without a dual contract does not constitute undue discrimination, in your view, in and of itself; correct?

A: Not in and of itself, no.

Id. at 451:22-452:13 (emphasis added). [fn omitted]

Third, Mr. Norris conceded that it is not unduly discriminatory for an affiliate to take more of a particular class of service than similarly situated nonaffiliates, regardless of whether such service is dual contract service (as in this case) or firm interstate service (hypothetically):

Q: I want you to further assume that dual contracts are available to affiliates and nonaffiliates, again, on exactly equal terms. Okay? [fn omitted]

A: Okay.

Q: Does the fact that an affiliate takes advantage of a dual contract arrangement more than nonaffiliates in and of itself constitute a form of undue discrimination?

A: No.

Q: Now, suppose that an intrastate pipeline offers firm interstate service, firm interstate service under NGPA Section 311(a). Are you with me?

A: So far.

Q: And you've already recognized that the intrastate pipeline can offer service for interstate gas under 311(a) -- I'm sorry, firm service under 311(a), right, (a) (2)?

A: Yes.

Q: Now, suppose an affiliate takes 60 percent of all the firm interstate service provided by the pipeline under that circumstance. Does that make the pipeline's provision of firm interstate service unduly discriminatory in favor of its affiliate due to that fact alone?

A: No, not due to that fact in and of itself.

Id. at 452:14-453:17.

And **fourth**, Mr. Norris conceded that affiliates with firm service have priority over non-affiliated customers without firm service:

Q: In that case the affiliate has paid for firm service, has a priority over the nonaffiliate without firm service; right?

A: That's true.

Q: And that does not constitute undue discrimination; correct?

A: That's correct.

Id. at 453:18-454:2.

12. In its Opposition to the motion for summary disposition, Staff argues that Norris' responses to each of these four inquiries posed by Oasis counsel were to hypothetical questions that were incomplete, unclear, and vague and, as such, can not provide the basis for summary judgment. Staff Opposition at 1-2, 7, 8, and 10. However, as Oasis aptly noted at oral argument, Staff did not object to the four areas of inquiry as vague or incomplete, Tr. at 314, and Staff witness Norris had no difficulty in responding to those questions.

13. Staff further argues that “these four pieces of testimony do not establish with respect to interstate interruptible transportation on Oasis Pipeline that dual contract customers and stand alone shippers are not similarly situated.” *Id.* at 10.

14. Oasis further argues that in response to the following questions posed by Staff on *redirect*, Mr. Norris reiterated his views that both classes of shippers inquired of were *not* similarly situated.

Q: *You were asked during your examination whether dual contract holders who ship interstate gas on a fill-in basis are similarly situated with respect to shippers of interstate gas who do not hold dual contracts. Do you recall being asked that question?*

A: Yes.

Q: *And are they similarly situated?*

A: *No. The shippers of interstate 311 gas who do so pursuant to a dual contract have -- basically, they've got firm service. They also have the opportunity to nominate at a time gas is nominated that is intrastate in nature. So those are differences that are not available to the nondual contract 311 shipper.*

Norris Dep. Tr. 885:19-886:11 (emphasis added).

15. Mr. Norris further responded on *redirect*:

Q: *If you strip away the fact that the dual contract holders have paid a demand charge, would they be similarly situated with respect to transportation of interstate gas, would they be similarly situated to nondual contract holders seeking to transport interstate gas?*

A: *Currently, under the dual contract program, they are not, because they have the opportunity to nominate early.*

Q: *Meaning they have an advantage?*

A: Yes.

Norris Dep. Tr. 888:18-889:6 (emphasis added).

16. Regarding Mr. Norris' first quoted *redirect* response, in its Motion Oasis points out that in the first instance Mr. Norris maintained that dual contract customers are *not* similarly situated with stand-alone IT customers—customers whose interstate contract was not accompanied by a dual intrastate firm contract. Oasis states that Norris's further explanation that dual contract holders have the opportunity to nominate at a time gas is

nominated that is intrastate in nature suggests that dual contract customers enjoyed preferential treatment. Regarding Mr. Norris's further or second quoted redirect response, Oasis reiterates that Norris agreed that Oasis dual contract customers are not similarly situated. In this respect, Oasis argues, "Well, Judge, you can't strip away the differences. It's a factual inquiry as to whether customers are Similarly Situated. And the answer, as you've now noted time and time again, was No." Tr. at 340.

17. Norris' second quoted redirect response reiterates that dual contract customers are not similarly situated. Oasis argues that Norris' further statement that dual contract customers have an advantage because they have the opportunity to nominate early is circular reasoning that turns the factual analysis of undue discrimination on its head. Oasis Motion at 16.

18. In these respects, Oasis argues:

It is black letter law that, "a showing of undue discrimination requires a demonstration . . . that there be similarly situated customers who are receiving unduly disparate treatment." *Boston Edison Co.*, 40 FERC at 65,194. On redirect, however, Staff allowed Mr. Norris to take the position that Oasis customers are not "similarly situated" *because* they "are receiving unduly disparate treatment." *Contra id.* That view may be charitably described as unorthodox, but may perhaps be more aptly described as "uncommon nonsense" that represents "nothing more than an ad hoc rationalization of and by Staff counsel." *Pub. Serv. Co. of Colo.*, 23 FERC ¶ 63,036 at 65,086 (1983) (Birchman, J.). This "redirect" exchange shows only that neither Staff nor Mr. Norris can articulate a credible argument in favor of their flawed "analysis." Oasis Motion at pps. 16-17.

19. Staff asserts that Norris' two redirect responses quoted above show that he understood "similarly situated" in the context of these questions as referring to the factual difference in treatment that is at the heart of this proceeding. See Staff Opposition at 6-7. At oral argument Staff further asserted that what Norris said in his second quoted redirect response is that in the context of interstate interruptible transportation dual contract holders essentially have firm service, "so the problem here is disparate treatment." Tr. at 326. In response to my inquiry of what was wrong with this analysis, Oasis correctly points out that, "You don't get to--they want to rewrite the law. You don't get to whether there is disparate treatment and whether the treatment is justified unless the customers are Similarly Situated." Id.

20. The following colloquy highlights the different perspectives of Oasis and Staff:

MR. SCHERMAN: It's pretty simple, Judge. You don't get to--they want to rewrite the law. You don't get to whether there is disparate treatment and whether the treatment is justified unless the customers are Similarly Situated. He said unequivocally in response to Mr. Crowe's [redirect] question: They're not Similarly Situated. The Dual Contract Holders are not Similarly Situated. End of case. You don't get to the rest of it.

And, Judge, what they did in this question and answer is turn the law on its head. I look at--I'm sorry.

PRESIDING JUDGE: Let's get back to you, Mr. Crowe. What's wrong with that?

MR. CROWE: Well, Your Honor, we're not attempting to turn anything on its head.

PRESIDING JUDGE: You're not?

MR. CROWE: No. What we need to prove is that there was disparate treatment, one element, of shippers who were Similarly Situated. In other words, that the disparate treatment was not justified because of a difference in status or position, or what have you.

And here Mr. Norris is being very specific. What he's referring to in the portion of the testimony that we're discussing is they're not Similarly Situated, one, they, meaning the Dual Contract Holders got Firm Service, and then the second one is they also have the opportunity to Nominate gas at a time usually reserved for Intrastate Gas. *Id.* at 326-27.

21. My response was that Staff's analysis is seriously flawed:

PRESIDING JUDGE: Well I can understand his answer better if he said, *yes*, they are Similarly Situated because of one, and because of two, *but not: No*, they're not Similarly Situated, and then he goes on to cite one and two. *Id.* at 327-28 (Emphasis added)

22. I further observed:

PRESIDING JUDGE: Yes, but there also has to be a factual similarity, right?

MR. CROWE: Yes.

PRESIDING JUDGE: And he [Norris] says there is no factual similarity. If there can't be a factual similarity, a materially similar circumstance in facts, I don't see how you can even get to the question of disparate treatment. The classes have to be the same. We have just gone through that at least twice.

Id. at 335.

23. Stated differently, Oasis is quite correct in observing “they concede the fact that he was talking factually. And to prove a case of Undue Discrimination, the allegations by the complainant have to be proved factually to show that they are Similarly Situated. He said, No, time and time again.” Id. at 342. Staff also agreed that if the dual contract shipper and the non dual contract or stand alone shipper are not similarly situated, other differences don't come into play. Id. at 350. Further, “It doesn't count. Right? Mr. Crowe: Yes.” Id.

24. Additionally, in response to my inquiries, Staff agreed that its two redirect questions to Mr. Norris quoted above were not vague, broad, or incomplete hypothetical questions. Id. at 345. On redirect, to each of these questions which tracked the facts of the case, Norris answered clearly, “No”, those dual contract holders and non dual contract holders were not similarly situated.

25. At oral argument, Staff states that in his rebuttal testimony, Ex. S-71 at 33, Norris unambiguously states that dual contract shippers and nondual contract shippers are similarly situated. Tr. at 352. In this respect and with regard to Norris second redirect response to the question of “if you strip away ...” Oasis aptly points out that, “The deposition was about his direct testimony. To say that somehow a new theory on rebuttal when the answer is No either way, [sic] the case has to be as a threshold matter, they have not met their burden of showing that these classes of customers are Similarly Situated under any formulation of their questions.” Tr. at 358.

26. Norris' responses quoted above, and particularly his *redirect* responses, underscore his understanding of what is required to demonstrate undue discrimination. Norris' responses, and particularly his redirect responses, conflate the requisite factual showing and analysis of whether dual contract holders and nondual contract holders or stand alone shippers are similarly situated. Norris' deposition responses quoted above, and particularly his redirect responses, focus on the extent to which there is disparate treatment or advantages. This analysis short circuits and ignores whether these two classes of shippers are similarly situated. Absent that factual analysis, one does not reach the matter of whether there is disparate treatment as between similarly situated classes of shippers which provides one class of shippers with an undue advantage and /or an undue preference, and, in turn, would warrant a finding of undue discrimination as defined by the Transwestern case. In the circumstances present here, viewing matters in the light most favorable to Staff, and, on balance, for the reasons discussed above I find that no genuine issue of material fact is

present with regard to stipulated issue I., that Oasis' motion for summary disposition should be granted, and that summary disposition is appropriate.

27. To be complete, the oral argument on the motion for summary disposition spanned Tr. 291-371. My reasons at oral argument, Tr. 361-63, for granting the motion and summary disposition are incorporated by reference. Those views are supplemented by my views in this Initial Decision. In the circumstances present here and for the reasons discussed, Oasis' motion for summary disposition with regard to stipulated Issue I. is granted. So Ordered.

ORDER

28. Wherefore, It is Ordered, that subject to review by the Commission on appeal or on its own motion, the motion filed by Oasis Pipeline Line LP for summary disposition with regard to stipulated issue I. is granted and the hearing scheduled to commence on December 10, 2008, will be confined to the adjudication of the remaining stipulated issues.

Bruce L. Birchman
Presiding Administrative Law Judge

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