

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)	
WOLVERINE GAS AND OIL COMPANY, INC.,)	
and SHELL WESTERN E & P INC. against)	Case No. U-10807
SPARTAN INTRASTATE PIPELINE SYSTEM.)	
_____)	

At the March 10, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
 Hon. John C. Shea, Commissioner
 Hon. David A. Svanda, Commissioner

OPINION AND ORDER

History of Proceedings

On March 7, 1995, Wolverine Gas and Oil Company, Inc., (Wolverine) and Shell Western E & P Inc. (SWEPI) filed a complaint against Spartan Intrastate Pipeline System (Spartan) alleging that Spartan's rates for the transportation of natural gas were excessive.

At a prehearing conference on May 23, 1995, Administrative Law Judge Theodora M. Mace (ALJ) granted Spartan's motion to consolidate the complaint with two pending applications for authority to construct pipelines in Cases Nos. U-10782 and U-10812.

Following extensive hearings, on September 27, 1995, after the close of the record and two days before briefs were due in the consolidated cases, Wolverine and SWEPI filed an amended complaint alleging that Spartan had engaged in unlawful discrimination against certain shippers. On November 27, 1995, the ALJ conducted a hearing and denied the request to amend the complaint.

On December 1, 1995, the ALJ issued her proposal for decision, affirming the denial of the request to amend the complaint and recommending that Spartan's rates be reduced.

The Commission issued an order on April 10, 1996 in the consolidated cases. With respect to the complaint, the Commission reduced Spartan's rates, but concluded that it was arguable whether the claim of discrimination had been litigated. The Commission found it unnecessary to resolve that issue because it ordered Spartan to show cause why it should not be found to have violated 1929 PA 9 (Act 9), MCL 483.101 et seq.; MSA 22.1311 et seq., by having implemented new rates without Commission approval.

On May 10, 1996, Spartan filed its response. It requested that the Commission find that it had not violated Act 9 or, alternatively, set a hearing to permit it to develop fully its defense. On June 26, 1996, the Commission issued an order remanding the case for further proceedings on whether Spartan had violated Act 9 and prior Commission orders and the appropriate remedy, if any.

A prehearing conference was held on July 19, 1996. The ALJ granted petitions for leave to intervene filed by Fruehauf Production Company L.L.C. (Fruehauf), HRF Exploration and Production, Inc. (HRF), and Chevron U.S.A., Inc. (Chevron). The ALJ also granted the petition of Michigan Consolidated Gas Company (Mich Con) on a limited basis to permit it to protect its interests arising from the decision in the consolidated proceedings. Attorney General Frank J. Kelley (Attorney General) and Terra Energy Ltd. (Terra), having been granted intervenor status previously, and the Commission Staff (Staff) continued to participate.

The parties cross-examined nine witnesses on October 14 and 15, 1996. The ALJ admitted 14 exhibits into evidence. On November 1, 1996, Wolverine and SWEPI, Spartan, Chevron, the Attorney General, Fruehauf and HRF, and the Staff filed briefs. On November 15, 1996, Wolverine and SWEPI, Spartan, Chevron, the Attorney General, and the Staff filed reply briefs.

On December 13, 1996, the ALJ issued a Proposal for Decision (PFD) recommending that the Commission dismiss the complaint.¹

On January 3, 1997, Wolverine and SWEPI, Chevron, Spartan, and the Attorney General filed exceptions. On January 17, 1997, Spartan, the Attorney General, Wolverine and SWEPI, Chevron, and the Staff filed replies to exceptions.

Background

Spartan built a 40-mile pipeline to transport gas west to a Mich Con pipeline. Pursuant to the Commission's May 21, 1993 order in Case No. U-10120, Spartan was authorized to charge 4¢ per thousand cubic feet (Mcf) for transportation from Zone A (the westernmost zone), 7.5¢ per Mcf from Zone B, and 9.5¢ per Mcf from Zone C. In March 1995, following construction of the Saginaw Bay Lateral Company's Lovells Extension, which connects near the middle of the Spartan pipeline, Spartan commenced charging 3¢ per Mcf for transportation from Zone A to the Lovells Extension, 3¢ per Mcf from Zone B to the Lovells Extension, and 5.5¢ per Mcf from Zone C to the Lovells Extension. Spartan did not reduce the charges for transportation to the western terminus. The central issue in the case is whether Spartan could lawfully implement new rates for transportation to the Lovells Extension without prior Commission approval and without also reducing the rates for transportation to the western terminus. The complainants argue that Spartan could not, and seek a refund of the higher amounts they paid for transportation to the western terminus.²

Discussion

¹The original claim that Spartan's rates were excessive was fully resolved by the April 10, 1996 order and is not at issue in the PFD or this order.

²Pursuant to the April 10, 1996 order in the consolidated cases, on April 11, 1996, Spartan commenced charging a uniform rate of 1.08¢ per Mcf for all transportation.

The ALJ concluded that the settlement agreement and order in Case No. U-10120 did not preclude the implementation of lower rates for transportation to the Lovells Extension because the agreement set “maximum rates” and authorized Spartan to “reduce any of such rates at any time and from time to time in order to meet competition.” Settlement agreement, Case No. U-10120, p. 3. She concluded that, under the circumstances, it was reasonable for Spartan to reduce its rates to reflect the shorter distances involved in transportation to the Lovells Extension because the original rates were also based on distance. She rejected the argument that the result of this conclusion would be to permit Spartan to create new rates for any new point of receipt or delivery. She viewed completion of the Lovells Extension as unique because it was a major pipeline that created a distinct route for the transportation of gas and the Commission approved construction of the pipeline. She also rejected the arguments that Spartan engaged in unlawful discrimination when it did not also reduce the charges for transportation to the western terminus and that Act 9 and the settlement agreement in Case No. U-10120 prohibit any discrimination. She viewed the transportation to the Lovells Extension and the western terminus of the Spartan pipeline as distinguishable because Spartan faced competition for transportation to the Lovells Extension. Finally, she concluded that Spartan did not violate Act 9 when it implemented the lower rates permitted by the settlement agreement and order in Case No. U-10120.

Wolverine and SWEPI concede that Spartan had authority under the settlement agreement (and Act 9) to reduce the rates for transportation to the Lovells Extension and that the reduction was proper. Tr. 143, 184, and 234. Therefore, their argument is that, having reduced the rates for transportation to the Lovells Extension to meet competition, Spartan was required by the terms of the settlement also to reduce the rates for transportation to the western terminus, even though it did not face competition for transportation to that location, or to seek Commission approval to implement a new rate structure.

In their exceptions, Wolverine and SWEPI argue that the essence of the complaint is that Spartan exceeded the authority granted by the Commission's order in Case No. U-10120, which they argue did not permit Spartan to charge two different rates within any one zone. They argue that the clear language of the order can be read only as authorizing Spartan to implement a rate structure with one rate for each zone, each of which could be reduced in a nondiscriminatory manner. They complain that the ALJ placed too much emphasis on the language in the settlement that authorized Spartan to meet competition and too little on the language that required Spartan to implement only three rates and to reduce those rates in a nondiscriminatory manner.

Wolverine and SWEPI assert that if any one aspect of the order is to be emphasized, it should be the requirement of nondiscrimination. They argue that by allowing three zones and three rates, rather than one rate for the entire pipeline, the Commission had already allowed some discrimination and had granted Spartan more flexibility than most pipelines have. They assert that the settlement agreement did not permit any further discrimination and that the concepts of "unduly," "unfairly," or "unreasonably" cannot be incorporated in the settlement agreement, which prohibited all discrimination. They also argue that references to Act 9 in the settlement agreement did not incorporate a "reasonableness" standard into the settlement agreement's prohibition on discrimination. They assert that Spartan's claim that the settlement is consistent with Act 9 should not be used to turn Act 9 into a "sword" for the pipeline to use against the interests of shipper by allowing Spartan to create any new rate structure it deemed reasonable, but rather Act 9 should serve as a "shield" for shippers against changes in rates, terms, and conditions of service that the Commission had not previously approved. Finally, they deny that discrimination was inevitable because Spartan could have charged the maximum rates approved in Case No. U-10120 for all gas delivered to the pipeline, including gas destined for the Lovells Extension, or could have reduced the three zone rates for all shippers, regardless of whether the gas was to be delivered to the western terminus or the Lovells Extension.

Similarly, Chevron argues that Spartan's new rate structure was not reasonable because it did not apply to all shippers. Chevron asserts that the settlement agreement and order in Case No. U-10120 and Section 6 of Act 9 prohibit two sets of rates and the settlement in particular permitted the rates to be based solely on the point of receipt, not the point of delivery. It argues that the settlement required transportation in a nondiscriminatory manner and Act 9 prohibits all preferences and any discrimination, not only "unfair" preferences or "unlawful" discrimination.

Wolverine and SWEPI go on to argue that because Spartan's actions were not authorized by the order in Case No. U-10120, Spartan actually implemented a new rate structure for which Act 9 required prior Commission approval. They assert that it is irrelevant whether the delivery of gas to the Lovells Extension is viewed as a new service. They argue that the only inquiry is whether Spartan properly exercised the authority granted in Case No. U-10120 to reduce its rates. They assert that Spartan exceeded that authority because it departed from the three-zone rate structure with a single rate in each zone applied to all gas delivered to Spartan within that zone. They also assert that there is no need to ask whether the resulting rates, implemented without authority, were reasonable and therefore arguably lawful under Northern Michigan Water Co v Public Service Commission, 381 Mich 340; 161 NW2d 584 (1968). They argue that because the Commission had previously approved rates for the pipeline, if Spartan wanted to implement a different rate structure, it needed prior approval.

Likewise, Chevron argues that if the new rates are considered initial rates, Act 9 required Spartan to obtain prior approval, and if the new rates are considered a change in the initial rates not authorized by the order in Case No. U-10120, Act 9 also required Spartan to obtain prior approval. Consequently, Chevron argues that it is too late for Spartan to seek approval of the new rate structure or to argue that the resulting rates were reasonable. Further, Chevron asserts that the ordering paragraphs in the order in Case

No. U-10120 did not specifically authorize Spartan to reduce its rates to meet competition, as the attached settlement did, and Spartan therefore lacked that authority.

The Commission disagrees. Wolverine, SWEPI, and Chevron place too much emphasis on the language of the Commission's order in Case No. U-10120 and too little emphasis on the settlement agreement that the order approved without modification. The text of the order served as a description of the terms of the settlement agreement and was neither a clarification nor a modification of the settlement agreement.

Therefore, an analysis of whether Spartan could implement reduced rates for transportation to the Lovells Extension depends initially on the language of the settlement agreement. If the settlement agreement that the Commission approved authorized Spartan to reduce its rates, the remaining question is whether that authority is consistent with Act 9.

In pertinent part, the settlement provides:

The established rates will represent maximum rates that Spartan may charge, and Spartan will have the authority to reduce any of such rates at any time and from time to time in order to meet competition. Spartan will exercise such authority to reduce its rates in a non-discriminatory manner which does not provide an unfair preference or advantage to any producer(s) as prohibited by Act 9, Section 6 (M.C.L. 483.106), and which does not result in unlawful discrimination prohibited by Act 9, Section 4 (M.C.L. 483.104).

Settlement agreement, Case No. U-10120, p. 3.

The Commission concludes that a fair reading of the settlement agreement as a whole, and this portion in particular, supports Spartan's position that its decision to reduce rates for transportation to the Lovells Extension was authorized, regardless of whether Spartan's conduct is characterized as reducing the price for some shippers, implementing a new rate structure, or pricing a new service. If the parties intended to agree that Spartan could not reduce the rates as it did and that any reduction must apply uniformly to all shippers, there is language to more clearly express that idea than to say that rates may be reduced "in a nondiscriminatory manner" that does not provide "an unfair preference" or result in "unlawful discrimination." This portion

of the settlement agreement, which links “nondiscriminatory” to “unfair preference” and “unlawful discrimination,” also belies the argument that the concept of nondiscrimination in the settlement is equivalent to not permitting any differences in rates regardless of differences in circumstances. The argument is further undercut by the parties’ agreement to three zone rates, which, according to this argument, would itself have to be prohibited discrimination because the rates were not uniform for all shippers.

The prohibition in the settlement agreement against discrimination can also be viewed in the context of Spartan’s proposals in its June 23, 1992 application that it continue to charge 75¢ per Mcf for gas produced from the Fletcher Pond Field while charging zone rates of 4¢, 10¢, and 12¢ for Antrim gas produced in the area of the pipeline and that it give priority to the transportation of gas from the Fletcher Pond Field. Application, Case No. U-10120, pp. 2-3. The language of the settlement can be read as an emphatic rejection of those proposals to discriminate on the basis of the kind of gas and identity of the producer without being read as a rejection of a more reasonable discrimination based on the distance to the delivery point.

Wolverine and SWEPI also assert that a new interconnection point was not in the contemplation of the parties when they negotiated the settlement agreement in Case No. U-10120. On the other hand, the application in that case requested approval of rates for the transportation of gas “from the producing areas located in the vicinity of Spartan’s pipeline to existing and future interconnections with other pipelines and gas processing facilities.” Application, Case No. U-10120, p. 2. The agreement that Spartan could reduce its rates to meet competition can thus reasonably be read as intended to authorize it to reduce rates for transportation to closer interconnections.

The Commission therefore concludes that the settlement agreement permitted differences in rates that were rationally related to differences in circumstances and that transportation to the Lovells Extension was different from transportation to the western terminus. The most obvious distinction is the shorter distances to the Lovells Extension, and distance is apparently the basis for the zone rates to which the parties agreed in

Case No. U-10120. The Commission is unpersuaded by the argument of Wolverine and SWEPI that distance was not a factor in Case No. U-10120. Common sense suggests otherwise.

In essence, Wolverine and SWEPI argue that if Spartan concluded that it needed to reduce its rates to meet competition to the Lovells Extension, Spartan was required to reduce the rates for even the shippers who were in a different situation by virtue of transporting their gas to the western terminus, a greater distance and a point to which Spartan did not face competition. In other words, they argue that neither the settlement agreement nor Act 9 would permit Spartan to make reasonable distinctions among shippers. The Commission does not agree that such a result is compelled by the settlement agreement or Act 9. To the contrary, Spartan's decision to reduce rates for transportation to the Lovells Extension was a reasonable response to new circumstances.³

Act 9 does not require uniform rates for all transportation on a pipeline. It prohibits the granting of any preference or advantage by a common carrier to any shipper. MCL 483.106; MSA 22.1316. That section has not been interpreted or implemented as requiring all shippers, even those in dissimilar situations, to pay the same rate. The act prohibits discrimination by a common purchaser. MCL 483.104; MSA 22.1314. That section has not been interpreted or implemented as requiring all sellers to receive the same rate or service if

³It bears repeating that Spartan had no independent basis in the settlement agreement to reduce the rates for transportation to the western terminus because it did not face competition to that point. The complainants can obtain a refund for their transportation to the western terminus only by arguing that Spartan was required to charge only one (lower) price from each zone.

they are in different situations. The complainants and intervenors have not established otherwise.⁴ On the other hand, the July 16, 1985 order in Case No. U-7660, pp. 69-71; the January 24, 1984 order in Case No. U-7633, pp. 9-10; and Antrim Resources v PSC, 179 Mich App 603, 612-614; 446 NW2d 515 (1989) all reject, in various contexts, the argument that prohibited discrimination can be shown merely by a difference in rates. Furthermore, Act 9 does not require that every price change receive prior Commission approval. The act permits the adjustment of rates within limits approved by the Commission without Commission review of each price change. See, October 25, 1995 order, Case No. U-10546, pp. 31-32. The Commission therefore concludes that Spartan's actions, undertaken within the terms of the settlement agreement in Case No. U-10120, were also consistent with Act 9.

In its exceptions, Chevron denies that Spartan faced competition for transportation to the Lovells Extension and argues that Spartan has offered only speculation.

The record supports a finding that competition from a bypass of the Spartan pipeline to the Lovells Extension was a realistic probability. Tr. 229, 232-233, 252, 316-317, 375, 391, 395, and 405. Wolverine and SWEPI acknowledge that Spartan feared a bypass of its pipeline. Brief, p. 18. Further, common sense suggests that a desire to maintain the pipeline's throughput, rather than a desire to decrease its revenues, motivated Spartan's decision to reduce the rates for transportation to the Lovells Extension.⁵

⁴Chevron cites the August 5, 1995 order in Case No. U-10195, pp. 16-17, where the Commission merely quoted a portion of Section 6 of Act 9 in the context of an issue unrelated to maintaining two sets of rates. It also cites the March 29, 1995 order in Case No U-10547, pp. 52-55, where the Commission discussed Section 6 in the context of discrimination between shippers, but declined to resolve the issue in the abstract. If the Commission agreed that all preferences are prohibited, it could have ruled on the issue without the development of a record.

⁵The Commission dismissed as speculative a claim of bypass in the earlier phase of the consolidated proceedings. That claim related to a different movement of gas and different evidence.

In their exceptions, Wolverine and SWEPI argue that it is too late for Spartan to argue that the new rate structure was reasonable, because prior approval was required, and there is no need to examine the reasonableness of the new rates, because the Commission determined that a single rate in each zone was the most appropriate. In any event, they also argue that the rate structure was not reasonable because a flat rate was most appropriate, as demonstrated by the Commission's April 10, 1996 decision to adopt a flat rate.

The Commission disagrees, as discussed above. Further, the fact that the Commission approved a single, lower rate on April 10, 1996 has no bearing on whether Spartan's conduct in March 1995 was lawful or reasonable under Act 9 and the settlement agreement.

Chevron also argues that the ALJ improperly concluded that the reduced rates were set at a reasonable level merely because they were below the rates that the Commission had previously approved as reasonable. It asserts that reduced plant costs and higher pipeline throughput required the Commission to conduct a hearing to determine if lower rates would also be reasonable.

The Commission disagrees. Unless and until the Commission reviewed the previously set rates and found them to be unreasonably high, Spartan was entitled to rely on the Commission's order in Case No. U-10120 that approved those rates and to exercise the authority granted by that order to reduce those rates consistent with the terms of the settlement agreement. Accepted at face value, Chevron's argument becomes the same as arguing that Spartan could never have exercised the authority to reduce its rates to meet competition because some shipper could always have argued that a change in circumstances rendered the approved rates, from which Spartan had authority to implement a reduction, too high.

The Attorney General's exceptions support the ALJ's ultimate conclusion that Spartan should not have to make refunds, although he disagrees with portions of the ALJ's reasoning. The Commission's reasoning is discussed above, and the Commission declines the Attorney General's suggestion that it resolve all of the alternative legal theories.

Spartan's exceptions raise a number of issues that need not be addressed in light of the Commission's determination that the complaint should be dismissed.

Finally, as discussed above, the Commission finds that the terms of the settlement and order in Case No. U-10120 are sufficient to provide lawful authority for Spartan to have implemented the lower rates for transportation to the Lovells Extension and its action was consistent with Act 9. Therefore, the Commission finds it unnecessary to decide whether, absent the settlement agreement in Case No. U-10120, a reduction in rates or the creation of new rates for transportation to the Lovells Extension required prior Commission approval. The Commission also finds it unnecessary to decide whether transportation to the Lovell's Extension was a new service, whether the approval of maximum rates in Case No. U-10120 alone would have authorized Spartan's conduct, whether the ALJ should have relied upon the order in Case No. U-10546 as a further rationale for dismissing the complaint, or whether the rates, if not approved, were nevertheless reasonable.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1929 PA 9, as amended, MCL 483.101 et seq.; MSA 22.1311 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 165, as amended, MCL 483.151 et seq.; MSA 22.1332(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. The complaint should be dismissed with prejudice.

THEREFORE, IT IS ORDERED that the complaint of Wolverine Gas and Oil Company, Inc., and Shell Western E & P Inc. against Spartan Intrastate Pipeline System is dismissed with prejudice.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

John G. Strand
Chairman

(S E A L)

John C. Shea
Commissioner

David A. Svanda
Commissioner

By its action of March 10, 1997.

Dorothy Wideman
Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

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By its action of March 10, 1997.

Executive Secretary

In the matter of the complaint of)
WOLVERINE GAS AND OIL COMPANY, INC.,)
and **SHELL WESTERN E & P INC.** against)
SPARTAN INTRASTATE PIPELINE SYSTEM.)
_____)

Case No. U-10807

Suggested Minute:

“Adopt and issue order dated March 10, 1997 dismissing with prejudice the complaint of Wolverine Gas and Oil Company, Inc., and Shell Western E & P Inc. against Spartan Intrastate Pipeline System, as set forth in the order.”