

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 4, 2013

IN RE:)	
)	
COMPLAINT OF CONOCOPHILLIPS COMPANY FOR)	DOCKET NO.
AN ORDER DETERMINING CONOCOPHILLIPS NOT)	11-00210
LIABLE FOR PENALTIES AND CHARGES ASSESSED)	
BY CHATTANOOGA GAS COMPANY, OR, IN THE)	
ALTERNATIVE, PETITION FOR SPECIAL RELIEF)	

ORDER DENYING PETITION FOR RECONSIDERATION

This matter came before Chairman James M. Allison, Vice Chairman Herbert H. Hilliard¹ and Director Kenneth C. Hill of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 17, 2013, for consideration of the *Petition for Reconsideration* (“*Petition*”) filed by ConocoPhillips Company (“ConocoPhillips” or “COP”) on February 6, 2013. In the *Petition*, ConocoPhillips seeks reconsideration of the Authority’s January 23, 2013 *Order Denying Settlement Agreement* (“*Order*”).

BACKGROUND

ConocoPhillips filed the *Complaint of ConocoPhillips Company for an Order Determining ConocoPhillips Not Liable for Penalties and Charges Assessed by Chattanooga Gas Company, or, in the Alternative, Petition for Special Relief* (“*Complaint*”) with the Authority on December 20, 2011. In its *Complaint*, ConocoPhillips, a producer and marketer of

¹ Director Sara Kyle originally was assigned to the panel that considered the *Proposed Settlement Agreement* and granted the *Petition for Reconsideration* to be heard on the merits at a later date. Thereafter, Director Kyle left the agency, and Vice Chairman Herbert H. Hilliard was assigned to the panel. Vice Chairman Hilliard was present and participated in oral arguments on the *Petition for Reconsideration* and reviewed the existing record prior to deliberations pursuant to Tenn. Code Ann. § 4-5-314. See Transcript of Proceedings, p. 16 (June 17, 2013).

natural gas and the designated third-party gas supply agent for Invista S.a.r.l. (“Invista”), a customer of Chattanooga Gas Company (“CGC”), sought relief from certain penalties imposed on it by CGC for failure to supply natural gas in accordance with an Authority approved tariff. On January 13, 2012, CGC filed a *Notice of Intent to File*, stating that it was attempting to resolve the issues stated in the *Complaint* and the parties had agreed to engage in negotiations. In the event such negotiations failed, CGC stated that it would file a responsive pleading in the docket. On March 12, 2012, the Consumer Advocate and Protection Division (“Consumer Advocate”) filed a *Petition to Intervene*, which was granted by the Hearing Officer on March 13, 2012.² After a period of negotiations, on August 27, 2012, ConocoPhillips and CGC filed a *Proposed Settlement Agreement*, which the Consumer Advocate did not oppose.

The panel heard and considered the *Proposed Settlement Agreement* at a regularly scheduled Authority Conference held on November 8, 2012. As reflected in its *Order*, the majority of the panel voted to deny the *Proposed Settlement Agreement* in its entirety and further found that the terms of the *Proposed Settlement Agreement* were not consistent with CGC’s existing tariffs and were not otherwise in the public interest. The majority further found that, as part of the *Proposed Settlement Agreement*, the parties proposed an Amendment to the 1999 negotiated contract; therefore, if the parties wanted the Authority to consider the prospective changes to the contract, then discovery and filing of testimony on that issue would be needed before a hearing. As a result, the majority referred the docket back to the Hearing Officer to prepare the case for hearing, including establishing a procedural schedule.³

² On February 27, 2012, the assigned panel appointed a Hearing Officer to prepare the matter for hearing. See *Order Convening a Contested Case and Appointing a Hearing Officer*, p. 1 (February 29, 2012).

³ Director Sara Kyle did not vote with the majority.

PETITION FOR RECONSIDERATION

ConocoPhillips filed its *Petition* on February 6, 2013, seeking reconsideration of the Authority's January 23, 2013 *Order*. ConocoPhillips asserts that reconsideration should be granted because:

the Settlement Agreement does **NOT** constitute a waiver of CGC's tariff. Invista, and its agent COP, and CGC operate under a Special TRA approved Contract which sets out both the rates and terms under which CGC will provide transportation services and sales services to Invista. The Special Contract provides that Invista, or its agent COP, does NOT pay the customer charge or the transportation rate set forth in CGC's tariff for gas transported by CGC. The Special Contract further provides that Invista, or its agent, may purchase natural gas from CGC. As set forth in paragraph 14 A. of the Settlement Agreement, the settlement re-characterizes the volumes of gas in question as sales volumes pursuant to the Special Contract. This arrangement, as provided for in the Settlement Agreement, is proper and allowable under the provisions of the Special Contract, and in no way violates or waives any of CGC's tariff provisions. The Settlement Agreement is based on the Special Contract, and **NOT** CGC's tariff. Based on the factual circumstances surrounding the nomination error and the existence of the Special Contract (which is the only such Contract on the CGC System), this is an entirely unique situation.⁴

ConocoPhillips further states that "it appears to [ConocoPhillips] that the Panel either ignored or overlooked this important fact in reaching its decision on November 8, which oversight was reaffirmed in the TRA Order of January 23, 2013."⁵

On February 7, 2013, CGC filed *Chattanooga Gas Company's Response to ConocoPhillip's* (sic) *Petition for Reconsideration*, in which it states that CGC "continues to believe that the Proposed Settlement Agreement filed on August 27, 2012 is an appropriate resolution of this matter that benefits CGC's customers and is not a waiver of CGC's tariff."⁶ The Consumer Advocate filed its *Response in Opposition of the Consuner* (sic) *Advocate to the Petition for Reconsideration Filed by ConocoPhillips* on February 11, 2013, stating that the

⁴ *Petition for Reconsideration*, p. 5 (February 6, 2013) (emphasis in original).

⁵ *Id.*

⁶ *Chattanooga Gas Company's Response to ConocoPhillip's* (sic) *Petition for Reconsideration*, p. 1 (February 7, 2013).

“proposed settlement requires the households and businesses of Chattanooga to fund a settlement payment to ConocoPhillips” and requesting that the *Petition* be denied.⁷

During the regularly scheduled Authority Conference held on February 13, 2013, the panel voted unanimously to grant ConocoPhillips’ *Petition* based on the procedure set forth in Tenn. Code Ann. § 4-5-317 and to address the merits of the reconsideration at a future conference. The panel heard oral arguments on the *Petition* at the May 6, 2013 Authority Conference.

POSITIONS OF THE PARTIES

ConocoPhillips Company

During oral arguments, ConocoPhillips stated that there is no controversy among the parties regarding the facts of the case.⁸ Mr. Mike Hastings, Director of Scheduling and Operations for ConocoPhillips, filed an affidavit corroborating the facts as outlined in the original *Complaint* and subsequent *Petition for Reconsideration*.⁹ A “simple mistake” was made by a COP employee entering data that went unnoticed for approximately thirty-six days.¹⁰ ConocoPhillips states that all parties are made whole by the settlement, except COP which still loses several thousand dollars as a result of the *Proposed Settlement Agreement*.¹¹

COP asserts that the 1999 Special Contract provides for the sale of gas by CGC to Invista at the Interruptible (“I-1”) industrial rate schedule and for transportation to be provided under CGC’s then existing Transportation (“T-1”) tariff.¹² The settlement re-characterizes the gas rates from those for transportation under the T-1 tariff to those for I-1 sales permitted in the Special

⁷ *Response in Opposition of the Consumer (sic) Advocate to the Petition for Reconsideration Filed by ConocoPhillips*, p. 2 (February 11, 2013).

⁸ Transcript of Proceedings, p. 27 (May 6, 2013).

⁹ *Id.*; see also *Proposed Settlement Agreement, Attachment B* (August 27, 2012).

¹⁰ *Id.* at 28.

¹¹ *Id.* at 30.

¹² *Id.* at 29.

Contract.¹³ ConocoPhillips states that the *Proposed Settlement Agreement* also contains a proposed Amendment to the 1999 Special Contract between CGC and Invista, which clarifies contract language going forward.¹⁴ Invista participated in discussions even though it was not a party to the case and has agreed to the revised language.¹⁵

According to ConocoPhillips, customers received credit for the full amount of the penalties and fines through the Actual Cost Adjustment filing process. As a result of the compromise reached in the *Proposed Settlement Agreement*, however, the amount of charges and fines is substantially less. As a result, according to COP, customers were not entitled to the full penalty amount and reasonably should pay back the difference.¹⁶ The negotiations that took place resulted in a settlement among the parties that COP argues is a reasonable response to the *Complaint* filed and also avoids any possibility of an appeal and further litigation.¹⁷

Chattanooga Gas Company

Chattanooga Gas argues that the compromise as outlined in the *Proposed Settlement Agreement* is reasonable or at least in the zone of reasonableness.¹⁸ CGC's position in reaching this particular compromise is three-fold: (1) the Company would not be waiving its tariff; (2) the Company wanted the Consumer Advocate to not oppose it; and (3) the Company wanted an amendment to the 1999 Special Contract with Invista that would make it clear that Invista and their third-party shipper must comply with CGC's tariff or modifications in effect at any given time and not the tariff in effect at the time of the Special Contract in 1999.¹⁹ CGC asserts that the *Proposed Settlement Agreement* achieves all three goals.²⁰ Finally, while CGC states it is

¹³ *Id.* at 32.

¹⁴ *Id.* at 28.

¹⁵ *Id.*

¹⁶ *Id.* at 31.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 34-35.

²⁰ *Id.*

obligated to argue that the settlement is fair and reasonable, it states that if the Authority rejects the *Proposed Settlement Agreement* on reconsideration, CGC is prepared to defend the Authority's decision.²¹

Consumer Advocate

The Consumer Advocate agreed to not oppose the *Proposed Settlement Agreement* when it was originally filed.²² Once it was denied by the Authority, however, the Consumer Advocate filed a response in opposition to ConocoPhillips' request for reconsideration of the Authority's order.²³ The Consumer Advocate states that COP signed a third party supplier agreement under CGC's third-party supplier ("TPS") tariff²⁴ and agreed to follow the terms of this tariff.²⁵ Furthermore, the Consumer Advocate asserts that tariffs contain the approved terms and conditions utilities must abide by when dealing with customers and that the Tennessee Court of Appeals considers tariffs binding upon the utility and the customer and carrying the effect of state law.²⁶ By re-characterizing the transport volumes as sales volumes, the Settlement effectively results in an "end run" around the tariff.²⁷ According to the Consumer Advocate, ConocoPhillips and CGC "say it's not a waiver, but that's exactly what it is."²⁸ From a policy perspective, the Consumer Advocate believes it would encourage more litigation in the future.²⁹

²¹ *Id.* at 36.

²² See *Proposed Settlement Agreement*, p.1 (August 27, 2012).

²³ See *Response in Opposition of the Consumer (sic) Advocate to the Petition for Reconsideration Filed by ConocoPhillips*, p. 2 (February 11, 2013).

²⁴ Rate Schedule TPS applies to brokers, marketers, and Customers intending to act as their own gas supplier, and other third party suppliers (collectively "Third Party Suppliers" or "TPS") of natural gas that wish to either act as agents for Transportation Customers or deliver natural gas supplies to Company's City Gate for Transportation Customers.

²⁵ Transcript of Proceedings, p. 37 (May 6, 2013).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 38.

FINDINGS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on June 17, 2013, the panel considered the merits of the *Petition*. The panel found that the terms and conditions of Chattanooga Gas Company's T-1 and TPS tariffs control the transportation services provided to Invista. While the existence of the Amendment to the Special Contract could possibly forestall disputes in the future, the panel determined that the current contract language does not nullify the force of Chattanooga Gas Company's current transportation tariffs. The Amendment is meant to "clarify" certain provisions, not change or add to those provisions. In effect, the new language reiterates rights and benefits under the Special Contract rather than changes them. The panel further found that the penalties were applied by Chattanooga Gas in accordance with its transportation tariff. These assessed penalties have been refunded to customers. Waiving penalties and fines, or in this case re-characterizing the volumes transported in order to avoid or lessen the impact of the penalties and fines to do an "end-run" around the tariffs, would send a wrong signal to other customers and is against the public interest. Therefore, the panel voted unanimously to deny ConocoPhillips' *Petition for Reconsideration* of its previous decision and thereby upheld the Authority's January 23, 2013, *Order Denying Settlement Agreement*.


IT IS THEREFORE ORDERED THAT:

1. The *Petition for Reconsideration* filed by ConocoPhillips Company on February 6, 2013, is denied.
2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

3. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

Chairman James M. Allison, Vice Chairman Herbert H. Hilliard and Director Kenneth C. Hill concur.

ATTEST:



Earl R. Taylor, Executive Director