UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40076

LOUISIANA INTRASTATE GAS CORP.,

Plaintiff-Appellee,

versus

PRAIRIE PRODUCING CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(90-CV-260)

(June 26, 1995)

Before WISDOM, JONES and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Prairie Producing Company ("Prairie") appeals the granting of summary judgment against it and in favor of Louisiana Intrastate Gas Corporation ("LIG") by the district court. The district court found that Prairie had breached a contract for the intrastate transportation of natural gas and awarded damages and specific performance to LIG. Because we conclude that Prairie did not fail to pay the proper rates for transportation of <u>its</u>

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

gas over the Eloi Pipeline, we REVERSE the district court's judgment and RENDER judgment that LIG should take nothing.

LIG is in the business of transporting natural gas and operates a vast 1900-mile network of pipelines wholly contained within the State of Louisiana. But LIG also operates the Eloi Pipeline which extends 22 miles from several platforms in Eloi Bay off the shores of St. Bernard Parish, Louisiana and terminates on shore at Yscloskey, Louisiana. The physically separate Eloi Pipeline does not connect to LIG's general pipeline, but instead interconnects at Yscloskey with an interstate pipeline operated by Tennessee Gas Pipeline Company ("Tennessee") that extends to markets in the northeastern United States, and an intrastate pipeline operated by Creole Gas Pipeline Corporation ("Creole") that extends to New Orleans. LIG owned both of these pipelines. Prairie, a Texas corporation, leased natural gas producing properties in Eloi Bay.

I.

THE AGREEMENTS BETWEEN LIG & PRAIRIE

In July of 1985, LIG and Prairie signed a general agreement wherein Prairie would transport the gas produced on its properties through the Eloi Pipeline to either Creole or Tennessee, or both. The general agreement specified that "transportation service shall be rendered pursuant to the terms and conditions of a transportation agreement to be entered into between LIG and Prairie, or Prairie's purchaser, generally

containing the terms and conditions in the form of the transportation agreement hereto attached."

The parties entered into their transportation agreement in October of 1985. The agreement, to last for 7 years, provided that Prairie would deliver all of its gas produced in the specified properties to LIG for transportation to the specified "Point(s) of Redelivery."[1] Prairie agreed to pay LIG "that rate of general applicability charged by [LIG] for performing transportation service under Section 311(a)(2) of the Natural Gas Act of 1978 as such rate exists from time to time. The rate as of May 1, 1985 is 29.8 [cents] per MMBtu (wet) subject to refund."[2] Both parties agreed that "none of the gas transported hereunder will be sold, transported, commingled, used or consumed so as to subject the gas or this Agreement to the jurisdiction of the Federal Energy Regulatory Commission, or successor authority, under the Natural Gas Act of 1938."

In a subsequent agreement, the parties agreed to a two-year discount rate that expired in December 1988 and amended the Transportation Agreement to list Tennessee Gas as a Point of Redelivery. When both the discount rate from LIG and Prairie's contract with Creole expired at about the same time, Prairie executed sales to purchasers located outside Louisiana and requested Section 311 interstate transportation via Tennessee

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[1] Exhibit A of the October 1985 agreement listed only the interconnection with Creole in Yscloskey.

[2] This "rate of general applicability" was the rate LIG offered to any customer for service on the Eloi system and the main intrastate system.

from LIG. LIG and Prairie executed a "Section 311" agreement in January 1989 that entitled Prairie to deliver up to 20,000 MMBtu's per day to LIG for transportation to the interconnection with Tennessee at Yscloskey. For two months, Prairie tendered gas under both agreements (i.e. for intrastate users via Creole's line per the October 1985 agreement and interstate users via Tennessee's line per the January 1989 agreement). After March 1989, Prairie tendered all of its gas under the January 1989 agreement.

II.

THE F.E.R.C. RATE CASES

Prairie intervened in LIG's ongoing Section 311 rate case before the F.E.R.C., Docket No. ST88-2555-000, et al., and opposed the settlement filed by LIG in December 1988 in which it proposed to establish a generally applicable rate of $0.21 per MMBtu for all Section 311 service through either the main onshore grid or the Eloi Pipeline. Prairie argued that the Eloi Pipeline was separate and discrete from the remainder of LIG's system and that it should have its own generally applicable rate. Prairie contended that rate should be $0.0547 per MMBtu. The F.E.R.C. entered an order on April 10, 1989 accepting the $0.21 "rate of general applicability" for the main network, but not for the Eloi Pipeline.[3] The F.E.R.C. agreed with Prairie that the Eloi Pipeline rate should be determined separately, and after further proceedings the agency established the "rate of general

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[3] Louisiana Interstate Gas Corp., 47 F.E.R.C. P 61,042 (1989).

applicability" for Section 311 service on the Eloi Pipeline at $0.0337 per MMBtu.[4]

> The result of the Commission's order was to establish two rates of general applicability for LIG's section 311 operations, one for non-Eloi line transportation and the other for transportation via the Eloi line. LIG appealed these orders to the United States Court of Appeals where they are pending review.FN6
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> > FN6 Louisiana Interstate Gas Corp. v. F.E.R.C., Nos. 89-1479, 90-1050, & 90-1476 (D.C. Cir., filed October 3, 1990).

Prairie Producing Co. v. Louisiana Interstate Gas Corp., 58 F.E.R.C. ¶ 61,308 (1992) (Order Granting Clarification and Dismissing Petition for Declaratory Order and Complaint [hereinafter, "Clarifying Order"]).

III.

THE INSTANT CASE

In late January 1990, two weeks after entry of the Commission's Order setting the Eloi Pipeline Section 311 rate at $0.0337 and one year after LIG and Prairie executed the January 1989 Agreement ("the Section 311 agreement"), LIG filed suit against Prairie in state court in Louisiana alleging that Prairie had breached its agreements with LIG when it stopped tendering its gas under the October 1985 Agreement ("the intrastate agreement") but instead began selling all of its gas to interstate consumers under the Section 311 agreement. LIG claimed it was entitled to

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[4] Louisiana Interstate Gas Corp., 50 F.E.R.C. P 61,011, reh'g granted in part, 52 F.E.R.C. 61,297 (1990).

the difference between the $0.21 rate (which LIG argued was specified by the intrastate agreement) and the $0.0337 rate (which Prairie paid pursuant to the Section 311 agreement. LIG also asserted that Prairie owed transportation fees for all of Customer's Committed Gas, which in LIG's view included gas from throughout Eloi Bay whether or not owned or controlled by Prairie.

Citing diversity jurisdiction, Prairie removed this case to the federal district court. Prairie moved to stay pending resolution of the F.E.R.C. issues (which were on appeal to the D.C. Circuit). LIG opposed the stay and moved for summary judgment as to Prairie's liability. The district court denied the stay and granted LIG's motion for summary judgment on liability. The district court later granted LIG's motion for summary judgment as to damages. This appeal followed.

The interpretation of an unambiguous contract is a question of law and is therefore subject to our de novo review. The initial question of whether a contract is ambiguous is also a question of law. <u>Exxon Corp. v. Crosby-Mississippi Resources, Ltd.</u>, 40 F.3d 1474 (5th Cir. 1995) (citing <u>Haber Oil Co. v. Swinehart (In re Haber Oil)</u>, 12 F.3d 426, 443 (5th Cir. 1993)). Further, this court reviews de novo a district court's grant of summary judgment. <u>Degan v. Ford Motor Co.</u>, 869 F.2d 889, 892 (5th Cir. 1989). We do not reach the issue whether the Section 311 agreement violated the earlier transportation agreement's prohibition of sales for interstate commerce, because under the rate provision common to both contracts, Prairie properly

calculated the rate owed to LIG. This is true not only for the transportation charge per MMBtu, but also for the scope of Committed Gas. LIG thus suffered no damages nor any detriment that justified an award of specific performance. Each of these issues requires discussion.

IV.

THE RATE OF GENERAL APPLICABILITY

LIG's first argument rests on its interpretation of the provision that Prairie was bound to pay the "rate of general applicability" for gas transportation through the Eloi pipeline. LIG argues that the "rate of general applicability" specified in the agreement refers to the $0.21 rate of general applicability for Section 311 service on the main pipeline network. Prairie argues that the rate of general applicability specified in the agreement means the $0.0337 rate for Section 311 service through the Eloi Pipeline.

The district court agreed with LIG, stating that the distinction between "rate of general applicability" and "systemwide rate" was a distinction without a difference. In its Ruling on the liability issues, the district court recited summary judgment evidence that LIG typically charged "systemwide rates" for its transportation services. The district court reasoned that a "general" rate differs from a rate derived by reference to the specific service rendered. Accordingly, the rate of general applicability must mean the systemwide rate as opposed to that for a specific pipeline. No cited authority bolstered this

interpretation. The district court rejected Prairie's argument on motion for reconsideration that "rate of general applicability" was a term of art in the industry with a meaning different from that adopted by the court.

We disagree with the district court's analysis and conclusion concerning the disputed provision. Instead, we find more revealing the F.E.R.C.'s discussion in its Clarifying Order of the proper meaning and usage of the term "rate of general applicability", which exhibits the phrase as a term of art, or at least a customary term, in regulatory practice. In the course of explaining why its Section 311 rate jurisdiction and the filed rate doctrine were not adequate grounds for preempting this lawsuit (which was then pending before the district court), F.E.R.C. summarized the regulatory background for its rate setting authority and the meaning of a rate of general applicability as follows:

> Intrastate pipelines subject themselves to the Commission's ratemaking jurisdiction to the extent that they choose to perform open access interstate transportation under section 311(a)(2) of the NGPA. NGPA section 311(a)(2)(B) requires that the Commission establish "fair and equitable rates" for interstate pipelines. Under Part 284 of the Commission's regulations, section 284.7 governs the establishment of just and reasonable rates for interstate pipelines, while section 284.123 governs the establishment of fair and equitable rates for intrastate pipelines. Under the latter regulations, the Commission establishes rates of general applicability for section 311 service. These are nondiscriminatory rates that are generally available to anyone using the relevant service. Since the service itself must be offered on an open access basis, the rate is not a rate for any specific customer or group of customers.FN14

> FN 14 By contrast, where a pipeline provides an individually certificated nonopen-access service to particular customers, the rates for that service are only available to the particular customers to whom the pipeline has certificate authority to provide the service. The Rate Schedule for such service is filed in Volume 2 of the pipeline's tariff as a customer-specific X-rate schedule which identifies the particular customer to which it is applicable. This type of rate is not a rate of general applicability. ANR Pipeline Co., 54 FERC P 61,032, at p. 61,116 (1991).

> If a pipeline's system is fully integrated such that it offers only one open-access transportation service, it may have one rate of general applicability for open access transportation service. **However, a single pipeline may offer separate open-access transportation services, for example where it provides service over discrete pipeline facilities. In such a situation the pipeline may have different rates for its different open-access services.**FN15

> FN15 Lear Petroleum Corp., 42 FERC P 61,015 (1988) (the intrastate pipeline maintained two separate systems that resulted in the establishment of two generally applicable rates for section 311 transportation).

> **Nevertheless, each rate is considered a rate of general applicability, since each rate is available to any customer using the service in question and there are no limitations on what customers may use the service. Thus, a pipeline may have more than one generally applicable rate, depending on whether the system is fully integrated.**

Clarifying Order, 58 F.E.R.C. P 61,308, at p. 61,987 (emphasis added).

Thus elucidated, Prairie's proffered distinction between a "rate of general applicability" and a "systemwide rate" is indeed a distinction with a difference. The trial court erred in equating the rate of general applicability called for in the intrastate agreement with the systemwide rate defined as what LIG typically charged its customers. Rather, the rate clause of the intrastate agreement expressly provides as follows:

> Customer agrees to pay Transporter . . . that rate of general applicability charged by Transporter for performing transportation service under Section 311(a)(2) of the Natural Gas Act of 1978 as such rate exists from time to time. The rate as of May 1, 1985 is 29.8 [cents] per MMBtu (wet) subject to refund. Should such rate cease to exist at any future date, the parties hereto do agree to substitute a comparable rate.

Transportation Agreement § 6.1, at p. 8 (R. 1067). In other words, although it could have bargained for a customer-specific charge for the original non-Section 311 service,[5] LIG agreed to charge Prairie the nondiscriminatory rate that would be generally available to anyone using the relevant Section 311 service. Clarifying Order, 58 F.E.R.C. P 61,308, at p. 61,987. The relevant service for the purpose of this discussion is transportation of natural gas through the Eloi Pipeline. At the time of the agreement that rate happened to coincide with the systemwide rate. The parties did not specify that Prairie would always pay the "systemwide rate", though they could have. The parties chose, as

[5] Indeed, the parties did later agree to a special discount rate which expired in December 1988.

the applicable rate for the service contemplated, the Section 311 rate as such rate exists from time to time.

When F.E.R.C. ultimately delinked the Eloi Section 311 rate from the systemwide Section 311 rate, the rate of general applicability for service on the Eloi Pipeline became $0.0337 per MMBtu. The parties expressly recognized that the applicable rate would be subject to change "from time to time", and each side bore the risk that the rate would rise or fall to its detriment or that various segments of the pipeline might be awarded different rates. Even if Prairie's actions in tendering the gas under the Section 311 agreement resulted in a breach of the intrastate agreement,[6] LIG has suffered no compensable damages because the rate to which it was entitled by the intrastate agreement was no more than the rate it received pursuant to the Section 311 agreement: $0.0337 per MMBtu.[7]

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[6] LIG's allegation of breach focuses specifically on Prairie's failure to tender "committed gas" which it was obligated to tender by the intrastate agreement. LIG states in its brief:

> Prairie has never understood that it is not Prairie's "request" for actual 311(a)(2) transportation service nor the subsequent agreement between LIG and Prairie to provide such service upon tender of gas by Prairie that constituted the breach of the Intrastate Agreement. . . . There was no breach of the Intrastate Agreement until Prairie tendered gas for §311(a)(2) service that was already dedicated to the Intrastate Agreement.

Appellee's Brief, p. 40. Believing that it was entitled to the systemwide rate of $0.21 per MMBtu by the intrastate agreement, LIG seeks the difference between the systemwide rate (which LIG argues applies to gas dedicated to the intrastate agreement) and the Eloi rate of $0.0337 per MMBtu set by the F.E.R.C. (which Prairie has paid pursuant to the interstate agreement). Id.

[7] Further, if the D.C. Circuit, on review of the F.E.R.C.'s rate orders, alters the Eloi Pipeline Section 311 rate, that new rate would govern the parties' relations.

LIG argues that the F.E.R.C., in the referenced Clarifying Order, declined to rule on the issue of which rate of general applicability was intended to be used by the parties in the intrastate agreement because that decision belonged to the district court as a matter of contract interpretation. That being true, this court remains free to find instructive the F.E.R.C.'s discussion of the meaning and usage of "rate of general applicability". LIG also contends simply that the words of the contract are clear and dismisses Prairie's argument as based on parole evidence. This is inaccurate. The contract terms are clear, but the question left by the terms is what referent to use for a "rate of general applicability," i.e., to what is the rate generally applicable? We have concluded that in the absence of contract language linking the rate specifically to the separate 2,200-mile LIG network, the reference point became the "rate of general applicability" for the Eloi pipeline, once such a rate was fixed. Consequently, we disagree with the district court's contrary reading of the rate provision.

V.

COMMITTED GAS

The other critical disagreement between Prairie and LIG centers on the amount of gas covered by the transportation agreement. LIG contended, and the district court agreed, that "Committed Gas", "Customer's Committed Gas" and "Prairie's Committed Gas" are interchangeable terms for all of the gas covered by Exhibit C, which includes gas owned and controlled by others,

together with Prairie's interest in gas flowing through the Eloi pipeline.[8] This reading of the terms makes no sense, whether viewed from the standpoint of the contract language or the result that it would have, rendering Prairie liable for phantom transportation charges for gas it neither owned nor controlled and which, indeed, was transported by LIG under separate contract arrangements with the owners (Pelto and Pogo).

The contract language, from start to finish, governs transportation of gas which "Customer has available in Louisiana. . . . " (emphasis added). In § 2.1, Prairie "commits to deliver, or cause to be delivered . . . all of Customer's Committed Gas . . ." Section 5.1 requires Prairie to notify LIG "prior to each month as to the daily quantity of gas it desires to be transported," a feat that would be difficult if not impossible as to gas over which it had no control. Finally, Prairie agrees to pay LIG "for all natural gas transported hereunder . . ." § 6.1. All of these provisions suggest that the contract deals with transportation of Prairie's gas or gathered gas by LIG, and no more.[9]

The transportation service is to be performed for "Customer's Committed Gas," a term defined by reference to the contract as follows:

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[8] We reject LIG's arguments that Prairie waived its position in the district court as to the scope of the "Committed Gas."

[9] See also Louisiana Power & Light v. United Gas PipeLine, 642 F.Supp. 781, 794-95 (E.D. La. 1986) (applying a similarly narrow interpretation of phrase "total volume" in a gas contract).

> 1.14 The term "Committed Gas" shall mean Customer's interest in lands and leases that is or may be accessible to the System, and in addition volumes belonging to others identified on Exhibit "C" hereto attached.

Exhibit C lists various leaseholds as "Dedicated Reserves," a term not defined by the contract. As noted, the contract requires Prairie to tender all of "Customer's Committed Gas" and requires LIG to accept "such quantities of gas tendered by Customer." Section 2.1 (emphasis added). The only use of "Committed Gas" in the contract refers to LIG's right to prorate transportation "[i]n the event the quantities of Committed Gas and other gas transported by Transporter exceed Transporter's capacity" in the Eloi pipeline.

The definition of "Committed Gas" must be broader than "Customer's Committed Gas", because the former definition includes both Customer's interest in lands and leases plus other volumes "belonging to others identified on Exhibit 'C' . . ." Further, Prairie could only tender gas it owned or controlled, and it could only comply with other provisions of the contract, *e.g.* §§ 5.1-5.3,[10] as to gas it owns or controls.

That Prairie agreed to pay for the transportation of its gas, not that of others, does not render other contract terms superfluous and is certainly not an absurd construction. "Committed Gas" identifies all of the reserves whose production may be directed into the Eloi pipeline, and that term provides a means for Prairie to add reserves to the contract through acquisition. It also affords a rough gauge of LIG's possible proration formula.

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[10] Sections 5.1-5.3 require Prairie to notify LIG regarding the volumes to be delivered.

Unlike the district court, we conclude that Prairie did not oblige itself to pay for "Committed Gas" owned or controlled by others.

VI.

CONCLUSION

Because Prairie has paid for gas transportation in accordance with the terms of the transportation agreement, there was no breach and accordingly no basis for the court to order specific performance. The judgment of the district court is **REVERSED** and **RENDERED**.