

121 FERC ¶ 61,303
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tennessee Gas Pipeline Company

Docket No. CP08-11-000

ORDER ISSUING CERTIFICATE AND PERMITTING ABANDONMENT

(Issued December 28, 2007)

1. On October 18, 2007, Tennessee Gas Pipeline Company (Tennessee) filed an application seeking authorization to enter into a Payment-in-Lieu-of-Taxes (PILOT) transaction involving Tennessee and the Schoharie County Industrial Development Agency (Agency).¹ Among other things, the transaction involves the transfer to the Agency, by lease of, a passive interest in certain Tennessee property and jurisdictional pipeline facilities located in Schoharie County, New York, as well as the lease of the property and facilities back to Tennessee by the Agency. Tennessee also requests pregranted authorization to reacquire the passive interest from the Agency, and to abandon its lease from the Agency, when the underlying PILOT Agreement expires on December 31, 2016. Further, Tennessee requests that authority to enter into the PILOT Agreement and the lease and leaseback agreements be effective retroactively to February 7, 2007, the date of the PILOT Agreement.

2. For the reasons discussed below, we are granting Tennessee's requests for a certificate and abandonment authority authorizing its PILOT transaction and the requested pregranted authority, but are denying the request for a retroactive effective date.

¹ The Agency is a public benefit corporation created and empowered under New York law to grant tax exemptions in order to advance the job opportunities, health, general prosperity, and economic welfare of the people of the state. Under New York law, the Agency is exempt from taxation "upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities." *See* N.Y. General Municipal Law § 874(1). The PILOT Agreement, therefore, enables fixed payments in lieu of taxes to be made, regardless of future tax valuations of Tennessee's Schoharie County property.

I. Background/Proposal

3. In its application, Tennessee explains that from 1997 to 2006, it was involved in litigation due to a tax dispute with several taxing authorities in Schoharie County, New York, with respect to a portion of its pipeline system that traverses the northern part of Schoharie County.² These tax authorities include the Towns of Sharon, Schoharie, Esperance, Wright, and Carlisle, and the School Districts of Cobleskill-Richmondville Central, Sharon Springs Central, Canajoharie Central, and Schoharie Central (collectively, tax jurisdictions). Tennessee explains that the dispute concerned its contention that the tax jurisdictions had over-valued its Schoharie County property and facilities for the 1997-2003 tax years. Tennessee states that it paid the ad valorem taxes for those years under protest, but continued to seek relief.

4. According to Tennessee, on December 1, 2006, it and the tax jurisdictions entered into a Stipulation of Settlement and Order (Stipulation) to settle the litigation. The Stipulation provides for a reduction in Tennessee's real property taxes over ten years to permit Tennessee to recover by offset a portion of the tax amounts in dispute which it had already paid. However, Tennessee explains that since the tax jurisdictions are not permitted by law to assess taxes on less than 100 percent of the property valuations, Tennessee and the tax jurisdictions agreed that the terms of the Stipulation would be implemented through a February 1, 2007 PILOT Agreement between Tennessee and the Agency, which was executed by Tennessee on March 1, 2007.³

5. Tennessee indicates that under the PILOT Agreement, the Agency would take such action as may be necessary to ensure that Tennessee's property is awarded a tax exemption after the Agency acquires a leasehold interest in the property and pipeline facilities and simultaneously leases back the property/facilities to Tennessee. It notes that the term of the PILOT Agreement, which corresponds to the terms of the lease and leaseback agreements, expires on December 31, 2016, unless Tennessee terminates the lease and leaseback agreements earlier upon payment of \$1.00. Additionally, Tennessee explains that under the lease and leaseback agreements, the Agency will pay Tennessee

² The part of the Tennessee's system relevant to this proceeding consists of the 200 pipeline system that crosses the northern portion of Schoharie County, a compressor station and associated rights-of-way, as more particularly described in the application. The Commission authorized Tennessee to construct these facilities in various proceedings beginning in 1950. *See Tennessee Gas Pipeline Co.*, 115 FERC ¶ 61,160 (2006); 57 FERC ¶ 61,047 (1991); 51 FERC ¶ 61,113 (1990); 39 FPC 607 (1968); 37 FPC 989 (1967); 35 FPC 715 (1966); 32 FPC 114 (1964); and 9 FPC 271 (1950).

³ The PILOT Agreement is attached to Tennessee's application as Exhibit Z-1. Exhibit B to the Agreement specifies the tax payments to be made by Tennessee over the ten-year period.

the sum of \$1.00 for its leasehold interest and Tennessee will pay the Agency's administrative and legal fees relating to the transaction. According to Tennessee, the result of the various transactions will enable it to pay a lower fixed payment to the tax jurisdictions in lieu of the ad valorem tax it would otherwise be required to pay, which will offset part of the already paid disputed tax amounts. Tennessee also maintains that the arrangements will also avoid future valuation disputes because it will pay the fixed amount during the lease/leaseback period, regardless of such valuations.

6. Tennessee stresses that under the lease and leaseback agreements, all benefits and burdens of ownership of the property remain with Tennessee; the property will continue to be owned in fee simple by Tennessee; and the Agency's interest in the property will be held solely to provide the tax exemption for the property and facilities in order to implement the terms of the Stipulation. Further, Tennessee emphasizes, that upon the expiration of the term of the leases, the Agency's interest in the property expires. Additionally, Tennessee explains that it and the Agency entered into a similar payment-in-lieu of taxes agreement (Sales Tax Agreement), which provides for a partial exemption from the sales tax on materials used to make improvements to Tennessee's Schoharie County Property. The maximum abatement amount of the sales tax made available to Tennessee will be \$800,000.00, and the term of the Sales Tax Agreement is correlated to the other transactional agreements, except that it could terminate earlier if the maximum abatement amount is exceeded.

7. Following the execution of the agreements involved in this proceeding, Tennessee states that it became aware of a Commission case involving a payment-in-lieu-of-taxes agreement and recognized that the lease and leaseback agreements necessary to effectuate the tax exemption required Commission approval, even though the leases conveyed no dominion over Tennessee's jurisdictional facilities to the Agency. Thus, Tennessee filed the subject application with the Commission.⁴ For this reason, Tennessee requests that the authority requested herein be granted retroactively to February 1, 2007, the date of the PILOT Agreement, since the parties have already entered into agreements effective February 1, 2007, and none of the parties recognized that the transactions needed the Commission's approval.

8. Tennessee cites numerous electric and several natural gas cases wherein lease/leaseback-type arrangements were authorized by the Commission, primarily for the purpose of allowing tax exemption.⁵ It contends that the Commission will authorize such

⁴ Tennessee indicates that it also consulted Commission staff on the matter of whether it was necessary for it to file the application in this proceeding.

⁵ Citing, e.g., *Pacific Power & Light Co.*; 3 FERC ¶ 61,119 (1978); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *LMB Funding LP*, 101 FERC ¶ 61,237 (2002); and *Liberty Gas Storage, LLC*, 117 FERC ¶ 61,224 (2006).

arrangements where the interest transferred by the electric or pipeline companies to another entity is a passive interest in that those companies will continue to have complete control over the operation of the facilities and services rendered over them. Tennessee avers that the Commission has also determined in certain circumstances that lease and leaseback arrangements may be terminated without requiring the company involved to file for case-specific authorization to reacquire the passive interest in the property and facilities or to abandon the leaseback arrangements.⁶ Tennessee contends that the circumstances of this case are consistent with those in which such pregranted authority was granted, noting, in particular, that it will retain full dominion and control over the assets subject to the arrangements, no facilities will be added or abandoned, no change in jurisdictional service to its customers will result, and no customers will be harmed. Therefore, Tennessee requests the Commission issue a certificate authorizing it to enter into the lease and leaseback agreements in order to implement the Stipulation, effective retroactively to the date of the PILOT Agreement, and issue authority for it to reacquire the Agency's passive interest in the property and facilities, and to abandon its lease of the facilities from the Agency on a pregranted basis when the underlying agreements expire by their own terms on December 31, 2016, or earlier if the parties agree to terminate the arrangements.

II. Interventions

9. Notice of Tennessee's application was published in the *Federal Register* on November 5, 2007 (72 Fed. Reg. 62,459). Timely, unopposed motions to intervene were filed by Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., and PSEG Energy Resources & Trade, LLC.⁷ No protests or adverse comments were filed.

III. Discussion

10. Since the facilities subject to Tennessee's proposals are used to transport natural gas in interstate commerce, they are subject to the Natural Gas Act and the Commission's jurisdiction.

A. Lease and Leaseback Proposals

11. The Commission will issue abandonment authority for Tennessee to transfer a passive leasehold interest in the subject property and facilities to the Agency, until December 31, 2016, in order to implement the PILOT Agreement and Sales Tax

⁶ Citing, e.g., *Granite State Gas Transmission, Inc.*, 40 FERC ¶ 61,165 (1987).

⁷ Timely, unopposed motions to intervene are granted by operation of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.2214 (2007).

Agreement, which, in turn, were entered into in order to effectuate the Stipulation between Tennessee and the tax jurisdictions to resolve a nine-year dispute between the parties. We also issue a certificate authorizing Tennessee to acquire a lease of the property and facilities back from the Agency until December 31, 2016, in order for it to continue operating and maintaining the property and facilities and to provide its certificated jurisdictional services. As explained, under the PILOT Agreement, Tennessee will make fixed annual payments in lieu of taxes to the tax jurisdictions. Under the proposed arrangements, Tennessee will maintain total control over the operation and maintenance of the property and facilities and over the provision of its certificated jurisdictional services. Because Tennessee's proposals will resolve a legal dispute without having any adverse effect on Tennessee's customers, we find that the proposals are in the public interest.

12. Moreover, as Tennessee points out in its Application, the Commission has approved lease and leaseback arrangements in the past in order to permit entities subject to its jurisdiction to obtain tax exemptions. Recently, in *Empire Pipeline, Inc.*,⁸ we approved similar lease and leaseback arrangements that would permit that company to obtain a property tax exemption to offset pipeline construction costs that had increased since the certificate authorizing the construction had been issued. There, we found that permitting the pipeline to enter into the lease and leaseback arrangements on a long-term basis would not change any of the findings in the Commission's certificate order. Similarly, Tennessee's proposal to implement the terms of the PILOT Agreement through the lease and leaseback arrangements with the Agency will allow it to offset overpayments of property taxes in previous years and will have no effect on Tennessee's certificated service obligations or the underlying certificates authorizing the construction and operation of the subject facilities. For these reasons, we conclude that Tennessee's proposal to enter into the lease and leaseback agreements is required by the public convenience and necessity.

13. However, we will not grant Tennessee's request that the authority requested herein be granted retroactively to February 1, 2007, the date of the PILOT Agreement. The only reason specified by Tennessee for requesting these authorizations to be granted retroactively is to "fully cure the oversight," that resulted in Tennessee's entering into the PILOT Agreement, and lease and leaseback agreements prior to seeking Commission authorization to do so. We do not think this is a sufficient reason to grant the retroactive authority sought by Tennessee. While the Commission has had occasion to exercise its discretionary equitable authority to grant certificate and/or abandonment authority retroactively, it does so only where it finds that the circumstances of a case warrant such action.⁹ For example, the Commission has granted retroactive abandonment authority

⁸ *Empire Pipeline, Inc.*, 121 FERC ¶ 61,129 (2007 (*Empire*)).

⁹ In this regard, we note that the Commission's general policy is not to grant

where there would be a specific monetary loss to a party.¹⁰ In *Southwest Gas Transmission Company*,¹¹ the Commission granted retroactive abandonment authority where several parties had agreed to and did restructure case-specific transportation arrangements, without *Southwest* first applying for Commission authorization to modify its service obligations. Granting the abandonment authority retroactively would allow the parties to allocate demand charges between certain customers as of the date of the agreements. However, the Commission declined to grant a retroactive certificate authority requested by the pipeline to conform the dates of various agreements to the date of the order. The Commission found that granting retroactive certificate authority would not change the fact that the pipeline had commenced a service without appropriate authority. This was the case even though the underlying purpose of the restructuring was to resolve a longstanding dispute between certain parties regarding responsibility for demand charges.

14. Although this proceeding does not involve the provision of unauthorized service, Tennessee did enter into agreements to transfer an interest in its jurisdictional property and facilities and into a lease permitting it to operate the property and facilities without first obtaining authority from the Commission. Retroactive certificate and/or abandonment authority will not change this fact. It is our understanding that as long as the Commission issues the authorizations sought in this proceeding in 2007, Tennessee will get the tax exemption described herein for the 2008 tax year. Additionally, we find that since Tennessee's entering into the lease and leaseback agreements without prior authorization from the Commission will not have any adverse effects on its customers, no enforcement action is necessary.

B. Pre-Granted Authorizations

15. Tennessee also requests pregranted authorizations so that when the PILOT Agreement and the lease and leaseback agreements expire, by their own terms, on

retroactive certificate authority. See, e.g., *Panhandle Eastern Pipeline Company*, 58 FERC ¶ 61,231, at 61,732 (1992) ("as a matter of policy, the Commission does not issue retroactive certificate authorization"); and *Mobil Producing Texas & New Mexico, Inc.*, 55 FERC ¶ 61,090, at 61,274 (1991) (Commission has policy of not granting certificates retroactively). But see *Michigan Consolidated Gas Company, Interstate Storage Division*, 35 FERC ¶61,203, at 61,476 (1986) (retroactive certificate amendment issued to avoid customers' paying for services not received by them).

¹⁰ Citing, e.g., *Transcontinental Gas Pipe Line Corporation*, 73 FERC ¶62,025 (1995); *order granting reh'g*, 73 FERC ¶ 61,301 (1995) (retroactive abandonment granted to allow a customer to avoid demand charges).

¹¹ *Southwest Gas Transmission Co.*, 91 FERC ¶ 61,007 (2000) (*Southwest*).

December 31, 2016, or earlier at Tennessee's option, Tennessee may reacquire the Agency's passive interest in the property and facilities, and can abandon its operation of the facilities under the lease from the Agency. Although Tennessee cites cases wherein the Commission addressed similar types of issues, it is sufficient in this proceeding to follow the approach taken in *Empire* because of the similarity of the proposed transactions. In *Empire*, we issued the pregranted authority for the pipeline to reacquire passive interests in its facilities and property that were to be transferred by lease to industrial development agencies in various counties in New York in order to obtain tax exemptions, and also to cease operating its facilities under the concurrent leaseback agreement with those agencies at the expiration of the lease and leaseback agreements.

16. The Commission distinguished the facts in *Empire* from those in *Liberty Gas Storage, LLC*,¹² wherein the jurisdictional company proposed to transfer legal title in jurisdictional facilities located in Louisiana to a development agency under an arrangement in which the facilities would be leased back to the company. However, in that proceeding, the agreement between the storage company and the development agency only gave the storage company the option to repurchase the title to the facilities back from the agency when the lease expired. The Commission held that Liberty would have to seek case-specific certificate authorization to reacquire title to the facilities. As described, Tennessee's proposal does not require it to take any action in order to reacquire the passive interest from the Agency. Thus, pregranted authority is appropriate in this case.

17. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity and abandonment authority are issued to Tennessee, authorizing it to implement, on the date of this order, the lease and leaseback agreements with the Agency, pursuant to the PILOT Agreement dated February 7, 2007, as more fully described in the body of this order and in the application.

(B) Section 157.20(a) of the Commission's regulations is waived to the extent necessary to allow the lease and leaseback agreements to go into effect prior to Tennessee's acceptance of the certificate consistent with that section.

(C) Tennessee's request for pregranted authorizations is granted.

¹² *Liberty Gas Storage, LLC*, 117 FERC ¶ 61,224 (2006) (*Liberty*).

(D) Tennessee's request for retroactive authorizations is denied.

(E) In all other respects, Tennessee's existing certificates shall remain in full force and effect.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.