127 FERC ¶ 61,321
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

In re ProLiance Energy, LLC Docket No. IN09-21-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued June 30, 2009)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and ProLiance Energy, LLC (ProLiance). This order is in the public interest because it resolves the investigation into self-reported violations by ProLiance of the Commission's open access transportation program, including circumventing the competitive bidding requirements for long-term, discounted rate capacity releases, violations of the shipper-must-have-title requirement, and violations of the prohibition on buy/sell transactions. ProLiance has agreed to pay a civil penalty of $3,000,000, to disgorge $195,959.44, plus interest, and to submit compliance monitoring reports.

Background

2. ProLiance is a natural gas marketer in Indiana. ProLiance is engaged in the bundled and unbundled sales of natural gas to its affiliate utilities, small non-affiliated municipalities and distribution companies, non-affiliated commercial and industrial customers, and other non-affiliated marketers. During the period covered by the investigation, ProLiance's affiliate Relius Energy (Relius) also participated in the wholesale natural gas market.

3. In late 2007, following a self-report by ProLiance, Enforcement opened an investigation pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), into possible violations of the Commission's open access transportation

program between January 2005 and October 2007. ProLiance self-reported certain "flipping,"[1] shipper-must-have-title, and buy/sell transactions.

Violations

A. Flipping Transactions

4. Section 284.8(h) of the Commission's regulations requires that a shipper releasing firm capacity for a term longer than 31 days and at a price less than the maximum tariff rate must post the capacity for competitive bidding on the pipeline's Electronic Bulletin Board. The regulations also provide that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2), a discounted, short-term release may not be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

5. The prior posting requirement for long-term, discounted rate releases promotes natural gas market transparency by providing notice to all interested shippers of the availability of released capacity. The competitive bidding requirement, in turn, ensures that the released capacity will go to the shipper who values it most. Together, the posting and bidding requirements are integral components of the Commission's pipeline open-access program, and promote transparency, market efficiency, and the elimination of undue preference and discrimination in the natural gas transportation market.

6. Enforcement staff confirmed that ProLiance and Relius improperly obtained 21.5 Bcf of discounted rate Texas Gas Transmission LLC (Texas Gas) pipeline capacity through flipping transactions. Through segmentation, ProLiance was able to transport 34.2 Bcf of natural gas on that capacity. In addition, Relius released 14.6 Bcf of discounted rate capacity through flipping transactions on Texas Gas, which was used by the replacement shipper to transport 8.8 Bcf of

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[1] Flipping is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2008). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the posting and bidding requirements, that creates a long-term, noncompetitive discounted rate release. *See, e.g., In re Puget Sound Energy, Inc*., 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Corporation*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Company*, 121 FERC ¶ 61,088 (2007).

natural gas. The flipping transactions caused harm to natural gas transportation markets, because they impeded transparency and denied other market participants an opportunity to bid for discounted, long-term releases of capacity that may not have otherwise been available from Texas Gas or other releasing shippers.

B. Shipper-Must-Have-Title Requirement Violations

7. The shipper-must-have-title requirement provides that the holder of title to the gas must be the capacity holder for the transportation as well. Without the shipper-must-have-title requirement, it is unlikely that shippers would need to use capacity release, since capacity holders could simply transport gas over the pipeline for another entity. Thus, transactions would not be subject to any of the capacity release requirements, such as the reporting requirements or the allocation through competitive bidding. Without the shipper-must-have-title requirement, the identity of the true users of the pipeline's transportation and the conditions under which they moved gas would not be known.[2] The shipper-must-have-title requirement is reflected in the FERC gas tariffs of interstate pipelines providing open-access transportation and storage service.[3]

8. Enforcement staff confirmed that ProLiance violated the shipper-must-have-title requirement by improperly transporting approximately 6.7 Bcf of gas owned by ProLiance on capacity held by others, but delivered to third parties. Violations of the shipper-must-have-title requirement interfere with the Commission's oversight of natural gas markets and with the Commission's goal of market transparency. ProLiance unjustly profited by $195,959.44 through its shipper-must-have-title violations.

C. Prohibited Buy/Sell Transactions

9. The Commission has prohibited certain buy/sell transactions. A prohibited buy/sell transaction is a commercial arrangement where a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (e.g., an end-user), ships that gas through its interstate pipeline

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[2] Matching ownership of the gas with the capacity used to transport the gas assures that capacity holders will not engage in capacity assignment, but will instead use the capacity release mechanism when another party wishes to transport its gas, and thus increases transparency in the transportation market.

[3] Although the specific language of pipeline tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

capacity, and then resells an equivalent quantity of gas to the downstream entity at the delivery point. *See Williams Energy Marketing & Trading Co.*, 92 FERC ¶ 61,219, at 61,715-16 (2000). By prohibiting buy/sell transactions, the Commission prevents a capacity holder with priority to pipeline capacity from acting as a broker of transportation capacity or assigning transportation capacity to end-use customers. Such practices, if permitted, would be a barrier to open access transportation on interstate pipelines.

10. Enforcement staff confirmed that ProLiance entered into three transactions that violate the buy/sell prohibition. Each took place on a different pipeline. Under the three agreements ProLiance purchased gas from a customer, transported the gas to a delivery point using ProLiance capacity, and then sold the gas back to the customer at a stated downstream delivery point. These agreements led to the transportation of 325,977 Dth of natural gas.

11. Buy/sell transactions such as those carried out by ProLiance circumvent, and therefore frustrate, the Commission's open access transportation policies requiring releases of capacity from one shipper to another to be subject to certain posting and competitive bidding requirements.

<u>Stipulation and Consent Agreement</u>

12. Enforcement and ProLiance resolved Enforcement's investigation of ProLiance's self-reported violations by means of the attached Agreement. The Agreement requires ProLiance to pay a $3,000,000 civil penalty to the United States Treasury within ten days of this order accepting and approving the Agreement. ProLiance will also disgorge $195,959.44 plus interest to certain energy assistance programs that receive and distribute funds from the Department of Health and Human Services, representing unjust profits from ProLiance's shipper-must-have-title violations. ProLiance also will submit semi-annual monitoring reports to Enforcement for a period of one year with the option of a second year at staff's discretion. Each compliance report shall describe any new and existing compliance program measures, including training, and alert staff to any additional violations of the capacity release requirements that may occur.

<u>Determination of the Appropriate Civil Penalty</u>

13. Pursuant to section 22(a) of the Natural Gas Act (NGA), the Commission may assess a civil penalty up to $1 million per day per violation for as long as the

violation continues.[4] In approving the Agreement and the $3,000,000 civil penalty, we considered the factors set forth in section 22(c) of the NGA, 15 U.S.C. § 717t-1(c), and the Revised Policy Statement on Enforcement.[5] We conclude that the penalty determination in the instant matter is a fair and equitable resolution of this matter and is in the public interest, as it reflects the nature and scope of ProLiance's violations. The penalty reflects the fact that ProLiance self-reported the violations and its exemplary cooperation throughout the investigation.

14. We conclude that the civil penalty, disgorgement, and the compliance monitoring reports specified in the Agreement are fair and equitable, and in the public interest.

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[4] 15 U.S.C. § 717t-1(a) (*added by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B), 119 Stat. 594, 691 (2005) (authorizing the Commission to impose civil penalties "of not more than $1,000,000 per day per violation for as long as the violation continues").

[5] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 54 -71 (2008).

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FEDERAL ENERGY REGULATORY COMMISSION

In re ProLiance Energy, LLC	)	Docket No. IN09-21-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and ProLiance Energy, LLC (ProLiance) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), of whether transactions self-reported by ProLiance violated the Commission's open access transportation program, including the competitive bidding requirements for long-term, discounted rate capacity releases, the shipper-must-have-title requirement, and the prohibition against buy/sell transactions.

II. STIPULATIONS

Enforcement and ProLiance hereby stipulate and agree to the following:

A. Background

1. ProLiance is a natural gas marketer in Indiana formed in 1996 by affiliates of Citizens Energy Group and Vectren Corporation. ProLiance is engaged in the bundled and unbundled sales of natural gas to its affiliate utilities, small non-affiliated municipalities and distribution companies, non-affiliated commercial and industrial customers, and other non-affiliated marketers. ProLiance procures over 300 Bcf of natural gas a year for its customers and holds approximately 1 Bcf a day of interstate pipeline capacity to provide service to these customers. ProLiance's affiliate Relius Energy (Relius), during the period covered by the investigation, also participated in the wholesale natural gas market.

2. In March of 2007, ProLiance's senior management, acting on the recommendation of its General Counsel, conducted an internal review of ProLiance's natural gas contracts to assess the company's compliance with the Commission's capacity release rules and the shipper-must-have-title requirement. Approximately 2,100 natural gas sales contracts were reviewed. As a result of that review, ProLiance contacted Enforcement staff and self-reported a number of transactions. Enforcement staff opened an investigation

pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), and investigated transactions that occurred during the period January 2005 through October 2007.

B. Summary of Violations

3. Enforcement confirmed that many of the transactions self-reported by ProLiance were violations of Commission open access transportation requirements.[1] ProLiance and its affiliate Relius participated as replacement shippers in four series of flipping transactions through which ProLiance and Relius acquired 21.5 Bcf of capacity, which ProLiance used to transport 34.2 Bcf of gas on one pipeline.[2] Relius was also the releasing shipper in a series of flipping transactions on the same pipeline through which Relius released 14.6 Bcf of discounted rate pipeline capacity, which was used by the replacement shipper to transport 8.8 Bcf of natural gas. The investigation also confirmed that, in various transactions on eight different pipelines, ProLiance violated the shipper-must-have-title requirement by transporting 6.7 Bcf of ProLiance-titled gas on customer-owned capacity for sale to third parties. In addition, Enforcement staff confirmed that ProLiance participated in three buy/sell transactions involving the transportation of 325,997 Dth of natural gas on four pipelines.

4. The violations confirmed by Enforcement staff resulted principally from ProLiance's failure to recognize the jurisdictional aspects of its marketing activities and the resultant absence of training on the Commission's open access transportation requirements.

1. Flipping Transactions

5. The Commission's regulations at 18 C.F.R. § 284.8 (2008) require that a shipper releasing firm capacity for a term longer than 31 days and at a price less than the

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[1] In addition to the transactions that were evident violations, ProLiance self-reported additional transactions that staff determined did not violate applicable requirements.

[2] "Flipping" is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2008). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the positing and bidding requirements, that creates a long-term, non-competitive discounted rate release. *See, e.g.*, *In re Puget Sound Energy, Inc.*, 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Co.*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007).

maximum tariff rate must post the capacity for competitive bidding on the pipeline's Electronic Bulletin Board. The regulations also provide that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2), a discounted, short-term release may not be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

6. Enforcement staff confirmed that ProLiance and Relius participated in four series of flipping transactions as replacement shippers on the Texas Gas Transmission LLC (Texas Gas) pipeline system. ProLiance and Relius obtained 21.5 Bcf of discounted rate pipeline capacity that, through segmentation, was used to transport 34.2 Bcf of natural gas. In addition, Relius released discounted rate capacity on Texas Gas in another series of flipping transactions involving the release of 14.6 Bcf of capacity used by the replacement shipper to transport 8.8 Bcf of natural gas.

7. The Commission has stated that flipping transactions circumvent the requirement that long-term discounted rate capacity be obtained through competitive bidding. The Commission has also stated that flipping transactions also cause harm to natural gas transportation markets because they impede transparency and deny other market participants an opportunity to bid for discounted, long-term releases of capacity that may not have been available from the pipeline or other releasing shippers. Enforcement staff determined that there were no unjust profits from the flipping transactions.

2. Shipper-must-have-title Violations

8. A central requirement of the Commission's open access transportation program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of each interstate pipeline's tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

9. ProLiance often acted as agent for customers that held rights to firm pipeline transportation capacity on pipelines where ProLiance itself also held capacity. ProLiance delivered gas to those customers but, in various transactions on eight different pipelines when the capacity was not needed to serve the customer, ProLiance used such capacity to deliver gas owned by ProLiance to third parties. To comply with the shipper-must-have-title requirement in such cases, ProLiance should have obtained pipeline capacity in its own name, such as by capacity release, or should have scheduled such gas on its own capacity. Enforcement staff confirmed that ProLiance violated the shipper-must-have-

title requirement by improperly transporting 6.7 Bcf of gas owned by ProLiance on capacity held by others, but delivered to third parties. ProLiance's violations of the shipper-must-have-title requirement avoided compliance with the Commission's capacity release requirements, reducing market transparency in the natural gas transportation market and adversely impacting the Commission's oversight of that market. In addition, Enforcement staff also determined that ProLiance unjustly profited by $195,959.44 related to the shipper-must-have-title violations.

3. Buy/Sell Violations

10. The Commission has prohibited certain buy/sell transactions. A prohibited buy/sell transaction is a commercial arrangement where a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (e.g., an end-user), ships that gas through its interstate pipeline capacity, and then resells an equivalent quantity of gas to the downstream entity at the delivery point. *See Williams Energy Marketing & Trading Co.*, 92 FERC ¶ 61,219, at 61,715-16 (2000). By prohibiting buy/sell transactions, the Commission prevents a capacity holder with priority to pipeline capacity from acting as a broker of transportation capacity or assigning transportation capacity to end-use customers. Such practices, if permitted, would be a barrier to open access transportation on interstate pipelines.

11. Enforcement staff confirmed that ProLiance entered into three transactions that violated the buy/sell prohibition. Each took place on a different pipeline. All three transactions involved the sale and purchase of equivalent quantities of gas on a single pipeline, under which ProLiance would purchase gas from a customer, transport the gas to a delivery point using ProLiance capacity, and then sell gas back to the customer at a stated downstream delivery point. These buy/sell agreements led to the improper transportation of 325,977 Dth of natural gas.

12. Buy/sell transactions such as those carried out by ProLiance circumvent, and therefore frustrate, the Commission's open access transportation policies requiring releases of capacity from one shipper to another so that the use of interstate pipeline capacity will be transparent to market participants. Enforcement staff determined that there were no unjust profits from the buy/sell transactions.

C. Self-Corrective Action

13. At the time the violations occurred, ProLiance did not have in place a compliance program or other mechanism that focused on the Commission's open access transportation program. As a result, ProLiance's operational personnel lacked sufficient familiarity with the Commission's requirements for the release or use of interstate pipeline capacity. Since submitting the self-report, ProLiance has amended or terminated all contracts in violation, has provided extensive training on the Commission's open

access transportation requirements to its employees, and has significantly increased its compliance measures by formulating and implementing an enhanced compliance program.

14. ProLiance's cooperation with Enforcement staff's investigation has been exemplary. ProLiance engaged outside counsel to assist with a comprehensive review of its interstate pipeline and gas storage transportation transactions, which resulted in ProLiance providing Enforcement staff with a thorough written self-report. ProLiance ceased all violations promptly and has revised its operational practices to avoid future incidents of violations. Senior management fully supported the internal review and did not attempt to conceal the violations.

D. Civil Penalty Factors

15. In arriving at the agreed civil penalty to resolve the investigation in this matter, among the civil penalty factors Enforcement staff considered was the recent disclosure in Vectren Corporation's May 1, 2009 10Q of adverse developments regarding Liberty Gas Storage, LLC in which ProLiance has a substantial investment.

III. REMEDIES AND SANCTIONS

16. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation, ProLiance agrees to take the following actions:

A. Civil Penalty

17. ProLiance shall pay a civil penalty of $3,000,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below.

B. Disgorgement

18. ProLiance shall disgorge $195,959.44, plus interest, such amount representing unjust profits from ProLiance's shipper-must-have-title violations, to energy assistance programs administered by States, territories, or Indian tribes and tribal organizations that have received grants from the federal Secretary of Health and Human Services, such energy assistance programs to be agreed upon and such disgorgement to be made within 30 days from the Effective Date of this Agreement. This distribution of unjust profits to such energy assistance programs is appropriate because distribution of unjust profits to the customer whose capacity was used by ProLiance may result in windfall benefit to the customer.

C. Compliance Monitoring

19. ProLiance shall make semi-annual reports to Enforcement staff for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than ten days after the end of the second calendar quarter after the quarter in which the Effective Date of this Agreement falls. The second report shall be submitted six months thereafter. With respect to all of ProLiance's wholesale natural gas business, each compliance report shall: (1) advise staff whether additional violations of the open access transportation requirements have occurred; (2) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period, including a description of the training provided to all relevant personnel concerning the Commission's open access transportation policies and a statement of the personnel that have received such training and when the training took place; and (3) include an affidavit executed by an officer of ProLiance that the compliance reports are true and accurate. Upon request by staff, ProLiance shall provide to staff all documentation supporting its reports. After the receipt of the second semi-annual report, Enforcement staff may, at its sole discretion, require ProLiance to submit semi-annual reports for one additional year.

IV. TERMS

20. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without modification. When effective, this Agreement shall resolve the matters specifically addressed herein as to ProLiance and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to ProLiance.

21. Commission approval of this Agreement without modification shall release ProLiance and forever bar the Commission from holding ProLiance, any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to ProLiance liable for any and all administrative or civil claims arising out of, related to, or connected with the matters addressed in this Agreement.

22. Failure to make a timely civil penalty payment or disgorgement payment or to comply with the compliance program improvements and monitoring agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Natural Gas Act (NGA), and may subject ProLiance to additional action under the enforcement and penalty provisions of the NGA.

23. If ProLiance does not make the civil penalty payment above at the time agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 154.501(d) (2008) from the date that payment is due, in addition to the penalty specified above.

24. The Agreement binds ProLiance and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on ProLiance, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in Section III of this Agreement.

25. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or ProLiance has been made to induce the signatories or any other party to enter into the Agreement.

26. Unless the Commission issues an order approving the Agreement in its entirety and without modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor ProLiance shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and ProLiance.

27. In connection with the payment of the civil penalty provided for herein, ProLiance agrees that the Commission's order approving the Agreement without modification shall be a final and unappealable order assessing a civil penalty under section 22(a) of the NGA, 15 U.S.C. § 717t-1(a). ProLiance waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without modification, and judicial review by any court of any Commission order approving the Agreement without modification.

28. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

29. The undersigned representatives of ProLiance affirm that they have read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of their knowledge, information and belief, and that they understand that the Agreement is entered into by Enforcement in express reliance on those representations.

30. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:

Susan Court

Susan Court
Director, Office of Enforcement
Federal Energy Regulatory Commission

6/16/09
Date

John R. Talley

John Talley
President
ProLiance Energy, LLC

June 15, 2009
Date