

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Maritimes & Northeast Pipeline, L.L.C.

Docket No. CP06-32-000

DECLARATORY ORDER

(Issued April 20, 2006)

1. On November 16, 2005, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed a request for a declaratory order finding that its submitted engineering design is appropriate for an expansion of its system for which a certificate application has not yet been filed.¹ Maritimes' planned proposal, referred to as the Phase IV expansion, involves an expansion of facilities that are solely owned by Maritimes as well as facilities it co-owns with Portland Natural Gas Transmission Company (PNGTS) that are known as the joint facilities. Maritimes contends that after PNGTS indicated its intention to participate in, and informally agreed to the proposed engineering design for, the Phase IV expansion of the joint facilities, it has refused to approve the final design as required by the parties' ownership agreement until other contractual disputes between the co-owners are resolved. Maritimes maintains that Commission approval of its proposed engineering design, which it states would meet both owners' requirements, would give certainty to Maritimes' shippers who also have facilities to construct. Additionally, Maritimes contends that Commission approval of this one key aspect of the project will assist Maritimes to maintain its development schedule and meet its projected November 2008 in-service date for the Phase IV expansion.

¹ Maritimes styled its pleading as a petition for a preliminary determination; however, the Commission is deeming it a request for a declaratory order because it is the Commission's practice to issue preliminary determinations on proposals when an application is on file and a preliminary finding can be made from the record.

2. For the reasons discussed below, the Commission is finding that the engineering design put forth by Maritimes for the Commission's review is appropriate and adequate for the purposes stated in the request. However, the Commission is not making a finding that the expansion project is required by the public convenience or necessity nor reaching the issues relating to the contract dispute between Maritimes and PNGTS.

Background

3. The Commission, in many orders, has explained the genesis of the joint facilities in which Maritimes and PNGTS share an interest, so that history will not be repeated at length here.² Briefly, in 1996 both Maritimes and PNGTS proposed projects to import Canadian gas into the United States to serve markets in the northeast. The import points and the northern parts of each proposed pipeline were different; however, the southernmost part of each pipeline's proposed route essentially converged from a point near Westbrook, Maine, to a point in Dracut, Massachusetts. Because of environmental concerns arising from the possibility of constructing two separate pipelines in close proximity to each other in a congested area, the Commission urged Maritimes and PNGTS to study the feasibility of constructing joint facilities.

4. The pipelines did make such a proposal and eventually, after much negotiation, came to terms on an ownership agreement, engineering and construction management agreement, and operating agreement, known together as the definitive agreements. Among other things, the definitive agreements provide for expansions of the joint facilities and set forth the procedures whereby one owner may propose an expansion and the other owner may opt to participate in it.³

² See, e.g., *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061, order on *reh'g*, 89 FERC ¶ 61,123 (1999) (amending Phases I and II).

³ The Commission approved the definitive agreements on November 4, 1997. See *Maritimes & Northeast Pipeline, L.L.C. and Portland Natural Gas Transmission System*, 81 FERC ¶ 61,166 (1997). The ownership agreement sets forth the rights and obligations of the parties regarding the development, construction, operation, capacity entitlement and ownership of the joint facilities; the engineering and construction management agreement provides for the rights and obligations of the parties for the engineering, design, construction and procurement for the initial joint facilities and subsequent expansions; the operating agreement designates the M&N Operating Company, LLC (now known as the M & N Operating Company), as the operator of the joint facilities and the construction manager for future expansions of the joint facilities, and defines the

(continued)

5. Maritimes later expanded its own mainline facilities and then, in 2002, filed an application in Docket No. CP02-78-000 for authority to construct and operate a Phase IV expansion, which involved increases in the capacity of both Maritimes' solely-owned facilities and the joint facilities. PNGTS chose to participate in the expansion of the joint facilities, but raised a number of issues, including an issue (referred to herein as the indemnification issue) regarding how the ownership interests in the joint facilities will be adjusted when the joint facilities are expanded. Maritimes and PNGTS resolved their disputes regarding that Maritimes' Phase IV expansion in a settlement which the Commission approved and under which PNGTS withdrew its protest to the project.⁴ However, Maritimes withdrew its application in Docket No. CP02-78-000 on February 11, 2004, because its shipper for the expansion capacity terminated its precedent agreement.

6. On September 15, 2005, Maritimes filed a request with the Commission, in Docket No. PF05-17-000, to initiate a National Environmental Policy Act (NEPA) review for the current Phase IV project. Maritimes maintains that any certificate application it files for the current Phase IV project is, in effect, a resubmission of its earlier Phase IV expansion proposal, *albeit*, with some modifications.

The Current Proceeding

7. From February 15 to March 31, 2005, Maritimes held an open season to assess whether there was still interest in an expansion of its system. As a result of the open season, Maritimes executed agreements with two shippers to transport gas from LNG import terminals located in Canada which are owned by affiliates of the shippers. Maritimes' Canadian affiliate, Maritimes & Northeast Pipeline Limited Partnership, would provide the Canadian portion of the service. On April 5, 2005, Maritimes notified PNGTS of its planned expansion project, as required by the definitive agreements, so that PNGTS could participate in it. PNGTS notified Maritimes that it wanted 150,000 Dth per day (Dth/d) of expansion capacity, as opposed to the 10 Dth/d it had requested on the previously proposed expansion. Maritimes subsequently proposed an initial facility design to accommodate PNGTS' volumes.

8. On August 3, 2005, pursuant to section 3.01(a) of the operating agreement, the operator of the joint facilities, acting in its capacity as the construction manager,

rights and obligations of Maritimes, PNGTS and the operator with respect to the operation of the joint facilities.

⁴ See *Maritimes & Northeast Pipeline, L.L.C.*, 101 FERC ¶ 61,348 (2002).

submitted to the joint owners a recommendation for the most economical design based on the information provided by the owners regarding their requirements and their suggested modifications. In order to comply with the timelines provided in the definitive agreements, the joint owners began the process of proposing modifications to the design submitted by the operator. To this end, they met on September 9, 2005, with the operator to discuss the design and at that meeting PNGTS requested additional information from the operator.

9. After an extension of a deadline and an exchange of letters between the co-owners, on October 5, 2005, PNGTS provided the operator with its suggested modifications to the August 3, 2005 engineering design proposal. PNGTS' modifications included the elimination of a proposed compressor unit at an existing compressor station and alternative locations for other proposed compressor stations. On October 18, 2005, the parties once again met to discuss the proposed modifications to the design. In his affidavit in this proceeding, Mr. Robert J. Bocoock, the Principal Engineer for the operating company, states that at that meeting Maritimes proposed a modified engineering design which accommodated PNGTS' concerns and PNGTS presented its own proposed modification. Maritimes and Mr. Bocoock agree that the minutes of the October 18 meeting, attached to Maritimes' request as Exhibit D-2, accurately reflect that the co-owners agreed that their two modified designs were very similar and that each proposal represented that party's final comments on the August 3, 2005 proposed design.⁵

10. Based on the discussions at the October 18 meeting, the operator provided each co-owner with a final engineering proposal on October 27, 2005. The design relating to the joint facilities consists of two compressor stations located in the municipalities of Westbrook and Eliot, Maine, the installation of approximately 13.53 miles of 36-inch diameter pipeline loop downstream of the Westbrook compressor station, and modifications to the existing Dracut, Massachusetts compressor station. Maritimes states that the design would meet its planned new flow rate of 1,332,386 Dth/d and PNGTS' planned new flow rate of 296,286 Dth/d for gas entering at the Westbrook compressor station.⁶ Maritimes states that PNGTS asked two questions by e-mail regarding the final

⁵ Maritimes also explains that after the parties agree on an engineering design, under section 3.01(c) of the operating agreement the next step would be for representatives of the owners on the Joint Facilities Executive Committee to vote on the final design as presented by the operating company/construction manager.

⁶ We note that on January 27, 2006, Maritimes and PNGTS responded to data requests providing additional information on the engineering design.

engineering proposal: one relating to the ad valorem taxes and one regarding the estimate of the operation and maintenance costs. The operating company responded to these questions by letter dated November 4, 2005.

11. Maritimes asserts that although at the October 18 meeting PNGTS appeared to agree to essentially the same proposal that is embodied in the final design, PNGTS subsequently indicated in conversations on October 24, 2005 between representatives of the parties and in an October 24, 2005 letter to the operating company, attached to certain petition as Exhibit I, that it would not vote to approve the final engineering design, as required by section 3.01 of the operating agreement, until there is a resolution to contractual dispute issues between the parties. According to PNGTS, these issues include indemnification and cost sharing in the event a co-owner changes its level of participation. PNGTS also expressed concern about anticipated cash flow projections.

Interventions

12. Notice of Maritimes' request in this proceeding was published in the *Federal Register* on December 16, 2005 (70 *Fed. Reg.* 74794). Ten timely, unopposed motions to intervene were filed.⁷ Several of the intervenors filed comments indicating their support for Maritimes' request that the Commission make a determination as to the adequacy of the proposed Phase IV engineering design prior to the filing of a certificate application. Calpine Corp., a shipper on PNGTS, indicates that it favors Commission action on Maritimes' request, but urges the Commission to limit its finding only to the design of the facilities and not to consider any cost allocation issues related to Phase IV. Rather, Calpine Corp. asserts that since the issues raised by PNGTS, in particular the indemnification issue, could affect the cost allocation for the project, thereby affecting the rates PNGTS' and Maritimes' shippers will pay, it is appropriate for the Commission to analyze PNGTS' concerns when it applies the Certificate Policy Statement⁸ to the project in the certificate proceeding.

⁷ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2006). The intervenors are: Keyspan Delivery Companies; Salmon Resources LTD; Central Maine Power Co. and Maine Electric Power Co. (filing jointly); Calpine Corp.; Portland Natural Gas Transmission System; Repsol Energy North America Corp.; The Province of Nova Scotia; Mobil Natural Gas Inc.; and Anadarko Petroleum Corp.

⁸ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 92 FERC ¶ 61,094, *order on further clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

13. In addition to its motion to intervene, PNGTS filed a protest to Maritimes' request, the substance of which will be summarized below. Maritimes filed a motion for leave to answer PNGTS' protest, and PNGTS subsequently filed a motion for leave to answer Maritimes' answer. Maritimes then filed a motion for leave to answer PNGTS' answer. As the parties recognize in these motions, the Commission's regulations do not permit answers to protests or to answers; however, the Commission will accept the answers filed in this proceeding because they provide information that clarifies the issues and aids us in our decision-making.⁹

Maritimes' Position

14. Because, as discussed below, the Commission is not persuaded that it needs to reach the contractual issues in dispute between the parties at this time, we will only briefly describe their positions on the merits of those issues. Maritimes asserts that the issues raised by PNGTS do not relate to the specific engineering design before the Commission here and that in none of its pleadings has PNGTS' objected to that design. Thus, Maritimes posits that PNGTS could approve the design without resolving the other issues at this time.

15. Maritimes suggests that PNGTS may be attempting to delay the project because it is a competitor and PNGTS has not actually developed a proposal to utilize the capacity it has requested in the Phase IV expansion. To the extent PNGTS hopes to find shippers for the project, Maritimes notes, its projected service date would be in 2009, nearly a year after Maritimes expects to start service for its shippers in November 2008. In this regard, Maritimes explains that the definitive agreements require the co-owners to coordinate expansions of the joint facilities where their respective expansions would occur at approximately the same time. Maritimes contends that because of the difference between the in-service dates, the two expansions technically do not require coordination. Maritimes states it was willing to include PNGTS in its expansion as an accommodation,

⁹ In addition to the motions to intervene, protest and comments, several representatives of the Maine legislature and the Governor filed letters in which they support Maritimes' position that it is appropriate for the Commission to address the engineering design for the project so that Maritimes' Phase IV can go forward on a timely basis. They cite to the need for critical energy infrastructure in the northeast to meet growing energy requirements. They stress, however, that they are not prejudging any issues related to Maritimes' project and that they expect the Commission will review Maritimes' proposal with the same level of scrutiny that it applies to any certificate application.

but only to the extent PNGTS' participation does not delay Maritimes' obligations under agreements it has executed with its shippers.

16. Further, Maritimes maintains that the Commission need not and should not resolve the contractual disputes between it and PNGTS in order to make the requested finding on the adequacy of the engineering design. Additionally, Maritimes asserts that the definitive agreements provide a means for the parties to resolve such disputes through arbitration and/or through action in the appropriate courts. Thus, in Maritimes' view, PNGTS' concerns do not provide a basis for PNGTS to delay its approval of the engineering design that has been proposed.¹⁰ Maritimes states that its project is well into the development phase and that it has completed its system design work, acquired survey permission for its entire right-of-way, and is in the process of its environmental review, including the scheduling of scoping meetings. According to Maritimes, PNGTS has attempted to delay every expansion that Maritimes has proposed and that, thus far, the Commission has not allowed those projects to be delayed and should not do so here.

17. Maritimes urges that the consensus of the parties regarding a final engineering design at the October 18 meeting, as embodied in the October 27 final design submitted to the parties by the operator, in effect, constitutes PNGTS' approval of the design and that a declaration from the Commission that the design is appropriate will remove any uncertainty on this issue. Maritimes emphasizes its request is limited only to the engineering design for the expansion and is not meant to be a certificate application wherein the Commission must determine under section 7 of the Natural Gas Act that the Phase IV project is required by the public convenience and necessity.¹¹

¹⁰ Maritimes indicates that to the extent PNGTS is implying that the contract issues could be resolved by arbitration and/or in the courts in time for Maritimes to meet its time table for the Phase IV project, it is wrong. Maritimes explains that it requires two construction seasons in order to prosecute its certificate application, and then to construct the project so that it can go into service in 2008. Thus, Maritimes must move forward on developing the final design as soon as possible.

¹¹ Maritimes indicates that it is not asking the Commission to determine at this time whether PNGTS' actions relating to the engineering design in current Phase IV project violate the settlement wherein PNGTS agreed, among other things, not to delay Maritimes' Phase IV project.

PNGTS' Position

18. PNGTS asserts that the Commission should not act on Maritimes' request because it is premature, as well as novel. PNGTS contends that Maritimes is simultaneously considering multiple alternatives and has failed to provide PNGTS a sufficient level of detail to approve any one of them. PNGTS asserts that the contract disputes between it and Maritimes should be resolved via procedures set forth in the definitive agreements before PNGTS gives its approval to any proposal. PNGTS cites numerous instances where the Commission has declined to resolve contractual disputes between parties over whom it has jurisdiction, including several proceedings wherein the Commission declined to resolve such disputes between Maritimes and PNGTS.¹² PNGTS also contends that the settlement between the parties regarding the previous Phase IV proposal does not bar it from raising issues in this proceeding, including some that were raised earlier, because this proceeding does not involve merely a resubmission of the previous proposal and is the same in name only. In this vein, PNGTS notes that the current Phase IV project differs from the earlier proposal in several respects, among them, source of gas supply, size, facility configuration, and timing.

19. PNGTS takes exception to Maritime' suggestion that it is purposely delaying the Phase IV expansion. Rather, PNGTS asserts that Maritimes, itself, has caused delays by failing to provide PNGTS with information it needs and has asked for in order to determine whether to participate in the expansion and how the project would affect its shippers. PNGTS states that by letter of December 21, 2005, Maritimes informed PNGTS that it would provide a breakout of the facilities' design and cash flow requirements under various timing scenarios only after the co-owners vote on the engineering design for Phase IV.¹³

¹² Proceedings involving Maritimes and PNGTS, cited by PNGTS, include: *Maritimes & Northeast Pipeline, L.L.C.*, 89 FERC ¶ 61,123 (1999); *Maritimes & Northeast Pipeline, L.L.C.*, 95 FERC ¶ 61,077 (2001); and *Maritimes & Northeast Pipeline, L.L.C.*, 101 FERC ¶ 61,348 (2002).

¹³Maritimes states that at this stage of the process, the definitive agreements only require Maritimes to provide to PNGTS a written estimate of the costs for the construction and operation, which it has done. It asserts that the kind of information PNGTS seeks relates to the timing of construction and the cash flow requirements or spending profile which the parties will address when they execute the engineering and construction agreement after the co-owners vote on a project design.

20. Additionally, PNGTS states that Maritimes has repeatedly revised the design for the Phase IV proposal. It provides a chart in its protest that compares aspects of the various proposals Maritimes presented on April 5, August 3, August 18 and October 27, 2005, and shows that the length of the pipeline has changed once, the amount of compression at Westbrook and Eliot is different in each proposal, and compression at Methuen ranged from 12,000 hp to 23,690 hp and then none in the October 27, 2005 proposal.¹⁴ PNGTS also states that Maritimes is considering another alternative project at the same time it is attempting to move forward with the one at issue here. Specifically, according to PNGTS, Maritimes has sought PNGTS' approval to apply to the Department of Transportation (DOT) to uprate the maximum allowable pressure of the joint facilities. PNGTS contends that such a proposal may also result in an unfair assignment of costs to PNGTS' shippers. However, PNGTS states that on January 5, 2006, it agreed to join in Maritimes' request to DOT.

21. Finally, PNGTS notes that it and Maritimes agree that the Commission should not attempt to resolve the contractual issues between them in the context of Maritimes' request in this proceeding.

Discussion

22. The facilities for which Maritimes contemplates filing a certificate application will be used to transport natural gas in interstate commerce; therefore, the construction and operation of the facilities and the services provided over them will be subject to the Commission's jurisdiction and the Natural Gas Act.

23. As an initial matter, the Commission will not reach the contractual dispute between Maritimes and PNGTS. Generally, the Commission does not resolve such disputes, but leaves the parties to seek their remedy in the state courts. The Commission has taken this approach with regard to previous contractual disputes between Maritimes and PNGTS and sees no reason to depart from this approach in this proceeding.¹⁵

24. The Commission also concludes that the settlement entered into between the parties in the proceeding relating to Maritimes' earlier Phase IV proposal does not preclude PNGTS from raising objections to any subsequent Phase IV certificate application because such an application will be treated by the Commission as a new and

¹⁴In response, Maritimes provides a chart similar to that submitted by PNGTS but with annotations explaining the reason for each revision to the proposal.

¹⁵ See *supra* note 12.

distinct proposal. Many aspects of Maritimes' latest Phase IV project have changed and too much time has elapsed for the Commission to consider a proceeding on this proposal to be a continuation of the previous one or to view any certificate application for the new Phase IV project to be simply an amendment of the earlier application. Therefore, PNGTS will not be precluded by the earlier settlement from raising objections to the current proposal based on the specific characteristics of it or other legal disputes.¹⁶

25. The Commission agrees with PNGTS that Maritimes' request here is somewhat novel. It is true that the Commission generally does not make findings on specific parts of a project for which a certificate application may be filed at a later date. To take a piecemeal approach to construction projects could result in the unnecessary expenditure of the Commission's administrative resources on projects that may never result in a bona fide certificate application. However, in this instance, given the history between Maritimes and PNGTS and the fact that Maritimes appears to have a bona fide project that has been significantly developed, we will make the requested finding so that Maritimes' project is not unduly delayed by issues that can be resolved concurrently with the continued development activities related to the project. We emphasize, however, that the Commission is not making a finding that Maritimes' Phase IV project is required by the public convenience and necessity; the Commission will reach that issue when it has a complete certificate application before it.

Engineering Analysis

26. Based upon the information provided in Maritimes' request, as well as on answers to a January 17, 2006 data request filed by Maritimes and PNGTS on January 27, 2006, the Commission concludes that the facilities represented by Maritimes in the flow diagram entitled "M&N Pipeline and PNGTS Final Facilities Design for the Expansion of the Joint Facilities – Agreed to at the October 18, 2005 Meeting of the Joint Owners, 26-Oct-05" (October 26 document), attached to the November 16 request, would increase the capacity on the joint facilities by approximately 1,050,000 Dth/d, while meeting the flow and pressure requirements of both PNGTS and Maritimes. We note that PNGTS has not raised any major issues relating to the hydraulic design of the facilities represented in

¹⁶ We note that although we are finding that PNGTS may raise any issues it chooses in a proceeding on the Phase IV project, the Commission is not bound to resolve those issues if it concludes they would best be resolved in other forums.

above referenced flow diagram.¹⁷ In fact, PNGTS acknowledges that it “. . . is in general agreement with the pressures, flows, and compressor information agreed to at the October 18, 2005 meeting and as depicted on the October 25, 2005 document.”¹⁸ Further, PNGTS agrees that the October 26 document “. . . correctly depicts the appropriate pressures at interconnects (Westbrook and Dracut) such that they do not unfairly benefit the upstream and downstream interconnecting pipelines at the expense of PNGTS shippers.”¹⁹

27. Our analysis addresses only the hydraulic design of the facilities and does not attempt to address any cost issues, including construction/material costs, operating and maintenance expenses, and fuel allocation. Further, our analysis is limited to the facilities as presented by Maritimes in the October 26 document and does not constitute our final approval of the facility design.²⁰

Conclusion

28. For the reasons discussed herein, the Commission finds that the facilities represented by Maritimes in its November 16, 2005 filing would increase the capacity on the joint facilities by approximately 1,050,000 Dth/d, while meeting the flow and pressure requirements of both PNGTS and Maritimes.

¹⁷ PNGTS does note that the correct heat rate for volumes entering the joint facilities from its pipeline system should be 1,004 Btu/mcf rather than the 1,012 Btu/mcf depicted in the design proposed by Maritimes. This difference does not affect the overall design of the facilities.

¹⁸ PNGTS' January 27, 2006 response to the data request at paragraph 3.

¹⁹ *Id.* PNGTS does say, however, that increasing the pressure for PNGTS' deliveries at its point of interconnection with the joint facilities could shift costs to PNGTS' shippers.

²⁰ The design/location of the facilities presented in the October 26 document is subject to change for any number of reasons, including changes from the ongoing environmental review. Further, as noted by PNGTS and Maritimes, PNGTS has not yet conducted a reverse open season for its existing share of the Joint Facilities capacity, which might require a change in the design.

The Commission orders:

Maritimes' request for a declaratory order in this proceeding is granted to the extent discussed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.