112 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Williston Basin Interstate Pipeline Co. Docket No. RP00-463-008

ORDER DENYING REHEARING
AND DENYING MOTION TO INTERVENE OUT OF TIME

(Issued July 6, 2005)

1. On March 3, 2005, the Commission issued a Second Order on Remand[1] in this proceeding. ProLiance Energy L.L.C. (ProLiance) filed a timely request for rehearing of that order. In addition, the National Energy Marketers Association (Energy Marketers) filed a motion to intervene out of time and a request for rehearing. As discussed below, ProLiance's request for rehearing is denied. The request for late intervention of Energy Marketers is also denied. This order is in the public interest because it preserves the benefits of selective discounting for captive customers.

Background

A. The Discount Policy

2. The development of Commission's discount policy is set forth in detail in the prior orders in this proceeding.[2] As the Commission explained in those orders, under the Commission's discount policy, pipelines may engage in selective discounting based on the varying demand elasticities of the pipelines' customers.[3] The Commission has

[1] 110 FERC ¶ 61,210 (2005).

[2] 107 FERC ¶61,229 at P3-9 (2004), 110 FERC ¶ 61,210 at P 3-7 (2005).

[3] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. Regulations Preambles 1982-1985 ¶ 30,665 at 31,543-45 (1985); Order No. 436-A, FERC Stats. & Regs. Regulations Preambles 1982-1985 ¶ 30,675 at 31,677-80 (1985). 18 C.F.R § 284.10(c)(5). The Commission's adoption of these regulations was upheld in *Associated Gas Distributors v. FERC (AGD I)*, 824 F.2d 981, 1010-1012 (D. C. Cir. 1987). *See also Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309 at P 3 (2005).

explained that these selective discounts benefit all customers, including customers that do not receive the discounts, because the discounts allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service.[4] The Commission has also held that, in the next rate case after giving selective discounts, the pipeline is permitted to reduce the volumes used to design its rates to reflect discounting so that, assuming market conditions require it to continue giving the same level discounts that it gave during the test period when the new rates are in effect, the pipeline will not bear the cost responsibility for discounts necessary to meet competition.[5]

3. The Commission has also adopted policies regarding capacity release,[6] flexible point rights,[7] and segmentation,[8] and issues arose regarding the interaction of these policies with the discount policy. In the individual pipeline restructuring proceedings to comply with Order No. 636, the question arose whether a shipper paying a discounted rate may retain that discount if it or its replacement shipper uses points other than the releasing shipper's primary points. In *El Paso Natural Gas Co. (El Paso)*,[9] the Commission held that if the pipeline's contract with a shipper limits its discount to its primary point, the pipeline could require the shipper to pay the maximum rate whenever it or its replacement shipper uses a different point. The Commission explained that the market considerations justifying the discount at the primary point "may not be relevant at the alternative delivery point when the shipper wishes to flex to that point."[10]

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[4] Order No. 436 at 31,544.

[5] *E.g., Rate Design Policy Statement*, 47 FERC ¶ 61,295 at 62,056 - 57 (1989).

[6] Under the Commission's capacity release program, adopted in Order No. 636, holders of firm transportation rights on a pipeline may resell those rights to other shippers.

[7] Order No. 636 also adopted a policy giving firm shippers the right to use, on a secondary basis, receipt and delivery points other than the primary points listed in their contracts. This permits them to receive and deliver gas to any point within the firm capacity rights for which they pay.

[8] In Order No. 637, the Commission, among other things, revised the Part 284 regulations to require pipelines to permit a firm shipper to segment its capacity either for its own use or for the purpose of capacity release, where operationally possible.

[9] 62 FERC ¶ 61,311 at 62,990-91 (1993).

[10] *Id*. at 62,990.

4. While Order No. 637 did not change the Commission's policy on selective discounting, the Commission stated that the policy of permitting a pipeline to limit a shipper's discount to its primary point needed to be reexamined in the compliance filings, as part of the examination of restrictions on capacity release and segmentation. The Commission explained in Order No. 637-B[11] that it was concerned that requiring a releasing shipper with a discounted rate to pay the maximum rate in order to effectuate a segmented or release transaction could interfere with the competition created by capacity release.

5. *CIG* was the first Order No. 637 compliance proceeding where the Commission addressed how to resolve the tension between the Commission's selective discounting policy and the Commission's goal in adopting its segmentation and flexible point right policies of enhancing competition. The Commission stated that if a shipper always loses its primary point discount and is always required to pay the maximum rate when it uses a secondary point or segments its capacity, the shipper will be less likely to engage in these activities and competition will be restricted. On the other hand, the Commission recognized that if a shipper always retains its discount when it utilizes secondary points, discounts could be allowed at non-competitive points. Therefore, the Commission modified its policy and held that if a pipeline provides a discount at any point, a shipper that segments to that point or uses that point on a secondary basis is entitled to the same discount if it is similarly situated to the shipper receiving the discount from the pipeline. In *Granite State*, the Commission amended its holding in *CIG* to require pipelines to process shipper requests to retain discounts in no longer than two hours from the time the request is submitted.

B. <u>The Williston Decisions</u>

6. In Williston's Order No. 637 compliance filing, the Commission required Williston to implement the discount policies set forth in *CIG/Granite State*. Williston sought rehearing of the Commission's ruling and argued, among other things, that the *CIG/Granite State* policy would allow a firm shipper to obtain a long-term discount for an underutilized portion of its system and then engage in short-term discounted transactions at different receipt and delivery points. Williston asserted that this could reduce interruptible throughput in heavily utilized portions of its system while failing to increase flow at the point where the discount was originally given and where additional throughput was needed. The Commission, however, concluded that shippers could not misuse the discounts in the manner described by Williston because, under the *CIG/Granite State* policy, the firm shipper changing points would pay the greater of its own discounted rate or the prevailing discount at the alternate point. Therefore, the Commission denied the request for rehearing.

[11] 92 FERC at 61,167-68.

7. In *Williston Basin Interstate Pipeline Co. v. FERC*,[12] the court vacated the Commission's decisions in *Williston* on essentially two grounds. First, the court held that the Commission had not adequately addressed whether the application of the *CIG/Granite State* policy in this case was appropriate in light of Williston's individual circumstances, particularly the reticulated nature of its system. Second, the court held that the Commission had not adequately justified the general policy established in *CIG/Granite State* concerning retention of discounts when secondary points are used. The court was concerned that the *CIG/Granite State* policy undermines the benefits of selective discounting and remanded the case to the Commission.

C. The Orders on Remand

8. In response to the court's decision the Commission issued an order on remand on June 1, 2004[13] seeking comments from interested parties on the *CIG/Granite State* policy. The Commission stated that it would permit any interested party to intervene in this proceeding. Initial Comments were filed by seven parties representing pipelines.[14] Generally, the pipeline commenters opposed the *CIG/Granite State* policy and argued that it is inconsistent with law and Commission policy and results in harmful effects in the natural gas market. The pipelines supported a return to the *El Paso* policy. Their responses also indicated that the pipelines have received very few requests for discounts under the policy.[15] Only three shippers, including ProLiance, filed comments supporting the *CIG/Granite State* policy. They argued that it would not have the negative consequences in the natural gas market alleged by the pipelines and that it will maximize competition and shipper flexibility. They opposed a return to the *El Paso* policy and assert that that policy gives pipelines too much discretion as to whether to grant discounts and would reduce competition.

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[12] 358 F.3d 45 (D.C. Cir. 2004).

[13] 107 FERC ¶ 61,229 (2004).

[14] Duke Energy Gas Transmission and the DEGT pipelines, Gulf South Pipeline Co., LP, Horizon Pipeline Co., Kinder Morgan Interstate Pipelines (Kinder Morgan), Tennessee Gas Pipeline Co. (Tennessee), Williston Basin Interstate Pipeline Co., and INGAA.

[15] Tennessee stated that it received two such requests; it granted one and denied the other based on the similarly situated test. Kinder Morgan stated that it received one such request, and denied it because it did not meet the similarly situated test. Williston stated that it had not entered into any firm transportation discount transactions since the issuance of the *CIG/Granite State* policy.

9. In the March 3, 2005 Second Order on Remand, the Commission found, based upon review of the comments received, that it could not show pursuant to section 5 of the Natural Gas Act (NGA), that any benefits of increased competition achieved by the *CIG/Granite State* policy outweigh the costs of reduced selective discounting. The Commission found that the comments indicate that the *CIG/Granite State* policy has reduced the incentive of pipelines to seek to increase the sale of firm capacity through selective discounting by permitting discounted rate firm shippers to transfer their discounts to other shippers and other points. The Commission further found that the policy's effect of discouraging selective discounts may be particularly severe on reticulated pipelines and reticulated portions of systems where discounts are given to attract flow to specific areas to maximize system capacity and promote efficient operations. If the *CIG/Granite State* policy enables a shipper to transfer an operationally based discount to another point where the pipeline does not need to discount in order to attract throughput, then the operational benefits of granting the discount are lost. The commission noted that Williston's comments state that it had not entered into firm transportation discount transactions since the issuance of the *CIG/Granite State* policy.

10. Further, the Commission found that the comments suggest that the adoption of the *CIG/Granite State* policy has not significantly increased competition in the capacity market. The Commission stated that information submitted by the pipelines in their comments indicates that they have rarely received requests for discounts under the *CIG/Granite State* policy. The Commission referred to the comments of Tennessee stating that it received only two such requests and the comments of Kinder Morgan stating that it received only one such request. The Commission also stated that very few shippers filed comments supporting retention of the *CIG/Granite State* policy. The Commission concluded that the *CIG/Granite State* policy does not provide the anticipated benefits to shippers and may in fact harm captive customers by discouraging pipelines from offering selective discounts. Therefore, the Commission stated that it would not require pipelines to depart from the *El Paso* policy at this time.

Discussion

A. The Late Intervention

11. Energy Marketers filed a motion to intervene out of time and a petition for rehearing of the March 3, 2005 Order. In its motion for late intervention, Energy Marketers states that, as a representative of a diverse group of providers of energy and energy-related services, its interest and position is unique and significant and its interest and the interests of its members cannot be adequately represented by any other party. Energy Marketers asserts that given the nature of its interest, good cause exists to grant its late motion to intervene. Williston filed an answer in opposition to the late intervention.

12. In ruling on a motion to intervene out of time, the Commission applies the criteria set forth in Rule 214(d), 18 C.F.R. § 385.214(d), and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. Therefore, the Commission is more liberal in granting late intervention at the early stages of a proceeding, but is more restrictive as the proceeding nears its end.[16] A petitioner for late intervention bears a higher burden to show good cause for late intervention after the Commission has issued a final order in a proceeding,[17] and generally it is the Commission's policy is to deny late intervention at the rehearing stage even when the petitioner claims that the decision establishes a broad policy of general application.[18]

13. In this case, the Commission's order seeking comments on the *CIG/Granite State* policy was issued over a year ago, on June 1, 2004, with initial comments due by August 9, 2004 and reply comments due by August 30, 2004. The Commission's order made clear that it was reexamining in this proceeding both the general policy established in *CIG/Granite State* and the application of that policy to Williston and sought comments from all interested parties. The Commission relied on the comments filed in determining the impact of the *CIG/Granite State* policy in natural gas markets.

14. Energy Marketers has provided no reason for its late intervention and its failure to file comments or reply comments in this proceeding and has made no attempt to address the standards set forth in Rule 214(d). Energy Marketers merely asserts that late intervention should be granted because its interests and position are "significant and unique." This general statement of interest is not good cause to grant late intervention, particularly here where intervention is sought at the rehearing stage of the proceeding. The request for late intervention is denied.

The Request for Rehearing

15. In its request for rehearing, ProLiance argues that the Commission erred in finding that the *CIG/Granite State* policy does not benefit shippers on Williston and other interstate pipelines and that the *El Paso* policy provides benefits to shippers and the

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[16] *Transok, L.L.C.*, 89 FERC ¶ 61,055 at 61,186 (1999).

[17] *Williston Basin Interstate Pipeline Co.*, 31 FERC P 61,045 at 61,076 (1985).

[18] *Williston Basin Interstate Pipeline Co.*, 81 FERC P 61,033 at 61,178 (1997), citing *Transcontinental Gas Pipeline Corp.*, 79 FERC P 61,205 (1997).

system superior to those provided by the *CIG/Granite State* policy. ProLiance argues that the Commission failed to address the comments filed by shippers in this proceeding, did not base its decision on record support or sound reasoning, and did not use proper procedures in reaching its conclusion. For the reasons discussed below, ProLiance's request for rehearing is denied.

16. In its decision in *Williston Basin Interstate Pipeline Co. v. FERC*, remanding this case to the Commission, the court expressed concern that the *CIG/Granite State* policy would have an adverse effect on the goal of selective discounting. The court observed that the purpose of selective discounting is to increase throughput by allowing price discrimination in favor of demand-elastic customers, but a pipeline is unlikely to be able to increase throughput by selective discounting if capacity at secondary points can be transferred readily among shippers through resale at a discounted rate. The court stated that "economic theory tells us price discrimination, of which selective discounting is a species, is least practical where arbitrage is possible – that is, where a low-price buyer can resell to a high price buyer. . . . Yet this is precisely what the Commission's policy would appear not only to allow but to encourage." 358 F.3d at 50. Thus, the court was concerned that the *CIG/Granite State* policy undermines the benefits of selective discounting.

17. Therefore, on remand, the Commission was required to address this concern and weigh the benefits of increased competition through the *CIG/Granite State* policy against the adverse effect of less revenue from selective discounting. The pipeline commenters presented evidence and argument that showed that the *CIG/Granite State* policy discourages selective discounting and that the policy has not been used to any significant level by shippers. The shipper commenters, including ProLiance, on the other hand, did not provide the Commission with any basis to find any significant benefits from increased competition as a result of the policy or any evidence that they actually used the policy. ProLiance's did not present any factual evidence that the *CIG/Granite State* policy is beneficial to shippers or makes a substantial contribution to competition in the secondary market. Further, the Commission specifically asked shippers to provide information concerning how the policy has affected their capacity release and to provide information concerning the release of capacity prior to adoption of the policy and after its adoption. ProLiance did not provide this information.

18. ProLiance argues that the Commission's order did not address the comments of the shippers that supported the *CIG/Granite State* policy. Specifically, ProLiance argues that the Commission did not address the argument made in its comments that a customer that is receiving a discount is already compensating the pipeline for service from upstream points to a zone of delivery, and that the pipeline should not be able to marginalize the benefits of the discount by requiring maximum rates for all other points of receipt and delivery. Similarly, ProLiance states that in the case of a reticulated

pipeline, firm shippers are paying for the entire pipeline in their rates, and that the pipeline has an obligation to optimize the system so that the firm shippers could make the most effective use of capacity for which they pay.

19. This argument of ProLiance confuses two different ratemaking concepts. Firm shippers should be able to use secondary points within the rate zone for which they pay because the shipper is compensating the pipeline for the fixed costs allocated to that rate zone and is therefore entitled to use any receipt and delivery points within that zone. It does not follow, however, that if a shipper receives a discount at one point within that zone, it must be able to use that discount at all points in that zone. Selective discounting is not based on differences in cost causation or cost responsibility, but is based on differences in the elasticity of shipper demand and the value of service at different points within the zone. The fact that Order No. 636 allows firm shippers to use multiple receipt and delivery point combinations along the path for which it pays a reservation charge does not entitle the shipper that obtains a discount based on the higher elasticity of demand at particular points to use all other point combinations along the path at that same discounted rate regardless of the differences in elasticity of demand at those points. ProLiance's argument does not acknowledge that competitive circumstances may vary at different points along the path, making a selective discount at some, but not all, points appropriate. Under ProLiance's view, if a pipeline such as Williston, with a postage-stamp rate design, agreed to a discount at any point on its system, that discounted rate would apply to all the shipper's transactions using any other point on the system. The Commission has reasonably concluded that this is would discourage selective discounting and therefore deprive captive shippers of the benefits of discounting.[19]

20. ProLiance also argues, as it did in its comments, that the *CIG/Granite State* policy should be retained because it would allow the pipeline to maximize throughput by offering shippers discounts to retain business, and that this benefits even customers that do not receive the discounts by spreading fixed costs over more units of service.[20] However, it is not the *CIG/Granite State* policy that provides these benefits to captive customers, but the selective discounting policy itself. The Commission frequently stated that this is a benefit of selective discounting long before adoption of the *CIG/Granite State* policy.[21] The Commission has concluded that modifying the selective discount policy as it did in *CIG/Granite State* would have the opposite effect because it would discourage pipelines from granting selective discounts.

[19] *See also, Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d at 50.

[20] ProLiance cites *Colorado Interstate Gas Co.*, 95 FERC ¶ 61,321 at 62,120 (2001).

[21] *See, e.g.* Order No. 436 at 31,544.

21. ProLiance also argues, as it did in its comments, that if the Commission returns to the *El Paso* policy, pipelines would have total discretion to grant or deny a discount at a specific point, and this would result in greater discrimination among shippers and enhance the pipeline's market power over shippers. Contrary to ProLiance's assertion, pipelines do not have complete discretion to grant or deny discounts because the Commission's regulations prohibit unduly discriminatory or preferential practices.[22] As the court stated in *Village of Bethany v. FERC,*[23] pipelines are free to charge any rate between the minimum and the maximum applicable rate, "with the qualification that pipelines may not unduly discriminate between similarly situated customers." Moreover, as a practical matter, the market also limits the pipeline's discretion with regard to discounting and the pipeline must offer a rate reflective of the market value of the receipt or delivery point in order to increase throughput and revenue through selective discounting, regardless of the *CIG/Granite State* policy.[24]

22. In addition, ProLiance argues that the Commission has provided no record support for its conclusion that the *CIG/Granite State* policy has reduced the incentive of pipelines to offer selective discounts. Contrary to ProLiance's assertion, the Commission reviewed all the comments submitted on this issue and based its decision on those comments. The Commission specifically referred to the comments submitted by the pipelines that the *CIG/Granite State* policy creates uncertainty and risk of frustration of purpose in granting a discount, thereby discouraging pipelines from entering into such transactions.[25] For example, the Commission explained, the *CIG/Granite State* policy enables a shipper to transfer an operationally based discount to another point where the pipeline does not need to discount in order to attract throughput, with the result that the operational benefits of granting the discount are lost. Further, the Commission explained that the *CIG/Granite State* policy could discourage discounting because under that policy, a discount provided to obtain additional throughput at competitive points could be transferred to other less competitive points.[26] The Commission specifically cited Williston's comments stating that it had not entered into firm transportation discount transactions since the issuance of the *CIG/Granite State* policy.

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[22] 18 C.F.R. § 284.7 (b)(1).

[23] 276 F.3d 934,938 (D.C.Cir. 2002).

[24] Even BP America Production Company and BP Energy Company (BP), one of the three shipper commenters, recognized this in its comments. See comments of BP at 15.

[25] *See, e.g.,* Comments of Williston at 35.

[26] *See, e.g.,* Comments of Tennessee at 5.

23. The Commission also cited to information submitted by the pipelines in their comments that indicates that they have rarely received requests for discounts under the *CIG/Granite State* policy. The Commission referred to the comments of Tennessee stating that it received only two such requests and the comments of Kinder Morgan stating that it received only one such request. This information supports the Commission's conclusion that the *CIG/Granite State* policy has not been widely used by shippers and therefore has not provided significant benefits to shippers.

24. Further, ProLiance asserts that the Commission's decision was based on "minimal support" because only six "families" of pipelines filed comments and that a majority of interstate pipelines did not individually file comments. As explained above, the Commission's decision in this case was not based on the comments of the pipelines only, but was based on all of the comments received in this proceeding. Moreover, there is no validity in the suggestion that the persuasiveness of comments is ever diminished if the comments are filed by a group rather than by an individual entity. In this proceeding, there was broad participation by the pipeline industry, including the Interstate Natural Gas Association of America (INGAA), and these commenters provided evidence concerning the impact of the policy on their systems.[27] The fact that the pipelines filed their comments in groups rather than individually does not diminish the impact of the comments. It was shippers and shipper groups that did not participate widely in this proceeding, and the Commission justifiably took note of this fact in the Second Order on Remand. If the *CIG/Granite State* policy provided significant benefits to shippers, presumably there would have been more shipper support for the policy.

25. ProLiance also objects to the procedure used by the Commission. ProLiance states that the Commission cannot enact an industry-wide solution for problems that exist only in isolated pockets. ProLiance states that by making this policy change in a proceeding involving Williston's reticulated pipeline system, shippers on other systems will have been deprived of the opportunity to establish that the policy is necessary for pipeline flexibility and should be expanded to further allow flexibility of movement of discounts by shippers. ProLiance states that the procedure chosen by the Commission must give the parties fair notice of exactly what the Commission proposes to do to give them an opportunity to comment. Apparently, ProLiance is suggesting that the Commission should have addressed in this proceeding only the application of the *CIG/Granite State* policy to reticulated pipeline systems such as Williston, and left for another day the application of the policy to long-line systems.

[27] *E.g.,* Comments of Williston at 35-36, 52-65, and 79; comments of Tennessee at 14-15; comments of Kinder Morgan at 15.

26. ProLiance's argument is without merit. The Commission can address broad policy issues in specific adjudications.[28] Further, the court's decision remanding this proceeding to the Commission concerned not only the application of the policy to reticulated systems, but also the broader issue of the adverse effect of the policy on all pipelines' ability to use selective discounting to obtain additional throughput and the court was concerned that allowing automatic shifting of discounts on straight line systems could limit their incentive to offer selective discounts at points where required by competition if the discount could be moved.[29] The June 1, 2004 Order made clear that the Commission was seeking comments on both the general policy established in *CIG/Granite State* and the application of that policy to the specific circumstances on Williston[30] and all parties were therefore on notice of the scope of this proceeding and were given the opportunity to comment on the application of the policy to long-line systems as well as to Williston's reticulated system

27. For the reasons discussed above, the request for rehearing is denied.

The Commission orders:

(A) The request for late intervention is denied.

(B) The request for rehearing is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

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[28] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[29] *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d at 50.

[30] June 1 Order on Remand at P 17.