

124 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Millennium Pipeline Company, L.L.C.

Docket No. CP98-150-010

Columbia Gas Transmission Corporation

Docket No. CP98-151-005

ORDER AMENDING CERTIFICATES

(Issued August 4, 2008)

1. On March 31, 2008, Millennium Pipeline Company, L.L.C. (Millennium) filed an application in Docket No. CP98-150-010 under sections 7(b) and (c) of the Natural Gas Act (NGA) to amend its existing authorizations to, *inter alia*, permit its conveyance of passive ownership interests in certain facilities to governmental entities in order to qualify for tax benefits and to extend the terms of its leases of capacity to and from Columbia Gas Transmission Corporation (Columbia).¹ On April 1, 2008, Columbia filed an application in Docket No. CP98-151-005, under sections 7(b) and 7(c) of the NGA to amend its authorizations for its sale of certain facilities to Millennium and the terms of its leases of capacity to and from Millennium.

2. We will grant Millennium's and Columbia's proposals with appropriate conditions as discussed below.

I. Background

3. In 1997, Millennium filed an application to construct and operate approximately 424 miles of 24- and 36-inch diameter pipeline extending from an interconnection with facilities to be constructed by TransCanada Pipelines Limited at the United States-

¹ Millennium anticipates completing construction and placing its facilities in service on November 1, 2008.

Canada border in Lake Erie, through southern New York, across the Hudson River to a connection with Consolidated Edison Company of New York, Inc.'s high-pressure pipeline in the City of Mount Vernon, New York. Millennium proposed using the Columbia Line A-5's existing utility corridors and easements for approximately 223.9 miles of its proposed pipeline route.

4. In a companion application, Columbia proposed to abandon Line A-5 by sale to Millennium. Columbia also proposed to lease capacity from Millennium.

5. In 2001, the Commission issued an order authorizing Millennium to construct to the city limits of Mount Vernon.² That Interim order also authorized Columbia's abandonment of facilities by sale to Millennium and lease of capacity from Millennium. Millennium's construction authority was conditioned on an affirmative consistency review under the Coastal Zone Management Act³ (CZMA) from the New York State Department of State (NYS DOS).⁴ Millennium was directed to negotiate with elected officials, interested parties, and citizens of Mount Vernon and work toward reaching an agreement within 60 days concerning routing through that city.⁵

6. In 2002, after Millennium and Mount Vernon had reached a comprehensive settlement on the route of the pipeline through Mount Vernon, the Commission granted Millennium additional construction authority.⁶ The 2002 Order continued to condition Millennium's authority to commence construction on an affirmative CZMA consistency review from the NYSDOS.

7. On May 9, 2002, the NYSDOS found that Millennium's proposals were inconsistent with New York's Coastal Management Program. Millennium's appeal of the NYSDOS' decision to the Secretary of Commerce was unsuccessful, as was its subsequent appeal of the denial to the United States District Court for the District of Columbia.⁷ Consequently, authorization for Millennium to proceed with construction was further delayed.

² *Millennium Pipeline Company, L.P.*, 97 FERC ¶61,292 (2001) (2001 Order).

³ 16 U.S.C. §1451 *et seq.* (2004).

⁴ 97 FERC at 62,332 and Environmental Condition No. 54.

⁵ *Id.* at 62,344, Ordering Paragraph (B).

⁶ *Millennium Pipeline Company, L.P.*, 100 FERC ¶ 61,277 (2002).

⁷ *Millennium Pipeline Co. v. Gutierrez*, 424 F.Supp.2d 168 (D.D.C. 2006).

8. As a result of the court's denial of Millennium's appeal and in response to changes in the natural gas market, Millennium redesigned its project. As redesigned, the length of Millennium's proposed pipeline system was reduced from approximately 424 to 181.7 miles. In 2006, the Commission amended Millennium's certificate authorizations to approve the redesigned system and vacated its certificate authority for the facilities that would not be constructed.⁸ The 2006 Order also approved several lease agreements between Millennium and Columbia, as discussed below.⁹

II. Proposals

A. Millennium's Application

1. Lease of facilities to county agencies

9. At the time Millennium filed its application to redesign its system, it estimated its construction costs would be \$663,818,878, including the costs to acquire existing facilities from Columbia. Over the last few years, Millennium states that it has seen a significant rise in construction costs so that its construction increased by approximately \$163 million. In order to decrease the overall construction and operation costs of the pipeline system, Millennium has agreed to enter into agreements with the Industrial Development Agencies (IDA) of the Counties of Orange, Sullivan, Broome, Chemung, and Delaware, New York, in which its certificated facilities are located, to lease its facilities, including all land, machinery, and equipment, to the IDAs in exchange for partial abatement of state and local property taxes, state sales and use taxes, and other tax relief totaling \$14.6 million.

10. Under the proposed lease agreements, the respective IDAs will immediately leaseback those same facilities to Millennium and retain only a passive leasehold interest. The lease and leaseback agreements with each IDA are for identical terms and will terminate on February 28, 2024 for the counties of Broome and Sullivan and on June 30, 2024 for Chemung, Orange, and Delaware counties.

⁸ *Millennium Pipeline Company*, 117 FERC ¶ 61,319 (2006) (2006 Order).

⁹ The 2006 Order also granted certificates to Empire Pipeline, Inc. (Empire), a newly formed pipeline company, Algonquin Gas Transmission System, L.P. (Algonquin) and Iroquois Gas Transmission System, L.P. (Iroquois). Empire was authorized to construct facilities to interconnect affiliated Empire State Pipeline's existing system to Millennium's near Corning, New York. Algonquin was authorized to construct facilities from an interconnection with Millennium to an interconnection with Iroquois Gas Transmission System, L.P. in the Town of Brookfield, Connecticut. Iroquois was authorized to construct facilities to transport gas into the New York City metropolitan area.

11. Under the lease agreements, Millennium will remain the sole holder of the certificate granted by the Interim order, as amended by the 2006 Order, and will remain responsible for all of its obligations thereunder, including, specifically, operation of the Millennium pipeline.

12. While it will be exempt from general ad valorem taxes on certain segments of the project facilities, Millennium states that it will be required to make annual Payments-in-Lieu-of-Tax (PILOT) payments to the respective IDAs for as long as the facilities are covered by the IDA agreements. In addition to PILOT payments, Millennium will make special district tax payments assessed on project property, as well as certain community benefit payments. Millennium states that it will account for these payments by recording them under Account 408.1 of the Uniform System of Accounts (USA), *Taxes other than income taxes, utility operating income*.¹⁰ As it does with property taxes, Millennium will seek to recover the payments to the IDAs through its cost-of-service.

13. Millennium explains that it will retain complete operation of, and responsibility for, the leased facilities. Further, Millennium asserts that the lease and leaseback agreements will have no effect on its natural gas transmission service. Millennium also contends that neither the service contracts with its shippers, nor the terms or conditions of the services it provides, will be affected by the leasehold agreements. Though the net effect of the construction cost and tax burden adjustments would increase Millennium's recourse rate from \$0.65 to \$0.70 per Dth, Millennium is not proposing to change its initial rates at this time. Therefore, Millennium requests that its certificate of public convenience and necessity be amended to allow it to proceed with the lease and leaseback transactions.

14. Millennium also requests pre-granted authority under its certificate to effectively reacquire each IDA's interest in the certificated facilities upon the termination of the lease agreements. Because the IDAs are acquiring only a leasehold interest in Millennium's facilities, expiration of the lease agreements will extinguish the leasehold interests of the IDAs.

2. Accounting

15. Millennium executed firm transportation agreements with Consolidated Edison, KeySpan Energy Delivery Long Island, Columbia, and Central Hudson Gas & Electric Corporation (collectively the Anchor Shippers). The executed firm transportation agreements reflect certain modifications to the pro forma firm transportation agreements that were appended to the precedent agreements examined in the 2006 Order. These alterations include an extension of each Anchor Shipper's original ten-year contract term to fifteen years, as well as modifications to the levelized negotiated rates.

¹⁰ 18 C.F.R. Part 201, *Gas Plant Accounts* (2008).

16. Despite the modifications, Millennium asserts that the executed agreements continue to provide it assurance of recovery of a regulatory asset for differences in amounts recorded on its books and amounts recovered in its negotiated levelized rates to be paid by customers for whom the regulatory asset was created. Millennium therefore requests that the Commission find that the amended agreements do not alter the 2006 Order's determination that Millennium may record a regulatory asset and that it may do so for the 15-year terms of the amended agreements.

3. Lease Extensions

17. The 2006 Order approved lease agreements between Millennium and Columbia. Under one agreement, after abandoning Line A-5 by sale to Millennium, Columbia will lease 25,400 Dth per day of capacity in Line A-5 from Millennium for an annual payment of \$5,469,890 (Columbia Lease). In a second agreement, Millennium will lease 29,248 Dth per day of capacity in Columbia's Milford Line at an annual rate of \$440,124 (Millennium Lease). The 2006 Order authorized both leases for 10 years.

18. In order to conform the terms of the capacity lease agreements to their firm transportation agreements with their customers, Columbia and Millennium propose to amend the Columbia and Millennium Leases to extend both to 15-year terms. They do not propose to alter the annual rate of payment to be paid by Millennium for capacity in Columbia's Milford line (\$440,124 per annum). However, they propose that the payments by Columbia to lease capacity in Line A-5 from Millennium increase from \$5,469,890 to \$5,645,112 per annum.

19. Columbia asserts that its cost of service savings from the abandonment of Line A-5 by sale to Millennium is estimated to be \$6,381,235 (exclusive of savings of operation and maintenance expense). When that annual cost savings is added to Millennium's annual payment of \$440,124 to lease capacity in Columbia's Milford line, Columbia asserts that its total benefit will be \$6,821,359 annually.

B. Columbia's Application

1. Over Pressure Protection

20. The 2001 Order granted Columbia certificate authorization to construct over pressure protection facilities on certain of its existing measuring stations. The order also authorized Columbia's transfer of the measuring stations to Millennium upon the completion of construction.¹¹

¹¹ 2001 Order, 97 FERC ¶ 61,292 at 62,328.

21. As a result of the reconfigured Millennium project as approved by the 2006 Order, Columbia is no longer planning on installing the over pressure protection facilities at the measuring stations before transferring the stations to Millennium. The current project design has Millennium constructing the over pressure protection facilities on the measuring stations, as reflected on construction alignment sheets filed with the Commission on August 1, 2005 and updated in July, 2006. Therefore, Columbia requests that its certificate authority to construct the over pressure protection facilities be vacated.

2. Lease Extensions

22. Columbia seeks amendment of its abandonment and certificate authorizations to amend the agreements for its leases of capacity to and from Millennium consistent with Millennium's above-described proposal.

III. Interventions

23. Notice of Millennium's petition to amend was published in the *Federal Register* on April 10, 2008 (73 Fed. Reg. 20,620). There were no motions to intervene, notices of intervention, or protests to the application.

24. Notice of Columbia's petition to amend was published in the *Federal Register* on April 10, 2008 (73 Fed. Reg. 20,619). There were no motions to intervene, notices of intervention, or protests to the application.

IV. Discussion

25. Since the proposals herein involve facilities certificated for natural gas service in interstate commerce subject to the jurisdiction of the Commission, the proposals are subject to the requirements of subsections (b), (c) and (e) of section 7 of the NGA.

A. IDA Leases

26. The 2006 Order analyzed Millennium's revised proposals in light of the Certificate Policy Statement¹² and found that the proposals were in the public convenience and necessity.¹³ Specifically, the determination found that since Millennium was a new company with no existing customers, risk of subsidization was not present. Further, the order found that there would not be any adverse effects on existing pipelines or their customers. Finally, the 2006 Order found that adverse impacts to landowners and

¹² *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,277 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000); *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹³ 2006 Order, 117 FERC ¶ 61,319 at P 102.

communities affected by the project would be minimal, since most of the proposed pipeline facilities will be constructed in powerline or pipeline rights of way.

27. In making a preliminary determination that Millennium's proposals were in the public interest, we found that the proposals would serve the growing natural gas market in New York City, increase pipeline capacity in southeastern New York, provide access to existing storage fields in western New York, and increase deliverability for electric generation and local distribution in the region.

28. The 2006 Order authorized Millennium's proposals based on the above findings and the representations in Millennium's application for the project, including the fact that the proposed facilities would be owned by Millennium. Granting Millennium's request for amended certificate authority that will continue to authorize the construction and operation of the pipeline facilities, but permit Millennium to transfer a passive ownership interest to those facilities to IDAs in the counties where the facilities are located and lease them back on a long-term basis, will not change any of the above described findings in the 2006 Order. Further, Millennium's construction costs have increased substantially, causing an increase in the project's cost of service, and that the tax benefits from the lease and leaseback proposals will partially offset the increase in construction costs. Thus, we find that Millennium's proposals will keep total costs closer to the levels projected in the 2006 Order. In *Liberty Gas Storage, LLC*¹⁴ and *Empire Pipeline, Inc., (Empire)*¹⁵ the Commission addressed, and permitted, similar requests to transfer passive ownership interests in jurisdictional facilities to non-jurisdictional entities in exchange for property tax decreases that would lower operating costs. For these reasons, we find that the public convenience and necessity require the amendment of Millennium's certificate to permit implementation of its proposal to convey passive ownership interests in certain facilities to the IDAs and to lease the facilities back on a long-term basis.

B. Pre-Granted Authorization to Reacquire Legal Title to Facilities

29. Millennium requests pre-granted authority to reacquire each IDA's interests in the certificated facilities upon the termination of the lease agreements for each county. Millennium emphasizes that it will be using the facilities subject to the leases to provide jurisdictional interstate services and will not seek to abandon jurisdictional service when its lease-back agreements expire. Thus, pre-granted certificate authority is appropriate to reacquire each IDA's ownership interest when the lease and leaseback agreements terminate. Millennium also asserts that due to the IDAs acquiring only a leasehold interest in its certificated facilities, expiration of the lease agreements will automatically extinguish the leasehold interests of the IDAs. Millennium declares that neither the

¹⁴ 117 FERC ¶ 61,224 (2006).

¹⁵ 121 FERC ¶ 61,129 (2007).

public nor any shipper will be adversely affected by Millennium's reacquisition of the IDAs leasehold interests in the subject facilities and that Millennium's services will equally be unaffected by such reacquisition.

30. We will grant Millennium's request for certificate authority to reacquire ownership interests from the IDAs at the termination of the respective leases. The facilities at issue will be in use for jurisdictional interstate services when the lease and lease-back agreements expire. We agree that it is appropriate to pre-grant certificate authority for Millennium to recover ownership of the facilities as the leases expire. Thus, consistent with the Commission's order in *Empire*, ownership of the facilities will automatically revert to Millennium upon expiration of Millennium's lease of ownership interests in the facilities to the IDAs.

C. Accounting

31. The 2006 Order approved Millennium's proposal to record a regulatory asset for differences in depreciation amounts recorded on its books and depreciation amounts recovered in its negotiated rates. As explained in that order, under our Uniform System of Accounts, it is appropriate for a pipeline to record a regulatory asset for costs that would otherwise be chargeable to expense only when it is probable that the costs will be recovered in future rates.¹⁶ For rate levelization proposals, we have previously concluded that the Order No. 552 probability test is met to the extent that a pipeline's capacity is subscribed when the facilities are authorized.¹⁷ Thus, we allow regulatory assets, or liabilities, to be recorded for the differences between book depreciation expense and the amount of depreciation included in rates to the extent the pipeline's capacity is subscribed.

32. At the time 2006 Order was issued, Millennium had precedent agreements for approximately 80 percent of its total firm capacity at negotiated rates. Therefore, the Commission accepted Millennium's proposal to record a regulatory asset for differences in depreciation amounts recorded on its books and depreciation amounts recovered in its

¹⁶ The term "probable," as used in the definition of regulatory assets, refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain or proved. *Revisions to Uniform System of Accounts to Account for Allowances under the Clean Air Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2, and 2-A*, Order No. 552, FERC Stats & Regs. Regs., Preambles January 1991-June 1996, ¶30,967 (1993).

¹⁷ See, e.g., *TransColorado Gas Transmission Co.*, 67 FERC ¶ 61,301, at 62,064 (1994), *order on reh'g*, 69 FERC ¶ 61,066 (1994); *Mojave Pipeline Co.*, 69 FERC ¶ 61,244 (1994), *order issuing certificate and denying reh'g*, 72 FERC ¶ 61,167 (1995), *order vacating prior orders and dismissing motions*, 75 FERC ¶ 61,108 (1996).

negotiated rates, but conditioned its acceptance of the accounting treatment on: (1) Millennium and its shippers executing and filing service agreements consistent with their precedent agreements and providing assurance of recovery of the regulatory asset; (2) future Commission acceptance of the negotiated rate filings;¹⁸ and (3) Millennium's continuing obligation to meet the criteria for recognition of its regulatory asset.

33. Millennium has now entered into firm transportation service agreements with its four Anchor Shippers, extending the contract terms from ten to fifteen years and modifying the levelization period for reporting the regulatory asset to a fifteen year term. Millennium asserts that the executed agreements continue to provide it assurance of recovery of a regulatory asset for differences in amounts recorded on its books and amounts recovered in its negotiated levelized rates to be paid by customers for whom the regulatory asset was created.

34. The Commission finds that Millennium's proposal to extend the term of the regulatory asset from 10 to 15 years is consistent with authority granted in the 2006 Order, which required that Millennium provide assurance of recovery of a regulatory asset. Changing the term of the recovery from 10 to 15 years does not alter the Commission's ruling on recovery of a regulatory asset. Therefore, the Commission grants the proposed extension in term to 15 years for recovery of the regulatory asset and reminds Millennium that it still must provide for such recovery as required by the 2006 Order.

D. Over Pressure Protection

35. Millennium's planned construction of the over pressure protection facilities will ensure that the public's protection is maintained through the application of protective pressurization equipment in order to ensure the continued supply of natural gas to current Line A-5 customers. We will therefore grant Columbia's request that we vacate its certificate authority to construct the over pressure protection facilities on certain of its measuring stations before it transfers those stations to Millennium as previously authorized.

E. Extension of Leases

36. In the 2006 Order, the Commission approved the Columbia and Millennium leases, finding that the proposed lease arrangements met the Commission's test because the lease payments were less than, or equal to, the lessor's firm transportation rates for

¹⁸ Millennium filed on June 23, 2008 in Docket No. RP08-420-000, non-confirming firm transportation service and negotiated rate agreements with its four Anchor Shippers. This application is pending Commission action.

comparable service over the terms of the lease on a net present value basis.¹⁹ While the proposal to extend the agreement for Millennium's lease of capacity from Columbia from 10 to 15 years does not change the lease payments of \$440,124 annually, the proposal to extend the agreement for Columbia's lease of capacity from Millennium from 10 to 15 years would also increase Columbia's annual lease payment from \$5,469,890 to \$5,645,112. Columbia asserts that the lease payments continue to meet the test of being less than the lessor's (i.e., Millennium's) firm transportation rates for comparable service over the term of the lease on a net present value basis. Columbia explains that its annual cost-of-service savings from its abandonment of Line A-5 by sale to Millennium is estimated to be \$6,381,235 (exclusive of savings of operation and maintenance expense), and that when that amount is added to the annual payment Millennium will make to lease capacity in Columbia's Milford line, the total benefit to Columbia is \$6,821,359. Thus, Columbia asserts that its proposal to pay a higher annual payment of \$5,645,112 to lease back capacity in Line A-5 meets the Commission's test requiring lease payments to be less than or equal to the transportation rates for comparable service.

37. Consistent with our finding on extending the term of the regulatory asset to 15 years, the Commission grants both Millennium's and Columbia's proposals to extend the terms of the Millennium and Columbia Leases from 10 to 15 years. Further, while Columbia proposes to increase its annual payment to Millennium to lease back capacity in Line A-5 by \$175,222, from \$5,469,890 to \$5,645,112, the Commission recognizes that, overall, these interdependent agreements (Columbia's sale of Line A-5, its lease back of some of that facility's capacity and Millennium's lease of capacity in Columbia's Milford line) will result in a savings of \$6,821,359 to Columbia, thereby benefiting Columbia's customers and thus meeting the Commission's test as set forth in the 2006 Order. The Commission therefore approves the proposal to increase Columbia's annual lease payments.

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

The Commission orders:

(A) Millennium's certificate of public convenience and necessity to construct and operate certain of its facilities shall be amended to permit a transfer of an ownership interest to IDAs in five New York counties and the leaseback of the facilities by Millennium, as more fully described in the body of this order and in the application.

¹⁹ 2006 Order, 117 FERC ¶ 61,319 at n.58, citing *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,160, at 61,755-59 (1997); *Midwestern Gas Transmission Co.*, 73 FERC ¶ 61,320, at 61,888 (1995); and *Mobile Bay Pipeline Projects*, 55 FERC ¶ 61,358, at 62,078 (1991).

(B) Millennium shall inform the Commission of the effective date of the transfer of title of the certificated facilities to the respective IDAs.

(C) Millennium's request for pre-granted authorization to reacquire the ownership interests from the IDAs is granted.

(D) Millennium is authorized to record a regulatory asset for a 15-year period, as discussed herein.

(E) Authorization to extend the terms of the Millennium Lease and the Columbia Lease from 10 years to 15 years and to increase Columbia's annual payment for its lease of capacity from Millennium in Line A-5 from \$5,469,890 to \$5,645,112 is granted.

(F) Columbia's certificate authority to construct over pressure protection facilities on measuring stations to be transferred to Millennium is vacated.

(G) In all other respects, the terms and conditions of Millennium's and Columbia's existing certificate and abandonment authorizations shall remain in full force and effect.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.