

124 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Energy Transfer Partners, L.P.

Docket No. IN06-3-005

ORDER DENYING REHEARING AND STAY

(Issued August 7, 2008)

1. This order addresses Energy Transfer Partners, L.P.'s (ETP) request for rehearing and request for stay of the Commission's May 15, 2008 Order Establishing Hearing (Hearing Order).¹ For the reasons discussed below, the Commission denies ETP's requests for rehearing and stay.

Background

2. On July 26, 2007, the Commission issued an order directing ETP to show cause why the Commission should not find that ETP manipulated markets at the Houston Ship Channel (HSC) and Waha, Texas, on specific dates between December 2003 and December 2005, and why the Commission should not revoke ETP's blanket certificates to sell gas subject to the Commission's jurisdiction.² The order directed ETP to show cause why it should not be subject to certain Natural Gas Act (NGA) civil penalties and the disgorgement of unjust profits resulting from the alleged market manipulation. The order also directed ETP's affiliate, Oasis Pipeline, L.P. (Oasis), to show cause why it did not violate certain Commission regulations governing service provided pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA). The order also directed Oasis to show cause why it should not be subject to certain NGPA civil penalties and the disgorgement of unjust profits resulting from the alleged violations of Commission regulations.

3. On December 20, 2007, the Commission issued an order addressing ETP's expedited request for rehearing and stay of the Show Cause Order.³ The order rejected

¹ *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168 (2008).

² *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Show Cause Order).

³ *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007) (Rehearing Order).

ETP's argument that an adjudication of civil penalties under either the NGA or the NGPA must proceed in a *de novo* trial in federal district court. The order also rejected ETP's claims that the Commission's procedures in the proceeding did not provide ETP with due process. The December 20, 2007 order also established procedures for the adjudication of civil penalties that would apply in this proceeding and future proceedings where civil penalties under the NGA, NGPA or Federal Power Act (FPA) were at issue. Finally, the Commission denied ETP's request for stay finding that ETP was unable to demonstrate that it would suffer irreparable harm absent a stay. ETP's petition for review of the Show Cause Order and the Rehearing Order was dismissed by the United States Court of Appeals for the Fifth Circuit.⁴

4. On May 15, 2008, the Commission issued an order establishing a hearing to determine whether ETP's alleged market manipulation violated the code of conduct applicable to persons holding blanket gas marketing certificates at the time the relevant gas trading activities occurred. The order also established a hearing to determine whether Oasis violated certain Commission regulations governing service provided pursuant to section 311 of the NGPA.⁵ Since the alleged NGA violation and NGPA violations are unrelated, separate hearings were established by the Chief Administrative Law Judge to address the issues raised by the Show Cause Order against ETP and Oasis, respectively.

5. On May 23, 2008, ETP filed an expedited request for rehearing and request for stay of the Hearing Order.

ETP's Request for Rehearing and Stay

6. ETP asserts that, for the same reasons described in detail in its August 27, 2007 rehearing request in this proceeding, ETP seeks rehearing of the Hearing Order.⁶ ETP argues that, as a matter of law, the Commission is not authorized to compel adjudication of ETP's potential civil penalty liability for NGA and NGPA violations in a trial-type hearing on the merits before an ALJ. ETP contends that due process requires that ETP's potential civil liability be adjudicated *de novo* in federal district court. ETP asserts that under both the NGA and the NGPA, a person "aggrieved" by a Commission order may seek rehearing within thirty days after the issuance of the order. ETP argues that now that the Commission has actually ordered agency hearings on ETP's potential civil

⁴ *Energy Transfer Partners, L.P. et al. v. FERC*, No. 07-61021 (5th Cir. Mar. 17, 2008) (unpublished order dismissing appeal for lack of jurisdiction).

⁵ *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168 (2008).

⁶ ETP Request for Rehearing at 3.

penalty liability under the NGPA and NGA, ETP's aggrievement is concrete by any rational measure.

7. ETP states that the Commission has addressed the standard that guides its determination of whether to grant a request for a stay:

[T]he Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that "justice so requires." Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay would substantially harm other parties, and where the public interest lies. *Pub. Util. Dist. No. 1 of Pend Oreille County, Wash.*, 117 FERC ¶ 61,205, at P 22 (2006) (footnote omitted).

ETP contends that the circumstances presented here fully satisfy this standard and compel grant of a stay.

8. ETP asserts that absent a stay, it will be irreparably harmed. ETP asserts that both the NGPA and NGA protect ETP from litigating civil penalty liability before the Commission, requiring *de novo* federal district court proceedings instead. ETP contends that the Commission lacks authority to require it to adjudicate its potential civil penalty authority before an ALJ because Congress intended that a person in ETP's shoes have the right to *de novo* federal district court adjudication. ETP submits that this is a substantial right. Yet, ETP argues that if it stands on this right and refuses to participate in what it believes is an unauthorized proceeding, it will undoubtedly face arguments of default from the Commission in future district court proceedings.

9. ETP argues that the uncertainty that would be engendered if ETP is forced to proceed with agency adjudication before a federal appellate court has determined whether such proceedings are authorized would be patently unfair to ETP. ETP submits that it can be remedied, however, if the Commission temporarily stays the Hearing Order, so that the threshold issues ETP has raised regarding the Commission's NGA and NGPA civil penalty procedures can be resolved on judicial review. ETP states that this stay would not be indefinite. Rather, ETP states that it would only need to be in place through the judicial review process.

10. ETP asserts that no other person will be harmed if the stay is granted. ETP contends that all the Commission's allegations still will be litigated and completely vetted.

11. Finally, ETP argues that the public interest will be fully served by grant of a stay. Absent a stay, ETP submits that the Commission may waste substantial resources and taxpayer dollars on a proceeding that should not have been initiated in the first place.

12. ETP asserts that the Commission should act expeditiously and issue an order vacating the Hearing Order and recognizing ETP's right at this juncture to have the NGPA and NGA charges against it adjudicated *de novo* before a federal district court. If the Commission declines to do so, and refuses to proceed under the procedures mandated by the NGPA and NGA, ETP requests that the Commission immediately issue an order on its rehearing request and stay the Hearing Order pending judicial review.

Discussion

13. In its request for rehearing ETP states "we raise no new issues in this Rehearing Request that were not raised in the 2007 Rehearing Request. The amplified discussion of the issues, however, reflects ETP's response to the Commission's 2007 Rehearing Order. The discussion thus closely tracks ETP's opening brief to the Fifth Circuit."⁷ Since ETP itself indicates that it raises no new issues that were not raised in its 2007 rehearing requests, the Commission finds that it need not address the subject Rehearing Request in full. The Commission does, however, adopt here in full the findings in its December 20, 2007 Rehearing Order. ETP has also indicated that its discussion of certain issues reflects its response to the Rehearing Order. While rehearing of the December 20, 2007 Rehearing Order does not lie, and ETP's appeal of that order was dismissed, the Commission will nevertheless briefly address two issues raised by the subject rehearing request, in addition to addressing the request for stay.

14. First, with respect to ETP's argument that it is aggrieved by the May 15, 2008 Hearing Order, the Commission is assuming aggravement only for the purpose of acting on ETP's rehearing request. The Commission makes no such assumption for purposes of judicial review, and indeed notes that ETP's earlier petition for review of the Show Cause Order and December 2007 Rehearing Order was dismissed by the United States Court of Appeals for the Fifth Circuit.⁸

15. Second, the Commission will address a part of ETP's statutory construction argument that the plain language of the NGA, viewed as a whole, and in light of parallel provisions in the FPA and NGPA, dictates *de novo* district court adjudication of civil penalties. The Commission will focus on ETP's argument with respect to FPA

⁷ ETP's Request for Rehearing at 2, fn. 3.

⁸ *Energy Transfer Partners, L.P. et al. v. FERC*, No. 07-61021 (5th Cir. Mar. 17, 2008) (unpublished order dismissing appeal for lack of jurisdiction).

section 317.⁹ ETP asserts that a comparison between parallel provisions of the FPA and NGA helps to demonstrate the error of the Commission's interpretation of the NGA civil penalty scheme. ETP contends that the FPA contains a provision, section 317, that is virtually identical to NGA section 24, and similarly provides an express jurisdictional foundation for district court adjudication of civil penalty liability. ETP states that in the 2007 Rehearing Order, the Commission contended that if ETP's interpretation of NGA section 24 were applied to FPA section 317 (including the right to *de novo* federal district court adjudication), then FPA section 317 would make the entire assessment provision in FPA section 31 superfluous. Rehearing Order at P 61. ETP argues that this argument misses the mark. ETP submits that once we view FPA section 317 in the context of the FPA as a whole, we see that it is part of a harmonious broader scheme. ETP asserts that FPA section 317, like NGA section 24, is the grant of jurisdiction to the federal district court for adjudication of penalty assessments (as well as for collection actions). 16 U.S.C. § 825p. ETP argues that, for its part, FPA section 31(d), 16 U.S.C. § 823b(d), provides a fair amount of detail about the civil penalty assessment and collection process. ETP contends that this provision, in turn, defines the phrase "assessed by the Commission after notice and opportunity for public hearing," which appears twice in the FPA, 16 U.S.C. §§ 823b(c) and 825o-1(b), and again in the NGA, 15 U.S.C. § 717t-1(b), and tracks the same key terms in the NGPA, 15 U.S.C. § 3414(b)(6)(E)-(F). ETP concludes that read consistently, this language establishes Congress's intent to provide for federal district court *de novo* adjudication of NGA civil penalty liability.

16. The Commission finds that in the Rehearing Order it reasonably concluded that NGA section 24 does not require it to file an action in federal district court each time it believes a person has violated the NGA, but rather provides a vehicle for the Commission or other parties to bring an action in district court to enjoin violations of the Act, or to enforce liabilities or duties created under the Act (such as civil penalty liability created by a Commission order finding a violation).

17. The Commission's conclusion that NGA section 24 does not provide an independent basis to seek review of a Commission order assessing a civil penalty is in

⁹ FPA section 317 provides:

The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. 16 U.S.C § 825p.

accord with judicial precedent construing both that section and its identical counterpart, FPA section 317. For example, in *Panhandle Eastern Pipe Line Co. v. Trunkline Gas Co.*, 928 F. Supp. 466, 471, 473 (D. Del. 1996), the district court concluded that it would have jurisdiction to entertain a suit under NGA section 24 only if the Commission orders in question had first created a liability for it to enforce. The court also noted, importantly that “[a]ny alleged infirmity with the FERC’s ruling involving the merits or its authority to so rule needs to be passed upon” by the court of appeals. *Id.* at 473. Similarly, in construing identical FPA section 317, the courts have held that this provision gives district courts “exclusive jurisdiction to enforce or enjoin . . . definitive orders, establishing rights and duties, such as may be reviewed before the Circuit Court of Appeals.” *Mississippi Power & Light Co. v. FPC*, 131 F.2d 148, 150 (5th Cir. 1942). District courts have reached the same conclusion.¹⁰

18. Finally, the Commission will address ETP’s request for stay. When acting on a request for stay, the Commission applies the standard set forth in the Administrative Procedure Act (APA) section 705;¹¹ we will grant a stay if “justice so requires.”¹² To determine whether justice requires a stay, the Commission considers: (1) whether the moving party will suffer irreparable harm without a stay; (2) whether the stay will substantially harm other parties; and (3) whether a stay is in the public interest.¹³ The key element in the inquiry is irreparable harm to the moving party. If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the

¹⁰ See, e.g., *Louisiana Power & Light Co. v. Ackel*, 616 F. Supp. 445, 447 (M.D. La. 1985) (district court lacked jurisdiction under FPA section 317 where defendants had not violated the Commission’s order); *Allegheny Electric Cooperative, Inc. v. Power Authority of the State of New York*, 630 F. Supp. 1271 (S.D.N.Y. 1986) (FPA section 317 “is an enforcement section designed to address the violation of specific orders delineating rights and duties”).

¹¹ 5 U.S.C. § 705 (2000).

¹² *Pub. Util. Dis. No. 1 of Pend. Oreille County, Wash.*, 117 FERC ¶ 61,205, at P 22 (2006) (citing 5 U.S.C. § 705 (2000)); *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992)).

¹³ See, e.g., *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320, at P 8 (2007), *reh’g denied*, 120 FERC ¶ 61,098 (2007); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,631 (1991), *aff’d sub. nom.*, *Michigan Coop. Group v. FERC*, 990 F.2d 1377 (D.C.Cir.), *cert. denied*, 510 U.S. 990 (1993).

other factors.¹⁴ The only difference in facts between ETP's prior stay request and the current request is that the Commission has now ordered an administrative hearing to address the allegations against ETP. The Commission finds that no irreparable harm will occur to ETP if it is required to adjudicate its civil penalty liability in an administrative hearing before the Commission. The courts have determined that litigating a case before an administrative agency does not constitute irreparable harm. In *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), the company contended that it could be irreparably harmed unless the issuance of a complaint against it was judicially reviewed immediately. The company argued that the expense and disruption of defending itself in protracted adjudicatory proceedings constituted irreparable harm. The Supreme Court stated that it did not doubt that the burden of defending the proceeding would be substantial. Nonetheless, the court held that "the expense and annoyance of litigation is 'part of the social burden of living under government.'"¹⁵ The Supreme Court further held that: "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."¹⁶

19. We find that ETP is not irreparably harmed by having to proceed with the administrative hearings. ETP's due process rights are preserved through the Commission's adjudicatory proceedings and, in the case of the NGPA penalty issues, ETP will receive a *de novo* review in federal district court. Further, ETP is entitled to court review of any final NGA civil penalty assessment order through an appeal to the U.S. court of appeals. Additionally, we find that a stay in these proceedings would not be in the public interest. The public interest is best served by allowing this matter to proceed at the Commission. Accordingly, we deny ETP's request for a stay of the May 15 Hearing Order.

¹⁴ *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320, at P 8, *reh'g denied*, 120 FERC ¶ 61,098 (2007).

¹⁵ *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938).

¹⁶ *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974).

The Commission orders:

ETP's requests for rehearing and stay are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.