127 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses — Docket No. RM09-7-000

NOTICE TERMINATING PROCEEDING

(May 6, 2009)

1. On February 6, 2009, in Docket No. RM09-7-000, Dominion Resources, Inc. (Dominion) requested that the Commission clarify its policy regarding the availability of waivers of the Commission's capacity release regulations and related requirements for gas marketers transferring firm transportation rights on interstate pipelines as part of larger, integrated transactions. Dominion asserted that recent decisions created uncertainty about the scope and availability of waivers when a company transfers a specific group of its interstate natural gas pipeline service agreements as part of a larger bundled transaction. Dominion was concerned that waivers being granted recently were larger in scope and waived the capacity release posting and bidding requirements while earlier waivers were more narrowly tailored and required the entities seeking the waiver to follow the pipeline's posting and bidding requirements. For the reasons discussed below, the Commission is terminating this proceeding.

Background

2. In its request for clarification, Dominion stated that from 2004 to 2007, the Commission granted limited waivers of its capacity release regulations and policies in order to permit releasing shippers to exit the natural gas transportation business in an orderly fashion.[1] However, Dominion stated that, while the Commission waived its

[1] *Northwest Pipeline Corp. and Duke Energy Trading and Marketing*, 109 FERC ¶ 61,044 (2004) (*Duke*), *clarification denied*, 112 FERC ¶ 61,187 (2005); *Wasatch Energy, LLC and Northwest Pipeline Corporation*, 118 FERC ¶ 61,173 (2007) (*Wasatch*); *Tennessee Gas Pipeline Co. and Dartmouth Power Assoc., LP*, 111 FERC ¶ 61,509 (2005); *Duke Energy Marketing America LLC, et al.*, 114 FERC ¶ 61,198 (2006); *Duke Energy Marketing America LLC*, 114 FERC ¶ 61,309 (2006); and *Vitol Inc. and Natural Gas Pipeline Company of America*, 121 FERC ¶ 61,099 (2007).

prohibition on tying to permit the releasing shipper to package the release of its pipeline capacity with an assignment of its gas commodity purchase and sale agreements, the Commission nevertheless required that the capacity be awarded through an open and transparent process in order to ensure there was no undue discrimination. For example, the Commission approved the waiver in *Northwest* in part on the ground that a reverse auction would be used to determine the level of the payment releasing shipper would make to the replacement shipper in return for the replacement shipper taking the release at the maximum rate. Dominion also pointed out that the Commission had denied requests to waive the maximum rate so that the shipper could not profit from the waiver of other capacity release regulations, and the Commission had denied waivers altogether where the releasing shipper was not exiting the gas business.[2]

3. Dominion stated, however, that beginning in late 2007 the Commission had granted broader waivers of its capacity release regulations and policies to allow for the orderly transfer of assets in three cases, *Sempra Energy Trading Corp*.,[3] *Bear Energy LP*,[4] and *Barclays Bank PLC and UBS AG.*[5] Dominion stated that in each of these cases, unlike the earlier cases, the Commission permitted pipeline capacity to be transferred to prearranged replacement shippers along with other contracts without any bidding process to prevent undue discrimination and without any assurance that the releasing shipper was not profiting on its releases.

4. Shortly after Dominion filed its petition, Macquarie Cook Energy, LLC (Macquarie) and Constellation Energy Commodities Group, Inc. (Constellation) filed a request for a temporary waiver of various Commission capacity release policies and regulations in order to facilitate the acquisition by Macquarie of Constellation's wholesale natural gas trading portfolio in the United States. Dominion filed comments in that proceeding referring to its request for clarification in Docket No. RM09-7-000 and asserted that the waiver request seemed inconsistent with the Commission's transparency objectives and could be discriminatory. Dominion later filed a letter clarifying that it did not want to delay action on the request in the Macquarie proceeding and that the broader policy issues should be addressed in a separate generic proceeding.

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[2] *Wyoming Interstate Co.*, 110 FERC ¶ 61,325 (2005); *Cheyenne Plains Gas Pipeline Co.*, 110 FERC ¶ 61,326 (2005); *Louis Dreyfus Energy Services, LP,* 114 FERC ¶ 61,246 (2006); *Northern Natural Gas Co.*, 119 FERC ¶ 61,204 (2007); and *Gas Transmission Northwest Corporation, et al.*, 119 FERC ¶ 61,031 (2007).

[3] 121 FERC ¶ 61,005 (2007) (*Sempra Energy*).

[4] 123 FERC ¶ 61,219 (2008) (*Bear Energy*).

[5] 125 FERC ¶ 61,383 (2008) (*Barclays*).

5. On February 23, 2009, the Commission granted Macquarie and Constellation's request for waiver.[6] As in *Sempra Energy*, *Bear Energy*, and *Barclays*, the Commission granted a broader waiver of its capacity release regulations and policies than it had in the earlier 2004-2007 Orders cited by Dominion. In *Macquarie*, the waiver included not only waiver of the tying prohibition, but also the shipper-must-have-title policy, the prohibitions on buy-sell arrangements, and restrictions on capacity releases above or below the maximum rate. In addition, the Commission did not require the use of any bidding process. The Commission's order in *Macquarie* included an explanation of why the Commission granted broader waivers in that case and the three other recent cases than it had in the earlier 2004-2007 orders cited by Dominion.

Discussion

6. The Commission is terminating this proceeding because the *Macquarie* order provided clarification as to how the Commission will evaluate requests for waivers of its capacity release regulations and policies. As discussed below, the Commission will continue to consider requests for waiver of its capacity release regulations and policies on a case-by-case basis, based on a balancing of the facts and circumstances in each case with the purposes underlying particular regulations and policies.

7. As the Commission explained in *Macquarie,* in the earlier waiver orders cited by Dominion, such as *Duke*, the marketers simply wanted to release firm transportation capacity in conjunction with gas supply contracts in order to exit certain natural gas marketing activities. No other assets or transfers of business units and employees from one corporation to another were involved. Therefore, in the earlier cases, it was more practicable for the marketers to use a bidding process for the release of the interstate pipeline capacity, and accordingly the Commission did not waive all posting and bidding requirements.

8. By contrast, in the later cases such as *Bear Energy*, the transactions became more complex, involving the transfer of other assets and employees, as a result of various types of corporate restructurings, including corporate mergers and sales of entire business units. In those cases, the Commission granted broader waivers including waiver of the posting and bidding requirements, so that the parties could consummate the transfer of an entire business unit. The Commission found that the capacity release mechanism is not suited to these types of complex, integrated deals that do not permit the disaggregation of assets. Order No. 636 adopted the capacity release program in order to permit shippers to "reallocate unneeded firm capacity" to those who need it and promote efficient load

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[6] *Macquarie Cook Energy, LLC* (*Macquarie*), 126 FERC ¶ 61,160 (2009).

management by the pipeline and its customers.[7] The Commission did not contemplate that the capacity release posting and bidding requirements would necessarily apply in the cases of the merger or sale of entire business units as part of a corporate restructuring, including the transfer of transportation contracts, supply contracts, employees, data systems and technology. Moreover, given the financial difficulties that many energy-related companies are facing, and the difficult environment facing U.S. and international credit and capital markets, the Commission needs to be able to respond to requests for waivers related to complex business transactions in a flexible and expedited manner. Therefore, a rigid adherence to certain policies or regulations could have unintended, negative financial implications for the affected companies and their employees.

9. In *Macquarie*, the Commission considered these various factors, finding that the Macquarie/Constellation transaction, as in *Bear Energy* and *Sempra Energy*, went beyond a simple transfer of interstate pipeline capacity from one company to another, or even a transfer of pipeline capacity together with related gas purchase and sale agreements. Constellation was selling its entire gas commodity trading business unit to Macquarie, with the result that its employees would transfer to Macquarie and Macquarie would obtain such other related Constellation assets as its data systems and technology. The Commission concluded that granting the requested waivers would relieve Constellation of credit requirements, allow Constellation to realize the legitimate value of its wholesale natural gas trading business, permit Macquarie to lock in the current value of the business as soon as possible, and allow many of Constellation's employees to continue their work.

10. Because the Commission finds that the *Macquarie* order provided sufficient clarification as to how the Commission will evaluate requests for waivers of the capacity release regulations and policies, no further generic clarification is necessary. Waivers of Commission regulations and policies by their very nature need to be done on a case-by-case basis, because they turn on the specific circumstances of individual cases. In this regard, applicants for a waiver of the capacity release regulations and policies should (1) identify with as much specificity as possible the regulations and policies for which they seek waiver, (2) identify the pipeline capacity at issue, (3) provide a sufficient description of the overall transaction and its claimed benefits to permit the Commission and other interested parties to analyze whether granting the requested waivers are in the public interest based upon the factors discussed above, and (4) file the request as much in advance of the requested action date as possible. Accordingly, the Commission finds that the proceeding in Docket No. RM09-7-000 should be terminated.

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[7] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271, at P 119 and n.119, *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72692 (Dec. 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008).

The Commission orders:

Docket No. RM09-7-000 is terminated.

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.