128 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Transcontinental Gas Pipe Line Company, LLC    Docket No. RP09-441-000

ORDER ON REQUEST FOR DECLARATORY ORDER

(Issued July 30, 2009)

1. On March 6, 2009, Transcontinental Gas Pipe Line Company, LLC (Transco) filed a petition for a declaratory order that Transco's sales of certain storage gas are incidental sales of gas to operate its system and, therefore, excluded from the marketing functions subject to the Commission's Standards of Conduct for Transmission Providers (Standards of Conduct or Standards). In the alternative, Transco requests a limited waiver of the Standards of Conduct to permit Transco's transmission function employees to make those sales. As discussed below, the Commission denies Transco's request for a declaratory order, but grants Transco's alternate request for a limited waiver.

## I. Background

### A. Standards of Conduct

2. The Commission first adopted Standards of Conduct in 1988, in Order No. 497.[1] These initial Standards prohibited interstate natural gas pipelines from giving their

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[1] *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988); Order No. 497-A, *order on reh'g*, 54 FR 52781 (1989), FERC Stats & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989); Order No. 497-B, *order extending sunset date*, 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (1990); Order No. 497-C, *order extending sunset date*, 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (1991), *reh'g denied*, 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); *aff'd in part and remanded in part sub nom*. *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (collectively, Order No. 497).

marketing affiliates or wholesale merchant functions undue preferences over non-affiliated customers. The Commission adopted similar Standards for the electric industry in 1996, in Order No. 889,[2] prohibiting public utilities from giving undue preferences to their marketing affiliates or wholesale merchant functions. Both the electric and gas Standards sought to deter undue preferences by: (i) separating a transmission provider's employees engaged in transmission services from those engaged in its marketing services, and (ii) requiring that all transmission customers, affiliated and non-affiliated, be treated on a non-discriminatory basis.

3. Changes in both the electric and gas industries led the Commission in 2003 to issue Order No. 2004,[3] which broadened the Standards to include a new category of affiliate, the energy affiliate. The new Standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider must function independently not only from the company's marketing affiliates but from its energy affiliates as well. The new standards also provided that transmission providers may not treat either their energy affiliates or their marketing affiliates on a preferential basis.

4. On appeal, the U.S. Court of Appeals for the D.C. Circuit disapproved of the expansion of the Standards to include energy affiliates, and vacated Order No. 2004 as it applied to the gas industry.[4] Consequently, the Commission issued an Interim Rule on

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[2] *Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct*, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991- June 1996 ¶ 31,035 (1996); Order No. 889-A, *order on reh'g*, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,049 (1997); Order No. 889-B, *reh'g denied*, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (1997) (collectively, Order No. 889).

[3] *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (National Fuel).

[4] *National Fuel*, 468 F. 3d at 845.

January 9, 2007,[5] which repromulgated the portions of the Standards not challenged in *National Fuel*, and set about determining how to respond to the D.C. Circuit's order on a permanent basis. On October 16, 2008, the Commission issued Order No. 717,[6] which amended the Standards to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse. Specifically, Order No. 717 eliminated the concept of energy affiliates and the corporate separation approach in favor of the employee functional approach used in Order Nos. 497 and 889.

5. Under the Standards of Conduct promulgated by Order No. 717, a transmission provider's transmission function employees are required to function independently of its marketing function employees.[7] Further, a transmission provider is specifically prohibited from permitting its transmission function employees to conduct marketing functions.[8] Under the Standards of Conduct, "marketing functions" is defined, in the case of interstate pipelines and their affiliates, as "the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of natural gas" with certain exceptions. Those exceptions include "[i]ncidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities."[9] The Standards of Conduct also define "Marketing function employee" as "an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions."[10]

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[5] *Standards of Conduct for Transmission Providers*, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (2007) (Interim Rule); *clarified by, Standards of Conduct for transmission providers*, Order No. 690-A, 72 FR 14235 (Mar. 27, 2007); FERC Stats. & Regs. ¶ 31,243 (2007) (Order on Clarification and Rehearing).

[6] *Standards of Conduct for Transmission Providers*, Order No. 717, 125 FERC ¶ 61,064 (2008).

[7] *Standards of Conduct for Transmission Providers*, 73 Fed. Reg. 63,796, 63,830 (Oct. 27, 2008) (to be codified at 18 C.F.R. § 358.5) (also referred to as the "independent functioning rule").

[8] *Id.* at 63,830 (to be codified at 18 C.F.R § 358.5(b)(2)).

[9] *Id.* at 63,829 (to be codified at 18 C.F.R. § 358.3(c)) (defining Marketing Function).

[10] *Id.* at 63,829-30 (to be codified at 18 C.F.R. § 358.3(d)) (defining Marketing Function Employee).

### B. Hester and Eminence Storage Facilities

6. Transco is a natural gas company engaged in the transportation and sale of natural gas in interstate commerce by means of its natural gas transmission system extending from its sources of natural gas supply in Texas, Louisiana, Mississippi and the offshore Gulf of Mexico area, through the states of Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania and New Jersey, to its termini in the New York City metropolitan area.

7. The Commission has authorized Transco to sell natural gas currently in storage at both its Eminence and Hester storage facilities pursuant to the procedures set forth in section 43 of the General Terms and Conditions (GT&C) of its tariff. Section 43, entitled "System Management Gas," sets forth the terms and conditions under which Transco is permitted to buy or sell gas. Specifically, section 43.1 provides that Transco may buy or sell gas in order to maintain the operational integrity of its system, section 43.2 sets forth the posting requirements for any such purchase or sale, sections 43.3 and 43.4 set forth bid and bid evaluations procedures, and section 43.5 sets forth the accounting treatment for any costs or revenues associated with Transco's purchase or sale of gas.

8. Transco currently has excess top gas inventory[11] at its Eminence storage facility as a result of the implementation of a settlement agreement (2006 Storage Settlement) filed in Docket No. RP01-245-016 and approved by the Commission on November 27, 2006.[12] The 2006 Storage Settlement resolved, among other things, the issue of the unbundling of

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[11] Gas in an underground storage facility is divided into two general categories, working gas (top gas) and cushion gas (base gas). Base gas is the volume of gas, including native gas, needed as a permanent inventory in a storage reservoir to maintain adequate reservoir pressure and deliverability rates throughout the withdrawal season. Top gas is the volume of gas in the reservoir above the designed level of base gas and that can be extracted during the normal operation of the storage facility.

[12] *See Transcontinental Gas Pipe Line Corp.*, 117 FERC ¶ 61,232 (2006). Effective December 31, 2008, Transco changed its name from Transcontinental Gas Pipe Line Corporation to Transcontinental Gas Pipe Line, LLC. *See Transcontinental Gas Pipe Line Corp.*, Docket No. RP09-158-000 (2008) (unpublished letter order).

Transco's Emergency Eminence Storage Withdrawal Service.[13] The 2006 Storage Settlement provided that Transco would give to certain eligible shippers an allocation of their proportionate share of Emergency Eminence storage service. The shippers were permitted to elect to either (a) turn-back to Transco their Emergency Eminence entitlements, (b) convert their Emergency Eminence entitlements to Eminence Storage Service under Transco's Rate Schedule ESS, or (c) retain their Emergency Eminence entitlements for service under a new, unbundled Rate Schedule EESWS (or Emergency Eminence Storage Withdrawal Service). Further, the entitlements turned back by the eligible Rate Schedule FT customers were to be dedicated to system flexibility.

9. As a result of the shipper elections set forth in the 2006 Storage Settlement, shippers retained 508,809 dts of Emergency Eminence capacity under Rate Schedule EESWS and Transco retained, as system flexibility, 909,169 dts of capacity. As a result, Transco only required 1,417,978 of Eminence top gas inventory to support the Emergency Eminence Storage Withdrawal Service and retain system flexibility, leaving Transco an excess of 7,858,990 dts available to sell. On March 30, 2007, in Docket No. RP07-376-000, Transco requested Commission authorization to conduct the sale of 7,858,990 dts of "excess" Eminence top gas inventory under the posting and bid evaluation procedures set forth in section 43 of its GT&C and a waiver of GT&C section 43.5 so that the revenues from the sale need not be accounted for as part of its imbalance cash-out program.[14] Transco states that it sold 7,858,990 dts of Eminence top gas between July and December 2007.

10. Transco stated that although the operating conditions applicable to section 43 were not present, the posting and bid evaluation procedures in section 43 provided a useful framework for conducting the sale of the excess top gas at the Eminence storage facility.[15] The Commission granted Transco's requested authorization to sell excess top gas inventory at the Eminence storage facility and use the posting and bid evaluation procedures in GT&C section 43, without Transco needing to show that such sales were

[13] Previously, Emergency Eminence Storage Withdrawal Service was bundled in Transco's FT rate schedule with FT service. *Transcontinental Gas Pipe Line Corporation, Order on Initial Decision,* 106 FERC ¶ 61,299, at P 146 (2004). The Commission found this bundling unjust and unreasonable and ordered Transco to unbundle its Emergency Eminence Service from Rate Schedule FT and create a separate Emergency Eminence Service. *Id.* P 155.

[14] *Transcontinental Gas Pipe Line Corp.*, 119 FERC ¶ 61,105 (2007) (*Transcontinental*).

[15] *Id.* P 4.

necessary to maintain the operational integrity of its system.[16] However, the Commission set for hearing the issue of Transco's request to retain any gain on the disposition of the excess top gas inventory, which the Commission consolidated with the hearing ordered in Transco's Natural Gas Act (NGA) section 4 rate proceeding in Docket No. RP06-569-000.[17]

11. Transco has owned and operated the Hester storage field since 1977. Since the 1980s, however, Transco experienced ongoing gas losses at the facility. Despite numerous studies, Transco was unable to determine the cause of the gas losses. Further, because the causes were unknown, Transco was also unable to mitigate the gas migration. As a result, in December 2004, Transco completed its final inventory calculations and made the decision to cease operating Hester and pursue abandonment of the field.

12. On March 7, 2008, the Commission approved a settlement agreement (2008 Settlement) filed in Transco's section 4 general rate case in Docket No. RP06-569-000.[18] Article V of the 2008 Settlement provides that sales of excess top gas from the Eminence storage facility and sales of injected base gas from the Hester storage facility will be conducted using the posting and bid evaluation procedures in sections 43.2, 43.3, and 43.4 of the GT&C and sets forth procedures under which revenues received by Transco from the sales will be shared with eligible customers. The parties also agreed in the settlement that Transco would allow a shipper that retained Emergency Eminence Storage Withdrawal Service to convert from Rate Schedule EESWS to Rate Schedule ESS by providing notice to Transco within 30 days after the effective date of the 2008 Settlement. The parties agreed that Transco would sell the excess top gas resulting from any such conversion using the same section 43 posting and bid evaluation procedures and that Transco would share the proceeds with eligible customers.

13. Subsequent to the 2008 Settlement, in Docket No. CP08-207-000, the Commission granted Transco's application for permission and approval to abandon its Hester storage facility.[19]

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[16] *Id.* P 12.

[17] *Id.* P 14.

[18] *Transcontinental Gas Pipe Line Corp.*, 122 FERC ¶ 61,213 (2008).

[19] *Transcontinental Gas Pipe Line Corp.*, 125 FERC ¶ 62,003 (2008).

## II. Request for Declaratory Order or Waiver

### A. Request for Declaratory Order

14. Transco states that the Hester storage field contains an estimated 8.1 Bcf of injected base gas, of which 6 Bcf is recoverable. Transco also states that several customers elected to convert from Rate Schedule EESWS to Rate Schedule ESS as permitted under the 2008 Settlement, resulting in 337,208 dts of excess Eminence top gas inventory available to sell.

15. Transco states that, at the time that the 2008 Settlement was negotiated and approved, it was its intent that the sales of Hester injected base gas and Eminence excess top gas would be sales incidental to the operation of its system that would be accomplished by Transco's transmission function employees. As such, Transco states, these sales would not implicate the Commission's then-existing Standards of Conduct for Transmission Providers adopted in Order No. 2004.[20] However, Transco states, subsequent to the approval of the 2008 Settlement, the Commission revised the Standards of Conduct in Order No. 717.[21] Transco states that, given the issuance of Order No. 717 and out of an abundance of caution, it is seeking (a) a Commission declaration that the sales of the injected Hester base gas and the excess Eminence top gas are sales incidental to the operation of its system that can be accomplished by Transco's transmission function employees, or, in the alternative, (b) a waiver of the independent functioning rule in section 358.5 of the Commission's regulations in order to allow Transco's transmission function employees to make those sales.

16. Transco submits that the sales are a necessary incident to the abandonment activities at the Hester storage facility and to the conversion of storage service provided by Transco at the Eminence storage facility, and, therefore, constitute "incidental sales of natural gas to operate" Transco's transmission facilities under the Standards of Conduct. Transco states that since Order No. 636 the Commission has permitted a pipeline's transmission function employees to buy and sell gas for operational reasons, including balancing fuel usage, effectuating cash outs, managing line pack, and for storage operations. Further, Transco asserts that to the extent that the sales and purchases are for operational purposes, the independent functioning rule of the Standards of Conduct does not apply "because such purchases and sales are not part of [a] pipeline's sales or

[20] Transco Request at 6.

[21] Transco Request at 7.

marketing activities per se."[22] Indeed, Transco states, section 43 of its GT&C provides for the purchase and sale of gas by Transco to address certain operating events.

17. Transco states that the sales of gas from the Hester and Eminence storage facilities discussed in this order will be conducted pursuant to the posting and bidding procedures set forth in GT&C section 43 ensuring that all interested parties will have the opportunity to participate in the sales. Transco also states that, as required by the Commission, the Hester injected base gas and the Eminence excess top gas was not purchased by Transco in connection with any merchant activity and the sale of this gas is not in furtherance of any merchant function of Transco. In addition, Transco states that the sales will be made on an unbundled basis (i.e., at the applicable storage field, independent of transportation service).

### B. Alternate Request for Waiver

18. In the alternative, Transco requests a waiver of the independent functioning rule in section 358.5 of the Commission's Standards of Conduct regulations to allow Transco's transmission function employees to accomplish these sales. Transco submits that good cause exists to grant the requested waivers. Transco states that the injected base gas from the Hester storage facility is available for sale as a result of the Commission's authorization in Docket No. CP08-207-000 permitting Transco to cease operating and abandon the Hester storage facility and the excess top gas inventory from the Eminence storage facility is available for sale as a result of customer elections to convert from Rate Schedule EESWS to Rate Schedule ESS pursuant to the 2008 Settlement. As stated above, Transco states that this gas was not purchased by Transco in connection with any merchant activity and the sale of this gas is not in furtherance of any merchant function of Transco. Also as stated above, Transco states the sales of the gas from the Hester storage facility and the Eminence storage facility will be conducted pursuant to posting and bidding procedures under section 43, and will be made on an unbundled basis.

19. Transco states that it expects that the sales of gas will be accomplished by the equivalent of one employee, who will spend, at most, one hour per day administering and monitoring the sales as and when they occur. Transco maintains that it would be unduly burdensome to require Transco to designate that employee as a "marketing function employee" for purposes of the Standards of Conduct and establish compliance procedures to address that designation, solely in order for that employee to "actively" engage in a marketing function for, at most, one hour per day. That is particularly true, Transco argues, in this case given that, under the transparent procedures established to conduct

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[22] Transco Request at 9 (citing *Columbia Gulf Transmission Co.*, 118 FERC ¶ 61,066, at 61,329 (2007)).

these sales, the employee's active engagement will be to conduct essentially ministerial activities. Accordingly, Transco requests that the Commission grant any necessary waivers of the Standards of Conduct to allow Transco's transmission function employees to make the sales of gas from the Hester storage facility and the Eminence storage facility as discussed in this order.

## III. Public Notice, Intervention and Comments

20. Notice of Transco's filing was issued on March 10, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2008). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2008), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. The National Grid Companies[23] filed comments in support of Transco's petition in this proceeding.

## IV. Discussion

21. The Commission denies Transco's request for a declaratory order, but finds that good cause exists to grant Transco's limited waiver request. As recognized by Transco, historically, the Commission has permitted pipelines to buy and sell gas for operational reasons, including balancing fuel usage, effectuating cashouts, depleting or replenishing line pack, and maintaining storage cavern pressure, without triggering the independent functioning requirement of the Standards of Conduct. The Commission has found that purchases and sales under those circumstances were incidental to the operation of pipeline transmission facilities and therefore, not part of the pipeline's sales and marketing activities *per se*.[24] Along the same lines, pursuant to section 43 of its GT&C, Transco may buy or sell gas in the event that conditions exist which threaten the operational integrity of its system, without triggering the independent functioning requirement of the Standards of Conduct.

22. The sales of gas from the Hester and Eminence storage facilities at issue in the instant proceeding are not being made to maintain the operational integrity of Transco's

[23] The National Grid Companies include the Brooklyn Union Gas Company, Keyspan Gas East Corporation, Boston Gas Company, Colonial Gas Company, Essex Gas Company, EnergyNorth Natural Gas, Inc., Niagara Mohawk Power Corporation, and The Narragansett Electric Company.

[24] *See, e.g., Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,264, at P 9 (2007) and *Colorado Interstate Gas Co.*, 107 FERC ¶ 61,312, at P 16 (2004) (*Colorado*).

system;[25] nor are they being made for any of the other operational reasons historically recognized by the Commission as incidental to a pipeline's operations.[26] Rather, the sales of gas from the Hester storage facility are being made as the result of the Commission's authorization permitting Transco to cease operating and abandon the Hester storage facility and the sales of gas from the Eminence storage facility are being made as a result of customer conversions. Therefore, Transco's request for a declaratory order is denied.[27]

23. While the Commission denies Transco's request for a declaratory order, the Commission will grant Transco's request for a waiver of section 358.5 of the Commission's Standards of Conduct regulations to allow Transco's transmission function employee to accomplish those sales. Transco has indicated that it will conduct the limited sales of Hester injected base gas and Eminence excess top gas pursuant to the transparent posting and bidding procedures set forth in GT&C sections 43.2, 43.3 and 43.4 of its tariff, which help reduce the opportunity for unduly discriminatory or preferential behavior. Transco also states that its transmission function employees will not be engaging in any other merchant function activities. Moreover, Transco's transmission function employees are still required to observe the No-Conduit and Transparency Rules under sections 358.6[28] and 358.7,[29] respectively, as well as any other

[25] In Docket No. RP07-376-000, Transco conceded that the operating conditions applicable to section 43 are not present with respect to sales of excess top gas from the Eminence storage facility. *See* Paragraph 10, *supra.*

[26] *See also Northern Natural Gas Co.*, 70 FERC ¶ 61,228, at 61,705 (1995) (finding that the pipeline's sale of excess gas resulting from termination of its merchant service was not incidental to pipeline operations, such as sales of excess gas resulting from the cashout requirements of balancing provisions and maintaining line pack levels, and, therefore, required a waiver of the independent functioning requirement).

[27] It appears that Transco did not seek a waiver of the independent functioning requirements of the Standards of Conduct for its transmission function employees to make the sales of Eminence top gas in 2007. Transco is reminded that it must comply with applicable requirements or seek waiver of such requirements on a timely basis or face possible sanctions by the Commission.

[28] *Standards of Conduct*, 73 Fed. Reg. at 63,830 (to be codified at 18 C.F.R. § 358.6) (prohibits the exchange of non-public transmission function information among certain persons).

[29] *Id.* at 63,830-31 (to be codified at 18 C.F.R. § 358.7) (requires transmission providers to post certain transmission provider information).

non-waived requirements of the Commission's Standards of Conduct regulations. Accordingly, we find that good cause exists to grant Transco a limited waiver of section 358.5 of the Commission's Standards of Conduct regulations with respect to these sales in this instance.

The Commission orders:

Transco's request for a declaratory order is denied and Transco's request for a limited waiver is granted, as discussed in the body of the order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.