

128 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enserco Energy, Inc.

Docket No. IN09-24-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued August 24, 2009)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Enserco Energy, Inc. (Enserco). This order is in the public interest because it resolves the investigation into self-reported violations by Enserco of the Commission's open access transportation program, including circumventing the competitive bidding requirements for long-term, discounted rate capacity releases and violations of the shipper-must-have-title requirement. Enserco has agreed to pay a civil penalty of \$1,400,000 and to submit compliance monitoring reports.

Background

2. Enserco is a full service marketing company in the western and midcontinent region of the U.S. and Canada with more than 350,000 MMBtu/day of interstate pipeline capacity, and storage in excess of 8 Bcf. Enserco is a subsidiary of the Black Hills Corporation. During the period covered by the investigation, Enserco's affiliate Black Hills Energy Resources (BHER) also participated in the wholesale natural gas market.

3. In December 2007, following a self-report by Enserco, Enforcement opened an investigation pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2009), into possible violations of the Commission's open access transportation program between January 2005 and June 3, 2008. Enserco self-

reported potential “flipping,”¹ serial release, shipper-must-have-title, buy/sell, and tying transactions. Staff confirmed that certain of the reported flipping and shipper-must-have-title transactions were violations.

Violations

A. Flipping Transactions

4. Section 284.8(h) of the Commission’s regulations requires that a shipper releasing firm capacity for a term longer than 31 days and at a price less than the maximum tariff rate must post the capacity for competitive bidding on the pipeline’s Electronic Bulletin Board. The regulations also provide that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2), a discounted, short-term release may not be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

5. The prior posting requirement for long-term, discounted rate releases promotes natural gas market transparency by providing notice to all interested shippers of the availability of released capacity. The competitive bidding requirement, in turn, ensures that the released capacity will go to the shipper who values it most. Together, the posting and bidding requirements are integral components of the Commission’s pipeline open-access program, and promote transparency, market efficiency, and the elimination of undue preference and discrimination in the natural gas transportation market.

6. Enforcement staff confirmed that Enserco improperly transported 13.9 Bcf of gas on 20.6 Bcf of discounted pipeline capacity acquired through flipping

¹ Flipping is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2009). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the posting and bidding requirements, that creates a long-term, noncompetitive discounted rate release. *See, e.g., In re Puget Sound Energy, Inc.*, 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Corporation*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Company*, 121 FERC ¶ 61,088 (2007).

transactions. The flipping transactions caused harm to natural gas transportation markets, because they impeded transparency and denied other market participants an opportunity to bid for discounted, long-term releases of capacity. However, staff found no unjust profits related to these transactions.

B. Shipper-Must-Have-Title Requirement Violations

7. The shipper-must-have-title requirement provides that the holder of title to the gas must be the capacity holder for the transportation as well. Without the shipper-must-have-title requirement, it is unlikely that shippers would need to use capacity release, since capacity holders could simply transport gas over the pipeline for another entity. Thus, transactions would not be subject to any of the capacity release requirements, such as the reporting requirements or the allocation through competitive bidding. Without the shipper-must-have-title requirement, the identity of the true users of the pipeline's transportation and the conditions under which they moved gas would not be known.² The shipper-must-have-title requirement is reflected in the FERC gas tariffs of interstate pipelines providing open-access transportation and storage service.³

8. Enforcement staff confirmed that Enserco violated the shipper-must-have-title requirement by improperly transporting approximately 7.6 Bcf of gas owned by Enserco on capacity held by others and delivered to third parties. In addition, in one transaction, 166,334 Dth was delivered to the end-customer holding the capacity, for a total of 7.8 Bcf of shipper-must-have-title violations. Violations of the shipper-must-have-title requirement interfere with the Commission's oversight of natural gas markets and with the Commission's goal of market transparency. However, staff found no unjust profits related to these transactions.

² Matching ownership of the gas with the capacity used to transport the gas assures that capacity holders will not engage in capacity assignment, but will instead use the capacity release mechanism when another party wishes to transport its gas, and thus increases transparency in the transportation market.

³ Although the specific language of pipeline tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

Stipulation and Consent Agreement

9. Enforcement and Enserco resolved Enforcement's investigation of Enserco's self-reported violations by means of the attached Agreement. The Agreement requires Enserco to pay a \$1,400,000 civil penalty to the United States Treasury within ten days of this order accepting and approving the Agreement. Enserco also will submit semi-annual monitoring reports to Enforcement for a period of one year with the option of a second year at staff's discretion. Each compliance report shall describe any new and existing compliance program measures, including training, and alert staff to any additional violations of the capacity release requirements that may occur.

Determination of the Appropriate Civil Penalty

10. Pursuant to section 22(a) of the Natural Gas Act (NGA), the Commission may assess a civil penalty up to \$1 million per day per violation for as long as the violation continues.⁴ In approving the Agreement and the \$1,400,000 civil penalty, we considered the factors set forth in section 22(c) of the NGA, 15 U.S.C. § 717t-1(c), and the Revised Policy Statement on Enforcement.⁵ We conclude that the penalty determination in the instant matter is a fair and equitable resolution of this matter and is in the public interest, as it reflects the nature and scope of Enserco's violations. The penalty reflects the fact that Enserco self-reported the violations.

11. We conclude that the civil penalty and the compliance monitoring reports specified in the Agreement are fair and equitable, and in the public interest.

⁴ 15 U.S.C. § 717t-1(a) (*added by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B), 119 Stat. 594, 691 (2005) (authorizing the Commission to impose civil penalties "of not more than \$1,000,000 per day per violation for as long as the violation continues")*).

⁵ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 54 -71 (2008).

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(SEAL)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enserco Energy Inc.

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Docket No. IN09-24-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Enserco Energy Inc. (Enserco) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), of whether transactions self-reported by Enserco violated the Commission's open access transportation program, including the competitive bidding requirements for long-term, discounted rate capacity releases and the shipper-must-have-title requirement.

II. STIPULATIONS

Enforcement and Enserco hereby stipulate and agree to the following:

A. Background

1. Enserco is a natural gas marketer formed in 1996. It is a full-service marketing company serving the United States and Canada holding more than 350,000 Dth/day of firm and interruptible interstate pipeline capacity and storage capacity in excess of 8 Bcf. Enserco is engaged in the purchase, sale, and transportation of natural gas, including purchasing natural gas from producers throughout the western United States and Canada and selling natural gas to a variety of market participants, including Enserco's affiliate utilities, small non-affiliated municipalities and distribution companies, non-affiliated commercial and industrial customers, and other non-affiliated marketers.

2. Following the issuance of *Calpine*,¹ Enserco undertook a comprehensive review of its natural gas marketing activities, including an audit of all capacity release transactions

¹ *In re Calpine Energy Services, L.P.*, 119 FERC ¶ 61,125 (2007) (*Calpine*).

beginning in 2005, to determine whether Enserco had violated any of the Commission's capacity release rules or policies. As a result of that review, Enserco self-reported to Enforcement staff in December 2007 a number of transactions as possible violations. Enforcement staff opened an investigation pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), and investigated transactions that occurred during the period from January 2005 through May 2008.

B. Summary of Violations

3. Enforcement staff confirmed that certain transactions self-reported by Enserco were violations of Commission open access transportation requirements.² Enserco and its then-affiliate Black Hills Energy Resources (BHER) participated as replacement shippers in flipping transactions through which Enserco and BHER acquired 20.6 Bcf of capacity on four pipelines, which Enserco used to transport 13.9 Bcf of natural gas.³ The investigation also confirmed that, in various transactions on five pipelines, Enserco violated the shipper-must-have-title requirement by transporting 7.8 Bcf of natural gas owned by Enserco on customer-owned capacity, primarily for sale to third parties.

4. The violations confirmed by Enforcement staff resulted principally from Enserco's lack of a formalized compliance program integrating the impact of Commission requirements for open access transportation on Enserco's marketing activities and the resultant absence of adequate training on the Commission's open access transportation requirements.

1. Flipping Violations

5. The Commission's regulations at 18 C.F.R. § 284.8 (2008) require that a shipper releasing firm capacity for a term longer than 31 days and at a price less than the

² In addition to transactions that were evident violations, Enserco self-reported additional transactions that staff determined did not violate applicable requirements.

³ "Flipping" is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2008). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the posting and bidding requirements, that creates a long-term, non-competitive discounted rate release. *See, e.g., In re Puget Sound Energy, Inc.*, 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Co.*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007).

maximum tariff rate must post the capacity for competitive bidding on the pipeline's Electronic Bulletin Board. The regulations also provide that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2), a discounted, short-term release may not be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

6. Enforcement staff confirmed that Enserco and BHER alternated as replacement shippers in flipping transactions on four different pipelines that improperly avoided the requirement that discounted rate capacity be obtained through competitive bidding. Through the violations Enserco and BHER obtained 20.6 Bcf of discounted rate pipeline capacity which Enserco used to transport 13.9 Bcf of natural gas, of which 12.1 Bcf was moved during summer months when capacity was less constrained.

7. The Commission has stated that flipping violations circumvent the requirement that long-term discounted rate capacity be obtained through competitive bidding. The Commission has also stated that flipping transactions also cause harm to natural gas transportation markets because they impede transparency and deny other market participants an opportunity to bid for discounted, long-term releases of capacity that may not have been available from the pipeline or other releasing shippers. Enforcement staff determined that Enserco received no unjust profits from the flipping transactions.

2. Shipper-must-have-title Violations

8. A central requirement of the Commission's open access transportation program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of each interstate pipeline's tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

9. In the relevant period, Enserco acted as agent for many of its customers, often independent natural gas producers in the western United States and Canada that held rights to firm pipeline transportation capacity. Enserco purchased gas from producers to be marketed downstream and sold gas to its customers for transportation to those customers. In ten transactions on five different pipelines, when the capacity was not needed to serve the customer, Enserco used the customer's capacity to deliver gas owned by Enserco to third parties. To comply with the shipper-must-have-title requirement, Enserco should have transported its gas on its own capacity. Enforcement staff confirmed that Enserco improperly transported 7.8 Bcf of natural gas in shipper-must-have-title transactions.

10. Enserco's violations of the shipper-must-have-title requirement avoided compliance with the Commission's capacity release requirements, reducing market transparency in the natural gas transportation market and adversely impacting the Commission's oversight of that market. Enforcement staff determined that Enserco had no unjust profits in relation to the shipper-must-have-title violations.

C. Self-Corrective Action

11. At the time the violations occurred, Enserco did not have in place a formal compliance program or other mechanism that provided adequate attention to the Commission's open access transportation program. As a result, Enserco's operational personnel lacked sufficient familiarity with the Commission's requirements for the release or use of interstate pipeline capacity. After the issuance of *Calpine*, Enserco engaged outside counsel to review capacity release transactions and to provide training to Enserco's employees on the Commission's open access transportation requirements. Enserco also amended or terminated all contracts not in compliance with the Commission's rules and regulations.

12. Since submitting the self-report, Enserco has significantly enhanced its compliance policies and practices by formulating and implementing a comprehensive regulatory compliance program.

III. REMEDIES AND SANCTIONS

13. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation, Enserco accepts the facts as stipulated above and agrees to take the following actions:

A. Civil Penalty

14. Enserco shall pay a civil penalty of \$1,400,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below.

B. Compliance Monitoring

15. Enserco shall make semi-annual reports to Enforcement staff for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than ten days after the end of the second calendar quarter after the quarter in which the Effective Date of this Agreement falls. The second report shall be submitted six months thereafter. With respect to all of Enserco's wholesale natural gas business, each compliance report shall: (1) advise staff whether additional violations of the open access transportation requirements have occurred; (2) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period, including a description of the training provided to all relevant

personnel concerning the Commission's open access transportation policies and a statement of the personnel that have received such training and when the training took place; and (3) include an affidavit executed by an officer of Enserco that the compliance reports are true and accurate. Upon request by staff, Enserco shall provide to staff all documentation supporting its reports. After the receipt of the second semi-annual report, Enforcement staff may, at its sole discretion, require Enserco to submit semi-annual reports for one additional year.

IV. TERMS

16. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without modification. When effective, this Agreement shall resolve the matters specifically addressed herein as to Enserco and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to Enserco.

17. Commission approval of this Agreement without modification shall release Enserco and forever bar the Commission from holding Enserco, any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to Enserco liable for any and all administrative or civil claims arising out of, related to, or connected with the matters addressed in this Agreement.

18. Failure to make a timely civil penalty payment or to comply with the compliance monitoring agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Natural Gas Act (NGA), and may subject Enserco to additional action under the enforcement and penalty provisions of the NGA.

19. If Enserco does not make the civil penalty payment above at the time agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 154.501(d) (2008) from the date that payment is due, in addition to the penalty specified above.

20. The Agreement binds Enserco and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on Enserco, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in Section III of this Agreement.

21. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or Enserco has been made to induce the signatories or any other party to enter into the Agreement.

22. Unless the Commission issues an order approving the Agreement in its entirety and without modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor Enserco shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and Enserco.

23. In connection with the payment of the civil penalty provided for herein, Enserco agrees that the Commission's order approving the Agreement without modification shall be a final and unappealable order assessing a civil penalty under section 22(a) of the NGA, 15 U.S.C. § 717t-1(a). Enserco waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without modification, and judicial review by any court of any Commission order approving the Agreement without modification.

24. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

25. The undersigned representatives of Enserco affirm that they have read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of their knowledge, information and belief, and that they understand that the Agreement is entered into by Enforcement in express reliance on those representations.

26. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

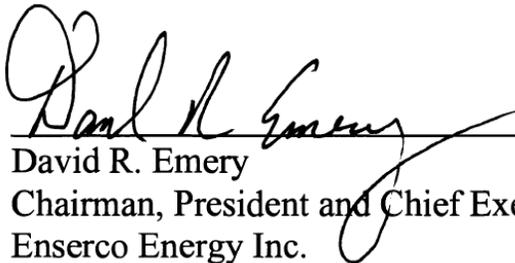
Agreed to and accepted:



Norman C. Bay
Director, Office of Enforcement
Federal Energy Regulatory Commission

8/7/09

Date



David R. Emery
Chairman, President and Chief Executive Officer
Enserco Energy Inc.

7/28/09

Date

