

130 FERC ¶ 61,247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Natural Gas Pipeline Company
of America LLC

Docket No. CP09-447-000

ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT

(Issued March 26, 2010)

1. On July 22, 2009, Natural Gas Pipeline Company of America LLC (Natural) filed an application under sections 7(b) and 7(c) of the Natural Gas Act (NGA) requesting authority to abandon certain existing pipeline facilities and to construct and operate replacement pipeline facilities in Panola County, Texas (Luminant Tatum Mine Project). As discussed below, the Commission will grant the authorizations, with appropriate conditions.

I. Background and Proposal

2. Natural's interstate pipeline system consists of the Gulf Coast Mainline and the Amarillo Mainline, as well as the A/G Line that connects the two mainlines. The Gulf Coast Mainline, also known as the Gulf Coast Mainline No. 1, extends from offshore and onshore areas of south Louisiana and the Gulf Coast of Texas to termination points near Chicago, Illinois. In 1961, the Commission authorized Natural to construct and operate, among other things, approximately 257 miles of 30-inch diameter line that looped the Gulf Coast Mainline No. 1.¹ The loop line was known as the Gulf Coast Mainline No. 2. In 1966, the Commission authorized Natural to construct and operate, among other things, approximately 300 miles of 36-inch diameter pipeline loop along the route of its Gulf Coast Mainline Nos. 1 and 2.² The loop line was known as the Gulf Coast Mainline No. 3.

¹ 26 FPC 728 (1961).

² 36 FPC 1168 (1966), as amended, 37 FPC 898 (1967).

3. In 1978, Luminant Mining Company LLC (Luminant) opened a strip mine, known as the Tatum Mine, to mine lignite coal in Rusk and Panola Counties, Texas.³ The Tatum mine and another nearby mine supply lignite coal to Luminant Generation Company LLC's (Luminant Generation) 2,250 megawatt Martin Lake Steam Electric Station (Martin Lake Station) in Rusk County.⁴ Luminant mines lignite coal by removing the surface ground using heavy machinery such as draglines. When the lignite has been removed, the ground is restored and reclaimed in accordance with the TRC's regulations.

4. Luminant wants to expand its access to coal reserves at its Tatum Mine for use as fuel at Luminant Generation's Martin Lake Station. The application states that three approximately 4.3-mile long segments of Natural's existing Gulf Coast Mainline Nos. 1, 2, and 3 are within an easement on Luminant's Tatum Mine property. Luminant's contemplated expansion of mining operations includes the area containing the three existing segments of Natural's mainlines.

5. In its application, Natural proposes to relocate its pipeline facilities approximately 6,000 feet east of the existing location to accommodate Luminant's expanded Tatum Mine lignite coal mining operations. Under agreements between Luminant and Natural,⁵ Luminant, effectively acting as a general contractor, will provide all engineering and construction materials and will construct the replacement pipeline facilities on behalf of Natural using Natural's design and service specifications, as well as a contractor approved by Natural. The replacement facilities that Luminant will construct will consist of three segments of new replacement pipeline – two 30-inch diameter pipeline segments approximately 5.55 miles long and the one 36-inch diameter pipeline segment approximately 5.55 miles long. Natural will tie-in the new segments of pipeline to its existing Gulf Coast Mainline Nos. 1, 2, and 3. The new segments will be constructed adjacent to one another in a 150-foot wide right-of-way partially paralleling DCP Midstream, LLC's pipeline facilities located in a reclaimed mining area.⁶ In addition, Luminant will initially own the replacement facilities.

³ Luminant's surface mining and reclamation activities are under the regulatory authority of the Texas Railroad Commission (TRC).

⁴ Luminant Generation is an affiliate of Luminant.

⁵ Master Agreement dated July 16, 2009 with Exchange and Easement Agreements (Exhibit U of Natural's application).

⁶ There are four landowners (besides Luminant) affected by the project.

6. Natural proposes to abandon, by transfer to Luminant, two approximately 4.3-mile-long segments of 30-inch diameter pipeline and one approximately 4.3-mile long segment of 36-inch diameter pipeline on Natural's existing Gulf Coast Mainline Nos. 1, 2, and 3, which are impeding development of Luminant's coal reserves. In exchange, Natural will receive the newly constructed pipeline facilities.⁷ Specifically, as each new segment of pipeline is completed and tied-in to Natural's system, Natural will transfer to Luminant a corresponding segment of existing pipeline and associated right-of-way and, by exchange, will receive and place in service the newly constructed replacement pipeline segment.⁸ After the exchange, Luminant will remove the abandoned pipeline segments in order to mine the area.

7. Luminant has agreed to pay all project costs, which are estimated at approximately \$29.7 million.

8. As a result of the relocation of Natural's pipeline facilities, Luminant will be able to expand its access to coal reserves at its Tatum Mine, while Natural's customers will receive continued transportation service using equivalent capacity at no additional cost.

II. Notice and Interventions

9. Notice of the application was published in the *Federal Register* on August 17, 2009.⁹ Luminant filed a timely, unopposed motion to intervene. North Shore Gas Company and Peoples Gas Light and Coke Company, jointly, filed a timely, unopposed motion to intervene. Timely, unopposed motions to intervene are

⁷ Natural is not seeking authorization to acquire the new construction from Luminant because Luminant will not place the facilities in service prior to Natural's acquisition. (Application at 10 n. 19.)

⁸ Natural and Luminant describe the proposed facility transfers as a "like-kind exchange" that the parties will consummate under section 1031 of the Internal Revenue Code of 1986. *See* 26 U.S.C. § 1031(d). The application, and supplemental information filed on August 11, 2009, explain that structuring the project as a "like-kind-exchange" will save Luminant approximately \$8.2 million in tax gross-up costs that it would have had to pay if the costs were paid to Natural in the form of a contribution in aid of construction, which would be treated as taxable income resulting in an additional expense to be reimbursed by Luminant.

⁹ 74 Fed. Reg. 41,422 (2009).

automatically granted under Rule 214 of the Commission's Rules of Practice and Procedure.¹⁰ No protests were filed.

III. Discussion

10. Because Natural proposes facilities for the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission, the abandonment, construction, and operation of the facilities are subject to the requirements of subsections (b), (c), and (e) of section 7 of the NGA.

A. Application of the Policy Statement

11. The Certificate Policy Statement provides guidance as to how the Commission will evaluate proposals for certificating new construction.¹¹ The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

12. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to support the project financially without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified, after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the

¹⁰ 18 C.F.R. § 385.214 (2009).

¹¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

13. As stated, the threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. Luminant will pay all costs of the proposed pipeline replacement project. Thus, Natural's existing shippers will not subsidize the Luminant Tatum Mine Project.

14. There will be no adverse operational impact on Natural's existing customers, since the proposed project merely replaces existing pipeline facilities with equivalent new pipeline facilities. Further, there will be no adverse effect on any other existing pipeline company and their customers, as no new capacity will be created by the project. Finally, the project will require permanent easements for approximately 101 acres, almost entirely located on Luminant's reclaimed mining property. Luminant will obtain a new easement from another landowner and certain state permits, which will be transferred to Natural as a part of the exchange of facilities. Natural does not anticipate the need to use eminent domain and no landowner has protested the proposals.¹² Thus, we find that the Luminant Tatum Mine Project will have minimal effects on landowners and communities.

15. The relocation of Natural's pipeline facilities will allow Luminant to mine coal for use in power generation, with no impact to Natural's system operations. Based on the benefits the Luminant Tatum Mine Project will provide and the lack of adverse impacts on Natural's existing customers, other pipelines and their customers, and minimal impacts on landowners and communities, we find, consistent with the Certificate Policy Statement and section 7(c) of the NGA, that Natural's proposed pipeline relocation project is required by the public convenience and necessity.

B. Abandonment

16. Natural requests authorization to abandon certain existing pipeline facilities. Granting the abandonment will allow Luminant to access Natural's existing right-of-way to expand its mining activities. The newly constructed replacement facilities will ensure that Natural's system operations are not impacted. Further, no shippers have objected to the Luminant Tatum Mine Project. Thus, we find that approval of the requested abandonment is in the public interest.

C. Environment

17. On October 1, 2009, we issued a Notice of Intent to Prepare an Environmental Assessment (NOI). The NOI was mailed to interested parties including federal, state, and

¹² See Natural's application at 15.

local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

18. We received comments in response to the NOI from the United States Fish and Wildlife Service (FWS), the Federal Emergency Management Agency (FEMA), the Texas Parks and Wildlife Department (TPWD), and one landowner (Troy Williams). The primary issues raised concerned water resources, threatened and endangered species, vegetation and wildlife, floodplain permit requirements, and mining-related activities at the existing Tatum Mine.

19. To satisfy the requirements of the National Environmental Policy Act of 1969, our staff prepared an environmental assessment (EA) for Natural's proposal that was placed into the public record on February 22, 2010. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, cultural resources, air quality, noise, safety, cumulative impacts and alternatives. All substantive comments received in response to the NOI were addressed in the EA.

20. Mr. Williams' comments are solely related to the impacts of Luminant's mining-related activities on his land, which are outside the scope of our review. Mining-related activities and impacts are not part of the proposed project and are not addressed in the EA.

21. The FWS provided comments to assist the Commission in the assessment and avoidance of potential impacts on the Louisiana black bear in Panola County, Texas, the bald eagle, and wetlands and wildlife habitat in the project area. As described in the EA, there is no "designated" critical habitat for listed species in Panola County. Recent sightings of the Louisiana black bear have been reported in several eastern Texas counties, including Panola. However, no extant breeding populations of Louisiana black bears are known to occur in Texas. In addition, all construction activities would be conducted in accordance with the FWS' National Bald Eagle Management Guidelines. The EA evaluated the possible project-related impact on wetlands and wildlife and concluded that no significant impacts are expected. The Commission concurs.

22. The TPWD also provided general comments related to the potential impacts of the project on water resources; rare, threatened and endangered species; and vegetation that would be impacted by project activities. The EA stated that Natural would construct and operate the proposed project in accordance with its Best Management Practices and Storm Water Pollution Prevention Plan (SWPPP), which incorporates provisions of the Commission's Upland Erosion Control, Revegetation and Maintenance Plan (Plan) and Wetland and Waterbody Construction and Mitigation Procedures. The EA concluded that Natural's adherence to these measures would ensure that the project will not result in a significant impact on vegetation and wetlands in the project area. Further, in response to Natural's request, the TPWD determined that there are no documented occurrences of

federally or state listed threatened or endangered species, including species of concern and rare communities, within the proposed location of the new pipeline segments.

23. FEMA provided comments about the need to contact the county floodplain administrator for possible floodplain permit requirements for the project. As stated in the EA, Natural consulted the Panola County, Texas, floodplain administrator on November 5, 2008, and was informed that no permit is required for the project.

24. On March 9, 2010, Natural filed responses from Indian tribes to its January 4, 2010 consultation letters. Two Indian tribes (the Choctaw Nation of Oklahoma and the Alabama-Coushatta Tribe of Texas) wrote letters to Natural indicating that the project should not impact religious or cultural sites important to the tribes. The other tribes contacted by Natural by certified mail did not respond. We conclude that this documentation satisfies recommended condition number 10 of the EA. Therefore, we have not included this condition herein.

25. Based on the discussion in the EA, we conclude that if constructed and abandoned in accordance with Natural's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

26. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹³

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

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Natural to construct and operate the facilities in the Luminant Tatum Mine Project, as described more fully in the application and in the body of this order.

¹³See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

- (B) The authorization in the above paragraph is conditioned on Natural's:
- (1) complying with the environmental conditions set forth in the appendix to this order and all applicable Commission regulations under the NGA, including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
 - (2) constructing and making available for service the facilities described herein, within one year of the date of this order.

(C) Natural's request to abandon facilities, as more fully described in the body of this order and in the application, is granted.

(D) Natural shall notify the Commission within 10 days of the effective date of the abandonment approved in Ordering Paragraph (C).

(E) Natural shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Natural. Natural shall file written confirmation of such notification with the Secretary of the Commission (Secretary) within 24 hours.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Environmental Conditions

This authorization is subject to the following conditions:

1. Natural shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA unless modified by the Order. Natural must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) before using that modification.

2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction.

3. **Prior to any construction**, Natural shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. As soon as they are available, and before the start of construction, Natural shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.
5. Natural shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP before construction in or near that area.

This requirement does not apply to extra workspace allowed by Natural's SWPPP, and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction begins**, Natural shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Natural must file revisions to the plan as schedules change. The plan shall identify:
 - a. how Natural will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;

- b. how Natural will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions Natural will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of Natural's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Natural will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Natural shall employ at least one EI. The EI shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Natural shall file updated status reports with the Secretary on a biweekly basis until all construction and restoration activities are complete. On request, these status reports will also be

provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

- a. an update on Natural's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Natural from other federal, state, or local permitting agencies concerning instances of noncompliance, and Natural's response.
9. Natural must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
10. **Within 30 days of placing the authorized facilities in service**, Natural shall file an affirmative statement with the Secretary, certified by a senior company official:
- a. that the facilities have been abandoned and constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the certificate conditions Natural has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
11. Natural shall modify its SWPPP to be consistent with the Commission's Plan regarding the frequency of vegetation maintenance.

12. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Natural shall file with the Secretary documentation that it has received all authorizations required under federal law (or evidence of waiver thereof).