

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

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

Arizona Public Service Company and
Sequent Energy Management, L.P.

Docket No. PR10-45-002

ORDER DENYING RENEWED MOTION FOR LATE INTERVENTION AND
DISMISSING REQUEST FOR REHEARING

(Issued December 22, 2010)

1. On June 25, 2010, Arizona Public Service Company (APS) and Sequent Energy Management, L.P. (Sequent) (collectively, Petitioners) submitted a joint petition seeking clarification that a certain transaction would not be a prohibited buy/sell transaction under Commission policy because the transaction involved a Hinshaw facility, as opposed to an interstate pipeline. Alternatively, Petitioners requested a limited waiver should the Commission determine that the transaction was a prohibited buy/sell transaction. On July 23, 2010, the Commission denied Petitioners' request for clarification finding that the prohibition against buy/sell transactions applies to interstate open-access transportation services provided by Hinshaw pipelines and intrastate pipelines (also referred to as, section 311 pipelines).¹ However, the Commission found that good cause existed to grant Petitioners' request for a limited waiver of the Commission's buy/sell prohibition in order to allow the transaction to proceed.

2. Following the July Order, several entities filed motions to intervene out-of-time, including the Texas Pipeline Association (TPA). Several entities seeking late intervention also filed requests for rehearing of the July Order, including TPA. On October 21, 2010, the Commission denied the motions for late intervention and dismissed the requests for rehearing.² However, contemporaneously with that order, the

¹ *Arizona Public Service Co.*, 132 FERC ¶ 61,064 (2010) (July Order).

² *Arizona Public Service Co.*, 133 FERC ¶ 61,049 (2010) (October Rehearing Order).

Commission issued a Notice of Inquiry to consider the significant policy issues raised in the rehearing requests regarding capacity transfers on section 311 and Hinshaw pipelines.³

3. On November 22, 2010, TPA submitted a renewed motion for late intervention and request for clarification or rehearing of the October Rehearing Order. For the reasons discussed below, the Commission denies TPA's renewed motion and request for clarification or rehearing.

I. Background

4. A detailed description of the background of this case, including the Commission's regulations governing section 311 and Hinshaw pipelines, as well as a description of buy/sell transactions and the Commission's policy related thereto are set forth in the July Order and October Rehearing Order. Briefly, on June 25, 2010, Petitioners sought clarification that a certain proposed transaction involving a Hinshaw storage facility was not a prohibited buy/sell transaction as contemplated by Commission policy.⁴ Alternatively, Petitioners requested a limited waiver should the Commission determine that the transaction was a prohibited buy/sell transaction.

5. Petitioners believed that the contemplated transaction was not a prohibited buy/sell transaction because in Order No. 636 the Commission prohibited buy/sell arrangements to prevent the circumvention of the Commission's capacity release regulations and the proposed transaction involved a Hinshaw storage facility not subject to the capacity release restrictions of Order No. 636.

6. Public notice of Petitioners' filing was issued in Docket No. PR10-45-000 on June 30, 2010. Interventions and protests were due July 7, 2010. One party intervened and no protests or adverse comments were filed.

³ *Capacity Transfers on Intrastate Natural Gas Pipelines*, 133 FERC ¶ 61,065 (2010) (NOI).

⁴ Petitioners proposed to enter into an agreement whereby APS would have the right to deliver gas to Sequent and Sequent would take title to the gas and inject it into storage at Chevron Keystone Gas Storage, LLC (Keystone Storage), a Hinshaw pipeline with a limited blanket certificate to provide certain storage and hub services in interstate commerce. APS would have the right to require Sequent to redeliver gas to APS and title would pass back to APS at the Keystone Storage delivery point. APS would pay Sequent a fixed monthly fee and volumetric charges that correlate to Sequent's costs to inject and withdraw gas at Keystone Storage.

7. In the July Order, the Commission stated that the Petitioners had raised an issue which the Commission had not previously addressed – whether the prohibition on buy/sell transactions applies to interstate open-access transportation services provided by section 311 and Hinshaw pipelines.⁵ The Commission acknowledged that it does not require section 311 and Hinshaw pipelines to include capacity release provisions in their tariffs, nor have any such pipelines done so. However, it did not follow from this fact that the prohibition on buy/sell transactions was unnecessary. Rather, the Commission stated that the absence of a capacity release program for section 311 and Hinshaw pipelines means that their tariffs contain no provisions to ensure that capacity reassignments by shippers are transparent and non-discriminatory. In these circumstances, a blanket authorization of buy/sell transactions would allow holders of capacity on such pipelines to privately contract to allow another party to make use of their capacity without informing the pipeline or publicly disclosing the transaction. This, the Commission stated, would create the same potential for discrimination and inability of the Commission to monitor capacity reassignment which led to the adoption of the capacity release program as the sole method for capacity reassignment on interstate pipelines.⁶

8. Recognizing, however, that capacity reassignments could promote more efficient use of firm pipeline capacity, and given the absence of any generic capacity reassignment programs on section 311 and Hinshaw pipelines, the Commission agreed to consider, on a case-by-case basis, requests for waiver of the buy/sell prohibition, where it can be shown that a particular buy/sell transaction provides significant benefits to the market.⁷ Along those same lines, the Commission found that, in this case, good cause existed to grant Petitioners a limited waiver of the Commission's buy/sell prohibition for the initial 12-month period of the agreement in order to allow the proposed agreement to proceed.⁸

9. Subsequent to the July Order, several entities filed motions to intervene out-of-time, including TPA. Several of the entities filing for late intervention also filed requests for rehearing of the July Order, including TPA. Four of the five rehearing requests asked that the Commission reverse its ruling expanding the buy/sell prohibition to section 311 and Hinshaw pipelines and of those four requests, two requests stated that issues regarding the secondary market on section 311 and Hinshaw pipelines should instead be

⁵ July Order, 132 FERC ¶ 61,064 at P 12.

⁶ *Id.* P 17.

⁷ *Id.* P 19.

⁸ *Id.* P 21.

addressed in a notice of inquiry. One of the five rehearing requests asked the Commission to consider a notice and comment proceeding requiring section 311 and Hinshaw pipelines to offer capacity release.

10. In the October Rehearing Order, the Commission denied the motions for late intervention and, accordingly, dismissed the requests for rehearing of the July Order.⁹ However, contemporaneously with that order, the Commission issued the *NOI* to consider the significant policy issues raised in the pleadings regarding the secondary market on section 311 and Hinshaw pipelines.¹⁰ The Commission found that the entities requesting late intervention had not met the higher burden of justifying late intervention. The Commission had already issued an order granting the Petitioners their requested relief, waiving the buy/sell prohibition so that they may implement their proposed transaction and neither Petitioner had requested rehearing of the Commission's order. Thus, the Commission had finally resolved the specific issue raised by the Petitioners of whether they may engage in their proposed buy/sell transaction. Unlike the cases cited by several of the entities as support for granting their requests for late intervention, there were no outstanding or unresolved issues in this case.¹¹

11. The Commission also found that the entities requesting late intervention and rehearing did not contest the relief granted to the Petitioners, but sought only to raise general policy issues concerning whether the prohibition on buy/sell transactions should apply to service on section 311 and Hinshaw pipelines and whether the Commission should permit other methods of reassigning firm capacity on those pipelines. The Commission determined that such policy issues were more appropriately addressed in a rulemaking proceeding, rather than the instant proceeding, which the Petitioners initiated solely for the purpose of determining whether their particular transaction should be allowed. The Commission recognized that these policy issues were significant, and accordingly contemporaneously with its order, issued the *NOI* in which all affected industry participants would have an opportunity to file comments. Further, as discussed in *NOI*, the Commission also granted a blanket waiver to allow buy/sell transactions involving section 311 and Hinshaw pipelines to continue to take place, while the Commission considered these policy issues. Moreover, the Commission stated that it would not institute any enforcement actions with respect to prior buy/sell transactions

⁹ October Rehearing Order, 133 FERC ¶ 61,049.

¹⁰ *NOI*, 133 FERC ¶ 61,065.

¹¹ October Rehearing Order, 133 FERC ¶ 61,049 at P 23.

involving section 311 and Hinshaw pipelines in recognition of the preexisting uncertainty of whether the buy/sell prohibition applied to those pipelines.¹²

12. Under section 19(b) of the Natural Gas Act and section 385.713(b) of the Commission's regulations, only a party to a proceeding is entitled to request rehearing of a Commission decision.¹³ Because the entities seeking rehearing were not parties to the case, they had no standing to seek rehearing of the July order.

II. Renewed Motion for Late Intervention and Request for Clarification or Rehearing (Renewed Motion and Rehearing Request)

13. In its Renewed Motion and Rehearing Request, TPA argues that the Commission did not provide any explanation for its rejection of TPA's request for intervention and therefore, failed to engage in reasoned decision making. Specifically, TPA argues that the Commission did not address TPA's argument that the notice of this proceeding was so lacking in information that it was not possible for TPA to know whether its members' interests could be affected. TPA maintains that a reasonable inference from the cases it cited in its original motion for late intervention and request for rehearing of the July Order¹⁴ is that if the published notice does not adequately describe the issue or provide a reasonable opportunity for a person to determine what interests might be affected, late intervention is justified.

14. TPA also argues that allowing the July Order to stand pending the outcome of the *NOI* was not reasoned decision making. TPA argues that once the Commission decided to address the general policy issues raised by the rehearing requests in the rulemaking proceeding, rather than the instant proceeding, the appropriate response would have been to grant the Petitioners waiver to the extent necessary and proceed to a rulemaking on the policy issues. Otherwise, TPA argues, allowing the July Order to stand risks denying TPA and others the right to appeal the outcome of the rulemaking. For example, TPA states, should the rulemaking determine to apply the buy/sell prohibition to section 311 pipelines, a court could determine that the policy issue was decided in this case and

¹² *Id.* P 24.

¹³ *Id.* P 25 (citing 18 C.F.R. § 385.713(b) (2010); *Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000)).

¹⁴ TPA Renewed Motion and Rehearing Request at 6, n.9 (citing *Jupiter Energy Corp.*, 106 FERC ¶ 61,170 at P 8 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,219 at P 13 and n.8 (2004); *ANR Pipeline Co.*, 109 FERC ¶ 61,038, at P 5-6 (2004); *Williams Natural Gas Co.*, 54 FERC ¶ 61,190, at 61,571-72 (1991)).

cannot be reviewed on appeal of any future rule. Accordingly, TPA states that the Commission should grant the requests for intervention and rehearing and reverse the July Order to the extent it makes any finding beyond granting the requested waiver.

15. TPA also argues that the October Rehearing Order erred to the extent that it ruled that the shipper-must-have-title rule applies to section 311 and Hinshaw pipelines. In its request for rehearing of the July Order, TPA asked the Commission to clarify that the requirement that a shipper-must-have-title does not apply to section 311 and Hinshaw pipelines. TPA states that in response to its request the October Rehearing Order stated: “Section 311 and Hinshaw pipelines generally include in their statements of operating conditions a requirement that shippers possess title to the gas being stored or transported.” To the contrary, TPA states that most section 311 and Hinshaw pipelines do not require shippers to hold title to the gas transported. TPA states that a typical requirement from a section 311 statement of operating conditions provides the shipper must warrant either that it will have and maintain “good and marketable title” to the gas or the right to deliver the gas for a third party that does have good title. TPA states that to date, no Commission rule or order has applied the shipper-must-have-title rule to section 311 and Hinshaw pipelines and the Commission has routinely accepted statements of operating conditions that do not require that shippers hold title to the gas stored or transported. Therefore, the Commission should clarify that although the application of the shipper-must-have-title rule is under consideration in the *NOI*, the rule has not applied previously to section 311 and Hinshaw pipelines.

III. Commission Determination

16. For the reasons discussed below, the Commission denies TPA’s renewed motion for late intervention and, accordingly, dismisses its request for rehearing of the October Rehearing Order.

17. When late intervention is sought after the issuance of a final order, the prejudice to the other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, a petitioner for late intervention bears a higher burden to show good cause for late intervention after issuance of a final order in a proceeding, and generally, Commission policy is to deny late intervention at the rehearing stage. The Commission continues to find that TPA has not met the higher burden of justifying late intervention. First, as the Commission stated in the October Rehearing Order, the Commission has already issued an order granting the Petitioners their requested relief and neither Petitioner has requested rehearing of the Commission’s July Order or the October Rehearing Order, for that matter. Thus, the Commission finally resolved the specific issue raised by the Petitioners of whether they may engage in their proposed transaction.

18. Second, TPA is not aggrieved by the July Order or the October Rehearing Order. As stated above, the Commission held in the October Rehearing Order that the policy issues raised by the entities seeking late intervention and rehearing of the July Order,

including whether the prohibition on buy/sell transactions should apply to service on section 311 and Hinshaw pipelines, “are more appropriately addressed in the rulemaking proceeding” in Docket No. RM11-1-000.¹⁵ Further, the *NOI* granted a blanket waiver to allow buy/sell transactions involving section 311 and Hinshaw pipelines to continue to take place until the Commission issues a further order in that proceeding and no enforcement actions will be instituted with respect to prior buy/sell transactions involving section 311 and Hinshaw pipelines.¹⁶ Our intent in taking these actions was precisely what TPA now asks us to clarify, that “the policy issues raised in the rehearing requests will be decided in the rulemaking docket and have not been predecided by the orders in this docket.”¹⁷ Thus, our orders in this proceeding do not prejudice the ability of TPA, or any of the other entities seeking late intervention in this case, to raise their policy issues in the rulemaking proceeding, including on appeal from any orders in that proceeding.

19. Regarding the application of the shipper-must-have-title rule to section 311 and Hinshaw pipelines, that issue was beyond the scope of the July Order and subsequently, the October Rehearing Order. Further, among the questions the Commission is requesting comments on in the *NOI* is whether application of the shipper-must-have-title rule is sufficient to minimize concerns about undue discrimination and transparency on section 311 and Hinshaw pipelines. TPA may raise its arguments regarding application of the shipper-must-have-title rule, including the interpretation of existing tariff provisions in operating statements of section 311 and Hinshaw pipelines, in that proceeding.

20. Lastly, because the *NOI* will provide TPA a full opportunity to raise all the policy issues of interest to it, we saw no need in the October Rehearing Order to consider TPA’s contentions concerning the adequacy of the published notice of the June 25, 2010 petition for clarification. In any event, we disagree with TPA’s contention that Commission precedent dictates that late intervention is justified if the published notice does not adequately describe the issue or provide a reasonable opportunity for a person to determine what interests might be affected. To the contrary, as the Commission has previously stated:

“The purpose of the Notice of Filing is to apprise the public of the fact that a filing has been made and the date by which interested parties must file interventions and protests. After

¹⁵ October Rehearing Order, 133 FERC ¶ 61,049 at P 24.

¹⁶ *NOI*, 133 FERC ¶ 61,065 at P 19.

¹⁷ TPA Renewed Motion and Rehearing Request at 2.

that, the burden is upon interested parties to inform themselves of the filing's precise contents."¹⁸

Petitioners' request for clarification was made available for viewing on the Commission's website on June 25, 2010 and notice of the filing was issued on June 30, 2010.

Petitioners' request for clarification clearly indicated in the opening paragraphs that the issue before the Commission involved the Commission's buy/sell prohibition with respect to a Hinshaw facility. TPA has not provided any justification why it was not able to access and apprise itself of the contents of the Petitioners filing.

21. For the foregoing reasons, TPA's Renewed Motion and Rehearing Request are denied.

The Commission orders:

TPA's renewed motion for late intervention and request for clarification or rehearing are denied

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,135 (2002) (citing *Southern Co. Services*, 92 FERC 61,167, at 61,565 (2000)); Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs, FERC Stats. & Regs., Regulations Preamble 1991-1996, ¶ 31,025, at 31,403 (purpose of the notice is merely to get the attention of interested parties who may then review the full filing).