

139 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Turtle Bayou Gas Storage Company, LLC

Docket Nos. CP10-481-002
CP10-481-000

ORDER DENYING REQUEST FOR REHEARING
OR RECONSIDERATION

(Issued April 11, 2012)

1. On June 16, 2011, the Commission issued an order denying a request by Turtle Bayou Gas Storage Company, LLC (Turtle Bayou) for authorization under section 7 of the Natural Gas Act (NGA) to construct and operate a proposed natural gas storage facility in Chambers and Liberty Counties, Texas.¹ On July 19, 2011, Turtle Bayou filed a request for rehearing, which the Secretary of the Commission rejected on July 20, 2011, for having been submitted late.² On July 22, 2011, Turtle Bayou filed a request for rehearing of the July 20 Notice, or in the alternative, requested the late-filed rehearing be considered as a request for reconsideration of the June 16 Order. As discussed below, this order denies the requests for rehearing and reconsideration.

¹ *Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233 (2011) (June 16 Order).

² *Turtle Bayou Gas Storage Co., LLC*, 136 FERC ¶ 61,052 (2011) (July 20 Notice). The Secretary determined that “Turtle Bayou’s request for rehearing must be rejected as untimely, and its motion for an extension of time to file for rehearing must be denied” because Turtle Bayou’s July 19, 2011 submission was made more than 30 days after issuance of the Commission’s June 16 Order. The Secretary explained that NGA section 19(a), 15 U.S.C. § 717r (2006), provides for a party to a proceeding to file a request for rehearing within 30 days after issuance of a final decision or other final order, and this statutory time period for rehearing cannot be waived or extended. *See also* 18 C.F.R. § 385.713(b) and (f) (2011).

I. Background

2. The Commission's June 16 Order denied Turtle Bayou's application for authorization to construct two subsurface natural gas storage caverns in a salt dome formation, and associated surface and appurtenant facilities, in Chambers and Liberty Counties, Texas.³ The June 16 Order found that the proposed project was not required by the public convenience and necessity.⁴ As described in the Commission's policy statement on certification of new facilities,⁵ if a proposed project will cause adverse impacts, the project proponent must demonstrate a sufficient showing of need for the project to balance the adverse impacts.⁶ The owners of the oil, gas, and other minerals⁷ (including salt) in the salt formation where the proposed subsurface caverns would be located protested the application, asserting that Turtle Bayou had not obtained the necessary property and mineral rights for construction and operation of the proposed project. The Commission found that the potential use of eminent domain to acquire the necessary property rights would be a significant adverse impact on Mineral Interest Owners,⁸ and concluded that Turtle Bayou had not demonstrated a specific showing of need for its proposed storage facility in proportion to the identified adverse impact on Mineral Interest Owners.⁹

³ June 16 Order, 135 FERC ¶ 61,233.

⁴ *Id.* P 34.

⁵ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁶ June 16 Order, 135 FERC ¶ 61,233 at P 28.

⁷ The owners are Kathryn Kyle, individually and as executor of the estate of W.W. Kyle III, deceased, and Brudge Kyle Hopkins (collectively, Mineral Interest Owners).

⁸ June 16 Order, 135 FERC ¶ 61,233 at P 30.

⁹ *Id.* P 33. Turtle Bayou's demonstration of need for its specific project consisted of the following non-project-specific sources: (1) the Energy Information Administration's Annual Energy Outlook 2005, which projected that total U.S. demand for natural gas would grow an average of 1.5 percent per year through 2025; (2) the Energy Policy Act of 2005, in which Congress gave the Commission new authority in NGA section 4(f) to grant market-based rates for storage facilities even when an entity is unable to show it lacks market power; and (3) statements in Commission orders from

(continued...)

3. On July 19, 2011, Turtle Bayou filed a request for rehearing of the June 16 Order.¹⁰ On July 20, 2011, the Secretary rejected Turtle Bayou's request.
4. On July 22, 2011, Turtle Bayou sought rehearing of the Secretary's July 20 Notice and asked that its late-filed July 19, 2011 request for rehearing be considered as a request for reconsideration. Turtle Bayou also asked that the Commission delay action in this proceeding to provide Turtle Bayou time to conduct an open season for its proposed storage capacity.
5. On September 26, 2011, Turtle Bayou filed an update on its progress in conducting an open season, and on January 4, 2012, it reported the results. Turtle Bayou stated that it held an open season from October 3 to November 15, 2011, and received four bids that constitute approximately 54 percent of the total project capacity (or approximately one cavern). Turtle Bayou states that other potential shippers expressed interest in the project, but these shippers indicated an unwillingness to submit official bids until after Turtle Bayou had received certificate authorization for the proposed project.¹¹
6. On January 30, 2012, Mineral Interest Owners filed a comment reasserting their opposition and confirming that Turtle Bayou had not obtained property rights in Mineral Interest Owners' subsurface holdings necessary to develop the proposed project.

2006 implementing the new NGA section 4(f) authority, and referencing the EIA's Annual Energy Outlook 2005 and a National Petroleum Council statement from 2003 regarding potential natural gas storage additions.

¹⁰ Turtle Bayou argued that: (1) the Commission erred in applying a policy requiring storage operators to conduct open seasons because policy considerations supporting an open season in other contexts do not apply to storage providers that lack market power; (2) the Commission attributed too much weight to Mineral Interest Owners' adverse impacts; and (3) to the extent the Commission denied Turtle Bayou's application based on Mineral Interest Owners' protest, this action violated the NGA by improperly injecting the Commission into determinations of compensation, thereby denying Turtle Bayou the right to exercise eminent domain pursuant to section 7(h) of the NGA to resolve compensation issues in court.

¹¹ In this filing, Turtle Bayou renewed its request for reconsideration and argued that its open season justified a new analysis of its proposal under the Certificate Policy Statement based on the public benefit demonstrated in the open season and its belief that the potential condemnation of Mineral Interest Owners' holdings should not be considered an adverse impact.

II. Request for Rehearing

7. Turtle Bayou argues that despite the Secretary's statement that the 30-day rehearing deadline cannot be waived or extended, the Commission has previously accommodated rehearing requests that were not technically in compliance with the statutory deadline. Turtle Bayou asserts that its request for rehearing was electronically filed at 6:25 p.m. on July 18, 2011, which was the 30th day after issuance of the June 16 Order. However, because the Commission's Rules of Practice and Procedure state that "[a]ny document received after regular business hours is considered filed on the next regular business day," Turtle Bayou's rehearing request was docketed as filed on July 19, 2011, or the 31st day after issuance of the June 16 Order.¹² Turtle Bayou asserts that because it did in fact submit its request on the 30th day, the Commission's procedural rules should be waived to accept the rehearing as timely,¹³ and cites several cases in support of this result. However, as explained below, these cases address different circumstances, and thus are not relevant to the circumstances here.

8. In arguing for accepting its untimely request for rehearing, Turtle Bayou cites *Dayton Power & Light Co. v. FPC (Dayton)*.¹⁴ In *Dayton*, one copy of a rehearing request had been received by the Commission within the 30-day deadline, but additional copies of the rehearing request, as required by the regulations, were received late. The court held that the Commission had improperly rejected the rehearing request as noncompliant because a copy had been received by an appropriate office at the Commission within the 30-day deadline. *Dayton* is inapplicable because in this case Turtle Bayou makes no claim that a copy of its rehearing request was received by the Secretary or hand delivered to the Commission within the 30-day deadline.¹⁵ Turtle

¹² 18 C.F.R. § 385.2001(a)(2) (2011).

¹³ We have never waived this Rule 2001 requirement. While electronic filing is available 24 hours a day for the convenience of participants in Commission proceedings, this flexibility in electronic filing does not alter the fact that the offices of the Commission are only open Monday through Friday (excluding holidays) between the hours of 8:30 a.m. and 5:00 p.m. 18 C.F.R. § 375.101(c) (2011).

¹⁴ 251 F.2d 875, 877 (D.C. Cir. 1957).

¹⁵ The only acceptable methods of filing under the current regulations are to mail the filing to the Secretary's office, to hand deliver the filing to Room 1A at the Commission, or to electronically file through the Commission's "eFiling" system. 18 C.F.R. § 385.2001(a) (2011).

Bayou submitted its request for rehearing electronically after the Commission had closed for business at 5:00 p.m. on the 30th day following issuance of the final order.

9. Turtle Bayou also cites *New York State Energy Research & Development Authority v. FERC (New York State Energy)*.¹⁶ *New York State Energy* involved a change in the Commission's procedural filing requirements for hydropower license applications. A competing hydropower license application was timely submitted to the Office of Energy Projects, as directed by a previous version of the Commission's regulations, rather than being submitted to the Secretary, as directed under the new filing requirement. Because a license application had been timely received by the Office of Energy Projects, and the rule had only recently been changed, the court found that it may have been unclear where filings were to be delivered and held that the competing license application had been timely filed. *New York State Energy* provides no support to Turtle Bayou because it involved a license application, not a request for rehearing, the Commission has not recently altered its procedural filing requirements (i.e., it is clear how and when filings are to be submitted), and the 30-day rehearing deadline set forth in section 19(a) of the NGA has not been altered since the statute's enactment in 1938.¹⁷

10. Finally, Turtle Bayou cites *Village of Saranac Lake, New York (Saranac Lake)*.¹⁸ In *Saranac Lake*, a rehearing request was rejected by the Secretary on the grounds that it was filed late. The Commission subsequently accepted the request for rehearing after determining that it had been received by the Commission's mail room on the 30th day during business hours, but inadvertently had not been time-stamped until three days later. *Saranac Lake* provides no support to Turtle Bayou. Turtle Bayou does not claim the Commission has delayed acknowledgment of receipt of a timely filed rehearing request. Turtle Bayou and the Commission are in accord that the rehearing was filed at 6:25 p.m. on July 18, 2011. For the reasons discussed above, we affirm the Secretary's determination that Turtle Bayou's 30-day deadline for submitting a rehearing request expired at 5:00 p.m. on July 18, 2011.

11. Rather than support Turtle Bayou's assertion that the Commission might find a means to overlook what Turtle Bayou characterizes as its "technical noncompliance" with the filing requirements, the cases cited demonstrate that the Commission can only

¹⁶ 746 F.2d 64, 67 (D.C. Cir. 1984).

¹⁷ The deadline for submitting competing license applications is not established by statute. Rather, it is established in the notice issued pursuant to the Commission's regulations governing competing hydropower applications. 18 C.F.R. § 4.36(b) (2011).

¹⁸ 67 FERC ¶ 61,077 (1994).

accept rehearing requests that technically comply in full with its filing requirements.¹⁹ Therefore, Turtle Bayou's request for rehearing of the Secretary's July 20 Notice rejecting Turtle Bayou's late filed rehearing request is denied.

III. Request for Reconsideration

12. Turtle Bayou alternatively requests that the Commission consider its late-filed request for rehearing as a request for reconsideration. Turtle Bayou is correct that on occasion the Commission has treated late requests for rehearing as requests for reconsideration, particularly where new information has come to the Commission's attention that it believes should be addressed. Such is not the case here, therefore we deny the request for reconsideration.

13. However, we will take this opportunity to clarify several misconceptions apparent in Turtle Bayou's submissions concerning its open season. First, Turtle Bayou asserts that reconsideration is appropriate because issues regarding application of the Certificate Policy Statement to market-based storage operators were announced in *Pine Prairie Energy Center, LLC*.²⁰ This argument implies that Turtle Bayou's request for authorization was denied due to a procedural deficiency, i.e., failure to hold a timely open season.²¹ That is not the case. Turtle Bayou's request for authorization was denied because Turtle Bayou failed to present evidence of sufficient public benefits to outweigh the identified adverse impacts on Mineral Interest Owners.²² While the June 16 Order did note that Turtle Bayou had not conducted an open season,²³ it was in the context of

¹⁹ The Commission routinely rejects submissions that fail to meet the filing requirements. *See, e.g., El Paso Natural Gas Co.*, 115 FERC ¶ 61,370 (2006). The Secretary rejected a request for rehearing filed at 9:31 p.m. on the last day of the 30-day deadline, explaining that under Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure "any document received after regular business hours is considered filed on the next regular business day." *Id.* The fact that Turtle Bayou filed at 6:25 p.m. as opposed to 9:31 p.m. is immaterial.

²⁰ 135 FERC ¶ 61,168 (2011).

²¹ We note that the Commission did not deny the requested authorization in *Pine Prairie*. Rather, authorization was granted, conditioned on a new open season – with solicitation of turn back capacity – being held.

²² June 16 Order, 135 FERC ¶ 61,233 at P 30-34.

²³ *Id.* P 32.

describing the lack of any evidence submitted by Turtle Bayou demonstrating a market demand for its particular project.

14. Second, Turtle Bayou argues the results of its open season should be considered new information that the Commission should take into account by reassessing its earlier decision. The results of an open season could be cause for reconsideration of the June 16 Order, but the information submitted by Turtle Bayou does not compel such a reconsideration because, again, it does not demonstrate a specific, concrete need for this proposed project. Turtle Bayou submitted only a statement of the *bids* it received for half the capacity of the proposed project. Turtle Bayou did not, for example, submit evidence of potential customer *commitments* for its specific project, such as precedent agreements for the available capacity.

15. Finally, Turtle Bayou asserts that condemnation of Mineral Interest Owners' subsurface property rights is not an appropriate indicator of an adverse impact under the Certificate Policy Statement. As explained in the June 16 Order, we recognized in the Certificate Policy Statement that holdout landowners could not veto a project that the Commission finds is required by the public convenience and necessity.²⁴ However, we affirm our statement in the June 16 Order that, in a case where the project sponsor will need to obtain virtually all of the property rights needed for the project from unwilling property owners, the applicant needs to make a showing of public benefits proportional to the potential exercise of eminent domain. Turtle Bayou has not done so here. Therefore, its request for reconsideration is denied.

The Commission orders:

(A) Turtle Bayou's request for rehearing of the Secretary's July 20, 2011 Notice is denied, for the reasons discussed herein.

(B) Turtle Bayou's request for reconsideration of the June 16, 2011 Order is denied, for the reasons discussed herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ June 16 Order, 135 FERC ¶ 61,233 at P 33.