UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Marathon Oil Company

v. Docket No. RP05-234-001

Trailblazer Pipeline Company

ORDER DENYING REHEARING

(Issued January 19, 2006)

1. On May 20, 2005, the Commission issued an order in this proceeding denying Marathon Oil Company's (Marathon) complaint that alleged, among other things, that the rates charged under two of Marathon's Expansion 2002 negotiated rate transportation contracts were the product of Trailblazer Pipeline Company's (Trailblazer) exercise of market power in violation of the Commission's Alternative Rate Policy Statement.[1] Marathon filed a timely request for rehearing of the order. As discussed below, Marathon's request is denied.

<u>Background</u>

2. In August 2000, Trailblazer held an open season to solicit bids for a proposed expansion project. For its open season, Trailblazer solicited bids for service at negotiated rates at or above 17 cents/Dth; it did not offer a recourse rate. As a result of the open season, Trailblazer awarded capacity to six shippers at rates between 17.82 to 24.01

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[1] *Marathon Oil Co. v. Trailblazer Pipeline Co.*, 111 FERC ¶ 61,236 (2005)(*Marathon v. Trailblazer)*

cents/Dth. Trailblazer filed for its Expansion 2002 project in January 2001. The application included a recourse rate of 12.19 cents/Dth.

3. On May 18, 2001, the Commission issued Trailblazer a certificate to construct and operate the proposed Expansion 2002 facilities.[2] In the order, the Commission found that the firm shippers supporting Trailblazer's Expansion 2002 elected to pay negotiated rates. The order also approved Trailblazer's proposed 12.19 cents/Dth recourse rate. No party challenged the Commission's findings concerning Trailblazer's recourse rate or filed a request for rehearing of the May 18, 2001 Order. Trailblazer commenced service on the facilities on May 7, 2002.

4. Before Trailblazer completed construction on the Expansion 2002 facilities, Marathon succeeded to Pennaco Energy Inc.'s precedent agreement for 22,500 Dth/d of firm capacity at 17.83 cents/Dth for 10 years. Marathon executed the final service agreement for this capacity. In May 2002, Marathon acquired, by permanent capacity release, CMS Energy Marketing, Services and Trading Company's (CMS) 10-year contract for 100,000 Dth/d of capacity at 24 cents/Dth.

5. On March 22, 2005, Marathon filed its complaint in this proceeding against Trailblazer, alleging that the rates charged under Marathon's negotiated rate transportation contracts are the product of Trailblazer's exercise of market power in violation of the Commission's Alternative Rate Policy Statement,[3] the Natural Gas Act (NGA), the Commission's regulations, and Trailblazer's tariff. Marathon also alleged that the rates charged under these service contracts are unduly discriminatory in violation of NGA section 4. It requested the Commission direct Trailblazer to disgorge and return all revenues collected under the contracts in excess of the applicable maximum recourse rates, plus interest, and require that Marathon charge rates no higher than the Commission-approved recourse rates for the remaining term of the agreements.

6. In the May 20 Order, the Commission determined that at the time Trailblazer conducted its open season in August 2000, the Commission did not – as it now does –

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[2] *Trailblazer Pipeline Co.*, 95 FERC ¶ 61,258 (2001)(*Trailblazer)*.

[3] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines* (*Alternative Rate Policy Statement)*, 74 FERC ¶ 61,076, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996), *petition for review denied*, *Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, 1998 U.S. App. Lexis 20697 (D.C. Cir. 1998).

require natural gas companies to offer a recourse rate during an open season for new service. The Commission did not require a gas company to include a recourse rate in an open season soliciting new service until October 31, 2002, when it articulated this requirement in *Natural Gas Pipeline Co. of America (Natural).*[4] Therefore, the Commission concluded that Trailblazer's failure to provide a recourse rate during its open season in August 2000 did not violate any then effective Commission policy or NGA regulatory requirement.

7. Moreover, the Commission determined that the negotiated rate contracts were entered into by knowledgeable business entities as the result of lawful conduct. The Commission found that the open season was widely publicized, and that the parties that bid on and were awarded the capacity were knowledgeable companies amply aware of the Commission's policies and procedures. Further, Trailblazer included a proposed recourse rate in its certificate application, which was approved by the Commission in the certificate proceeding. If a shipper that entered into the negotiated rate precedent agreements believed that Trailblazer was exercising market power, it could have protested the certificate application and requested another open season, as the *Natural* proceeding demonstrated. After the Commission issued the certificate authorization order, which specifically approved an applicable recourse rate for Trailblazer's Expansion 2002 project, a shipper could have sought rehearing to request service at the recourse rate.

8. In the May 20 Order denying Marathon's complaint, the Commission emphasized that it did not believe that it should second-guess the business and economic decisions of knowledgeable business entities when they enter into negotiated rates. It stated that pipelines rely on their contracts and the integrity of the Commission's process and that the Commission is reluctant to upset those expectations. The Commission found that the contract rates reflect the bids agreed to by each of the shippers regardless of what the Commission determined would be the recourse rate. The Commission concluded, based on all the evidence presented, that there was insufficient justification to warrant any further investigation into Marathon's allegations.

Rehearing Request

9. Generally, Marathon states that Commission erred in finding that the complaint failed to establish a prima facia case that Trailblazer violated its tariff or the Commission's regulations. Marathon argues that evidence shows that the difference between the higher negotiated rates under the Expansion 2002 contracts and the lower

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[4] 101 FERC ¶ 61,125 (2002).

Commission-approved cost-based recourse rate establishes a prima facia case of unlawful conduct.

10. Marathon argues that the Commission erred in ruling that Trailblazer reasonably interpreted the Alternative Rate Policy Statement. Marathon asserts that because Trailblazer did not offer a recourse rate during its 2000 open season, the resulting service agreements do not qualify as negotiated agreements under the Commission's negotiated rate policy and do not qualify as just and reasonable cost-based rates. Marathon concludes that the rates charged under Trailblazer's 2002 service agreements reflect the exercise of undue market power, and therefore violate Commission policy and the NGA.

11. Additionally, Marathon contends that the Commission's summary disposition of Marathon's allegation of undue discrimination was arbitrary and capricious and violates the protection offered shippers in the Alternative Rate Policy Statement. Under the circumstances, Marathon contends that the maximum rate Trailblazer could lawfully charge its expansion shippers was its maximum Part 284 tariff rate, *i.e.*, the approved recourse rate, and that any rate in excess of the maximum rate should be refunded, with interest. It believes that because of Trailblazer's unlawful behavior, the Commission should initiate an enforcement action to require that Trailblazer disgorge its profits.

Discussion

A. Negotiated Rate Policy and NGA Section 7 Open Seasons

12. The Alternative Rate Policy Statement and the Commission's negotiated rate policy were originally devised to address the availability of unused capacity on existing pipelines that resulted from the Commission's implementation of Order Nos. 436[5] and 636.[6] In the May 20 Order, the Commission pointed out that the Alternative Rate Policy

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[5] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. Regulations Preambles 1982-1985 ¶ 30,665 (1985); Order No. 436-A, FERC Stats. & Regs. Regulations Preambles 1982-1985 ¶ 30,675(1985).

[6] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 636, FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993) *remanded in part sub nom., United Distribution Co. v. FERC,* 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C,

(continued)

Statement articulated the Commission's intent to implement the negotiated rate policy on a case-by-case basis. *Natural* was a case of first impression in that the Commission had not previously addressed whether a cost-based recourse rate needed to be offered as an option during an open season for new capacity. Since Trailblazer's 2000 open season pre-dated the 2002 *Natural* decision, the fact that Trailblazer did not offer a recourse rate during its open season did not constitute a violation the Alternative Rate Policy Statement as interpreted and implemented at that time.

13. Marathon contends that *Natural* did not announce any new requirement, but only affirmed that the Alternative Rate Policy Statement's mandate that for any open season, if a pipeline seeks bids for new service at a negotiated rate it must also offer service at a cost-based recourse rate. Marathon points to other pre-*Natural* open seasons in which pipelines offered their shippers the option of negotiated rates or recourse rates for new service, arguing that these other pipelines recognized their obligation under the Alternative Rate Policy Statement to offer a recourse rate alternative to negotiated rates.

14. Initially, the Commission devised and implemented its negotiated rate policy at a time when there was a great deal of concern about capacity "turnback" as a result of Order Nos. 436 and 636 and other factors. Because the industry was shifting from traditional supply sources to other sources, many existing pipeline shippers no longer needed the same amount of firm capacity from their traditional pipeline's supply regions, and as a result sought to turn back transmission capacity when their transportation contracts expired. The negotiated rates policy was thus developed to help pipelines market that turned-back capacity to new shippers, such as electric generators, as well as to help retain local distribution customers whose existing contracts were expiring.[7]

15. At the time the Alternative Rate Policy Statement was issued in 1996, the Commission did not specifically contemplate the impact of the policy on the construction on new capacity. Its focus was on addressing issues concerning the unsubscribed capacity that arose as result of the restructuring under Order No. 636. In the Alternative Rate Policy Statement and the order on rehearing, the Commission declared it would address the application of its new policy on a case-by-case basis.[8]

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78 FERC ¶ 61,186 (1997), *cert. denied*, *Associated Gas Distributors v. FERC*, No. 95-1186 (1996), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

[7] *Notice of Inquiry Concerning Natural Gas Pipeline Negotiated Rate Policies and Practices*, 100 FERC ¶ 61,061 (2002).

[8] *Alternative Rate Policy Statement* 74 FERC at 61,227 and 75 FERC at 61,076.

16. The Commission did not address the application of its negotiated rate policy to open seasons for new capacity until the 2002 *Natural* order, two years after the Trailblazer open season. The fact that certain other pipelines, prior to *Natural*, elected to hold open seasons offering new service under negotiated or recourse rates is not material to our decision here. *Natural* remains the first instance in which the Commission specified that a recourse rate must be included as an option in an open season for new capacity. Thus, in 2000, holding an open season which did not include a recourse rate option was not inconsistent with Commission policy.

17. In the May 20 Order, the Commission referenced a footnote in *Kinder Morgan Interstate Gas Transmission LLC,*[9] in which the applicant explained that it had held a second open season with a recourse rate option following the issuance of *Natural*, because its initial open season, held before *Natural,* had solicited negotiated fixed rate bids without a recourse rate. Marathon contends that the footnote does not constitute support for the proposition that, prior to the Commission's decision in *Natural,* the Alternative Rate Policy Statement did not apply to pipeline expansions, arguing the policy statement already indicated that a recourse rate option should be offered. Again, this reflects the different interpretations of the Alternative Rate Policy Statement. The Commission affirms that the Alternative Rate Policy Statement did not specifically address the issue of recourse rates, and that it was not until the 2002 *Natural* decision that the determination was made that a recourse rate option was mandatory. Consequently Trailblazer's 2001 open season did not violate the Commission policy in effect at that time.

B. <u>Availability of the Recourse Rate</u>

18. Marathon contends that Trailblazer never gave its expansion shippers the option to choose traditional cost-based service rates because a recourse rate was not offered during the open season or prior to initiating service to expansion shippers. It argues that the availability of a recourse rate is the linchpin of the negotiated rate program, since the availability of the recourse rate permits the Commission to conclude that a negotiated rate, selected as an alternative to a recourse rate, is a just and reasonable rate. Marathon emphasizes that under the Alternative Rate Policy Statement, it is the availability of a recourse service that prevents pipelines from exercising market power by assuring that the customer can elect cost-based, traditional service if the pipeline demands excessive negotiated prices or withholds service. The Commission concurs with Marathon with regard to the need to offer a recourse rate option. In fact, the May 18, 2001 Order approving construction of Trailblazer's 2002 expansion facilities stated that:

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[9] 104 FERC ¶ 61,266 (2003).

> The firm shippers supporting Trailblazer's Expansion 2002 have elected to pay negotiated rates. The Commission's Alternative Rate Policy Statement required pipelines that enter into negotiated rate agreements for service to also provide recourse service and rates. The recourse service is intended to give customers the option of returning to cost-based, traditional service if the pipeline ever demands excessive prices or withholds service in the exercise of market power.[10]

In view of this description of the recourse rate option, had a prospective shipper desired service under a recourse rate, the Commission would have expected the shipper to have requested rehearing on the grounds that a recourse rate was not offered in the open season. Neither Marathon (who had at that time had already stepped into the shoes of a prospective expansion shipper) nor any of the other successful bidders for expansion service raised such an objection.

19. Marathon states that Trailblazer used it market power to force the negotiated rate shippers to execute binding precedent agreements, which not only obligated them to pay the negotiated rates for ten years, but to support Trailblazer before the Commission by threatening not to construct the facilities if the shippers objected. It contends that with the precedent agreements Trailblazer ensured silence of the expansion shippers.

20. While Trailblazer's precedent agreements with the expansion shippers state that they agree to support Trailblazer's certificate application, it is not clear that the shippers were foreclosed from ever raising issues regarding recourse rates.[11] A pipeline can reserve the right not to proceed with a project if it objects to terms imposed by prospective shippers or the Commission.[12] Reserving the right not to construct facilities

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[10] *Trailblazer*, 95 FERC ¶ 61,258, at 61,903 (2001).

[11] The precedent agreements state "Upon request of Trailblazer, Shipper agrees to support any notification or certificate filing made to the FERC, or other forums, that would assist Trailblazer in obtaining any necessary authorizations to construct facilities or to provide services as set out herein."

[12] Precedent agreements regularly contain out-clauses that make the agreements null and void if the pipeline is unable to obtain approval for a project or it subsequently decides not to proceed with the project in light of changed circumstances. *See Independence Pipeline Co.*, 92 FERC ¶ 61,268, at 61,891 (2000); *NE Hub Partners LP.*, 90 FERC ¶ 61,142, at 61,451 (2000) and 105 FERC ¶ 61,334 (2003); *ANR Pipeline Co.*, 103 FERC ¶ 61,025 (2003); *Transcontinental Pipe Line Corp.*, 100 FERC ¶ 61,164 (2002); and *Independence Pipeline Co.*, 100 FERC ¶ 61,082 (2002).

is not necessarily evidence of market power; to the contrary, it is a regular practice of most pipelines. In fact, it is not uncommon for a pipeline to receive certificate authorization for a proposal, but decide not to go forward based on unrealized expectations or changed circumstances. Accordingly, the Commission finds nothing inappropriate with the reservation clauses in Trailblazer's shippers' service agreements.

21. Marathon argues that Trailblazer's failure to offer a recourse rate during the open season violated its negotiated rate tariff provisions. Marathon contends that according to Trailblazer's tariff, it could negotiate rates with expansion shippers so long as, at the time of the execution of an FTS agreement, service was available under the terms and conditions of Rate Schedule FTS. However, Marathon asserts that service was not available at the time they executed their FT Service agreement because they had committed to execute only negotiated rate contracts in their precedent agreements. In the certificate proceeding, no party raised the issue of whether service was available under the terms and conditions of Trailblazer's Rate Schedule FTS. Accordingly, the Commission concludes that Trailblazer did not violate its tariff at the time it executed the contracts for the Expansion 2002 service.

C. Negotiated Rates Not Unjust and Unreasonable

22. Marathon insists the Commission impose cost-of-service rates on Trailblazer, arguing that to do otherwise would be to permit a pipeline to charge rates that are by definition unjust and unreasonable.

23. As explained in the May 20 Order, the Commission permits negotiated rates that exceed a pipeline's recourse rates,[13] and has determined there are legitimate reasons for shippers to choose to pay rates that exceed the maximum recourse rate.[14] The Commission has stated that "the option to pay a rate that deviates from the recourse rate is the customer's, and accordingly, would be considered reasonable."[15] Further, the courts have held the mere fact of a rate disparity does not establish unlawful

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[13] *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312 at P 44 (2002).

[14] *PG&E Transmission*, 100 FERC ¶ 61,291 at P 22 (2002).

[15] *Id.*

discrimination, as long as the contracts were entered into in good faith and did not involve improper conduct.[16]

24. The May 20 Order also explained that absent a compelling reason, the Commission does not believe it should second-guess the business and economic decisions between knowledgeable business entities when they enter into negotiated rate contracts. Pipelines rely on their contracts and the integrity of the Commission's process in deciding whether to construct new facilities. Thus, the Commission is reluctant to upset the expectations of pipelines when they make investment decisions in reliance on the commitments by their customers and on actions of the Commission.

25. On rehearing, Marathon contends that contracts between regulated pipelines and its customers are not private business and economic transactions. Rather, they must take place within the four corners of the regulatory scheme that has been put in place by Congress under the NGA and by the Commission's implementing regulations. It contends that the Commission's duty is not to ensure that infrastructure projects go forward at all costs but is to ensure that Trailblazer adheres to the NGA and Commission regulations regarding just and reasonable service requirements.

26. Marathon contends that there is nothing in the record to explain why prospective shippers chose to negotiate rates above the maximum recourse rate. It concludes that a fair inference is that the shippers chose the higher rate because they had no alternative if they wanted service. Marathon asserts that the only finding the Commission can make on the basis of the record is that the shippers did not freely negotiate for the agreed-upon rate. Marathon adds that shippers like CMS or Enron were major marketers, and had little incentive to refuse the pipeline's request for an above-recourse rate because such shippers pass the transportation cost on by adding it in to the ultimate commodity cost. Marathon maintains that it does not know why CMS bid for service at a negotiated rate and adds that Marathon cannot be charged or faulted with whatever knowledge CMS had regarding its 24 cents/Dth bid. Marathon states that Trailblazer ensured that CMS could transfer the capacity at the 24 cents/Dth rate and raised the possibility that Marathon might lose the capacity to higher bidders were Marathon to insist on paying the 12.19 cents/Dth recourse rate rather than the 24 cents/Dth negotiated rate. As there was no other Trailblazer capacity available, Marathon asserts that it had no option but to pay the negotiated rate to secure capacity for its Powder River Basin production.

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[16] *United Municipal Distributors Group v. FERC*, 732 F.2d 202, at 211-13 (D.C. Cir 1984). *See also Cities of Bethany v. FERC,* 727 F.2d 1131, 1138-1140 (D.C. Cir. 1984).

27. The NGA contemplates individual contracts for service.[17] Under the NGA, the Commission's role is to ensure that the rates agreed upon in those agreements are just and reasonable and not unduly discriminatory.[18] The Commission has designed its negotiated rate policies to fulfill this statutory scheme. While Marathon questions the motives of its predecessors-in-interest to these contracts, Marathon makes no allegations, and the Commission finds no evidence in the record, of bad faith on the part of Trailblazer in soliciting bids for expansion service. Under these circumstances, the Commission cannot find the negotiated rate agreements to be unjust and unreasonable.

28. In essence, Marathon is asking the Commission to initiate an enforcement action, five years after the open season for the Expansion 2002 facilities and three years after the facilities went into service, to investigate the motives behind the business and economic decisions made by Trailblazer and its expansion shippers. Were the Commission to initiate such an investigation, the result could be the reallocation of profits earned under the five year old contracts. Marathon contends that such a result would not undercut the reasonable expectations of the pipelines or the integrity of Commission orders. The Commission does not agree with this assessment, given that Trailblazer's decision to incur the cost to build and operate the expansion was based on its expectation of the profits available from providing expansion service at the rates negotiated in shippers' 10-year firm service agreements.

29. As stated in the May 20 Order, at the time of Trailblazer's open season, production had outpaced development of longhaul capacity in the Powder River Basin in the Rocky Mountain Region. While other pipelines proposed projects around the same time as Trailblazer,[19] Trailblazer was the only one constructed.[20] It would be inequitable, absent

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[17] *United Gas Pipe Line Co. v. Mobil Gas Service Corp.*, 350 U.S. 332, at 338-9 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[18] *Id.*

[19] *Marathon v. Trailblazer*, 111 FERC at n. 17. Williams Gas Pipeline Central, Inc. (Williams) announced an open season for 540 Dth/d for fixed rate 10-year contracts in the mid-20 cent range. *WIC, Williams Central, Trailblazer Offer New Capacity in Rockies*, Inside FERC, Aug. 14, 2000, at 1-2. Colorado Interstate Gas Co. announced an open season for a similar project. *Expansion in East and West Under Scrutiny With Open Season Scheduled by Dominion Transmission (Formerly CIG) and Colorado Interstate*, Foster's Natural Gas Report, Sept. 28, 2000 at 8.

[20] The Williams project filed by Western Frontier Pipeline Co. L.L.C., Docket No. CP02-11-000, was subsequently withdrawn due to lack of market participation. The CIG

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compelling evidence, for the Commission to allow a shipper to persuade a pipeline company to construct new facilities by contracting for new service only to subsequently allow that shipper, after years of receiving service, to then challenge the contract's terms of service. The shipper could have and should have raised concerns in the original certificate proceeding.

30. Marathon argues that the May 20 Order's observation that there were alternative pipeline infrastructure proposals at the time of Trailblazer's[21] open season is tantamount to a post hoc determination that Trailblazer lacked market power in the relevant market at the time it negotiated rates with the expansion shippers. Marathon examines the potential alternatives and asserts they could not mitigate Trailblazer's market power, since under the Commission's market power test, the alternative projects were not available on a timely basis, the price was not low enough, and/or did not provide service to same market area.

31. Whether alternatives were viable under the Commission's market power test is not material here. There was no need for, and thus the Commission did not undertake, a market power study in connection with Trailblazer's initial expansion certificate proceeding or this complaint proceeding. The prospective shippers were not captive customers without other alternatives. They elected to enter into precedent agreements at negotiated rates for new service. For the reasons discussed herein, the Commission finds that there was no irregularity in Trailblazer's conduct of its open season.

D. Policy Issues

32. Marathon contends that two prior Commission decisions to investigate pipelines' alleged exercise of market power support its request for a Commission investigation here.

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project was never proposed to the Commission. In 2003, Cheyenne Plains Pipeline Co., an affiliate of CIG filed an application to construct facilities, which the Commission subsequently approved. *Colorado Interstate Gas Co.*, 105 FERC ¶ 61,095 (2003), *order issuing certificate*, 106 FERC ¶ 61,275(2004), *order denying reh'g and granting clarification*, 108 FERC ¶ 61,052(2004), *order granting reh'g and clarification, in part, and denying motion*, 109 FERC ¶ 61,291 (2004).

[21] *Marathon v. Trailblazer*, 111 FERC at P 66 and n. 17.

Specifically, it cites to *PG&E Transmission Northwest (PG&E)*[22] and *Transwestern Pipeline Co.* (*Transwestern*).[23]

33. In both the *PG&E* and *Transwestern* cases, the Commission initiated investigations because it was concerned that the companies had entered into certain negotiated rate service agreements in violation of the Commission's then-current regulations and policy regarding firm transportation service and negotiated rate agreements. That circumstance does not exist here.

34. As discussed in the May 20 Order and above, Trailblazer's failure to offer a recourse rate at the time of its August 2000 open season was neither a violation of its tariff or of any Commission policy in effect at that time. Beyond its arguments to the contrary on that point, Marathon has presented no evidence of abuse of market power by Trailblazer or other justification sufficient to convince us that further inquiry into Marathon's contracts with Trailblazer is warranted.

Conclusion

35. Under NGA section 14, the Commission may initiate an investigation to determine if the NGA or the Commission's regulations have been violated. Additionally, NGA section 5 allows the Commission to initiate an investigation to determine the justness and reasonableness of a rate. However, it is well established that whether to initiate an investigation is within the Commission's discretion.[24]

36. Marathon's complaint comes down to a question on timing and a determination on equity. Trailblazer, like Natural, held an open season for expansion capacity soliciting bids for service at a minimum negotiated rate, without offering service under a cost-based recourse rate. Until Marathon's March 22, 2005 complaint, there had been no objection to Trailblazer's open season or to Trailblazer's expansion service rates. In contrast,

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[22] 96 FERC ¶ 61,276 (2001), *order on contested settlement*, 100 FERC ¶ 61,291 (2002), *order on reh'g*, 102 FERC ¶ 61,124 (2003).

[23] 94 FERC ¶ 61,337 (2001), *order establishing hearing procedures*, 96 FERC ¶ 61,138 (2001), *order on int'l decision and compliance filing*, 100 FERC ¶ 61,058 (2002).

[24] A regulatory agency has the prosecutorial discretion to determine what actions to take to enforce a statute when it believes a person has or is violating the statute. *See Baltimore Gas and Electric Company v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001) and *High Island Onshore System, L.L.C.*, 112 FERC ¶ 61,050, at P 119 (2005).

objections were promptly raised in response to Natural's open season, and the Commission issued a preliminary determination ordering Natural to hold a new open season with a recourse rate option. Natural claimed that the Alternative Rate Policy Statement requirement that a recourse rate be available applied only when existing customers were bidding for existing capacity and a pipeline could potentially withhold capacity so as to make it available under negotiated rates. The Commission did not concur with this interpretation and clarified that a recourse rate must also be available to new customers bidding for new service. However, the Commission did not apply this 2002 clarification retroactively to order new open seasons in previously completed expansion proceedings. A Trailblazer expansion shipper presumably could have taken note of the Natural finding and similarly sought a new open season. None did.

37. Had a prospective expansion shipper objected to Trailblazer's 2000 open season, as did a prospective expansion shipper to Natural's 2002 open season, the Commission might have had cause to reassess pipeline companies' interpretation of the requirements of the Alternative Rate Policy Statement in 2000 rather than in 2002. This was not the case. As a result, Trailblazer placed its expansion facilities into service in 2002, and provided service without complaint until Marathon's 2005 complaint. Because Trailblazer's expansion shippers had earlier opportunities to challenge their terms of service, but did not do so, and because the Commission finds no cause to question the conduct of Trailblazer's 2000 open season, the Commission finds that at this late date it would be inequitable to upset the economic assumptions upon which the expansion project was designed and has been operated. Accordingly, for the reasons discussed above, we affirm our earlier denial of Marathon's complaint and we deny Marathon's request for rehearing.

<u>The Commission orders</u>:

Marathon's request for rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.