

121 FERC ¶ 61,129  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Empire Pipeline, Inc.

Docket No. CP06-5-007

ORDER AMENDING CERTIFICATE

(Issued November 5, 2007)

1. On September 14, 2007, Empire Pipeline, Inc. (EPI) filed a petition to amend the authorization issued in *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319 (December 21, 2006; December 21 Order).<sup>1</sup> The December 21 Order authorized EPI, among other things, to construct and operate pipeline facilities in six counties in New York.
2. In its petition, EPI proposes to lease a passive ownership interest in the facilities it was authorized to construct in the December 21 Order to industrial development agencies (IDA) in each of the six counties in New York where the facilities are located and to concurrently leaseback the facilities in order to receive local real property and state sales and use tax exemptions. EPI also requests pre-granted authority to reacquire each IDA's interest in the facilities upon the termination of the lease and leaseback agreements.
3. For the reasons discussed below, we will grant EPI's proposals to amend its certificate, as well as grant EPI's request for pre-granted authority.

**I. Background**

4. The December 21 Order authorized EPI, a new company with no pipeline facilities, to construct and operate a 78-mile long, 24-inch diameter pipeline from a connection with Empire State Pipeline (Empire), its affiliate and an existing Hinshaw

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<sup>1</sup> *Order on reh'g*, 119 FERC ¶ 61,173 (2007). The Commission issued a preliminary determination to EPI in *Empire State Pipeline*, 116 FERC ¶ 61,074 (2006) (*Empire*).

pipeline,<sup>2</sup> near Victor, New York to a connection with Millennium Pipeline Company, L.L.C.'s (Millennium) proposed facilities near Corning, New York. The December 21 Order also authorized EPI to construct and operate a 20,620-horsepower compressor station on Empire's pipeline near Oakfield, New York. (Collectively, EPI's proposed facilities are known as the Empire connector facilities.)<sup>3</sup> In addition, the December 21 Order authorized EPI to operate Empire's existing system as a jurisdictional interstate pipeline, establishing separate firm, interruptible, and overrun rates for the existing Empire facilities and the Empire connector facilities.<sup>4</sup>

5. EPI estimated that the Empire connector facilities would cost \$144.2 million. The December 21 Order approved EPI's initial rates, which were based on a cost of service of \$27,883,014 and included Other Taxes of \$4,325,870.<sup>5</sup> The order required EPI to make a filing to justify its recourse rates, or to propose alternative rates, to be effective no later than three years after the in-service date.

6. EPI states that it accepted the certificate issued in the December 21 Order on January 19, 2007, that it commenced construction of the Empire connector facilities in mid-September 2007, and that it filed with the Commission the executed service agreement with its customer, KeySpan Gas East Corporation.

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<sup>2</sup> A Hinshaw pipeline is a pipeline located wholly within one state that engages in interstate commerce without becoming subject to the Commission's jurisdiction, if the pipeline's rates, services, and facilities are regulated by the state and the gas is consumed within that state.

<sup>3</sup> The December 21 Order, among other things, approved the Millennium project, authorizing (1) Millennium to construct and operate pipeline facilities from south central New York, east to Rockland County, New York; (2) Algonquin Gas Transmission, LLC to construct and operate pipeline and compressor facilities from a connection with Millennium in Rockland County to the Town of Brookfield, Connecticut; and (3) Iroquois Gas Transmission System, L.P. to construct and operate compressor facilities in Brookfield. The Millennium project was designed to bring new gas supplies from Canada to growing markets in the New York City metropolitan area.

<sup>4</sup> Empire's existing system extends from a connection with TransCanada PipeLines Ltd. at the United States-Canada border to a point near Syracuse, New York.

<sup>5</sup> 117 FERC ¶ 61,319, at P 212.

## II. EPI's Petition to Amend

### A. Overview

7. EPI states that property in New York acquired and owned by government entities is exempt from real property and state sales and use taxes. To qualify for these tax exemptions, EPI proposes to lease and assign a passive ownership interest in the Empire connector facilities, including easement rights, equipment, and improvements, to the respective IDA of the county in which the facilities will be located. EPI states that the proposed transaction will enable it to receive real property and state sales and use tax exemptions for the Empire connector facilities, which will lower the costs of constructing and operating the facilities and partially offset significant and unanticipated increases in capital costs.

8. Concurrently with its lease and assignment of a passive ownership interest in the Empire connector facilities to the IDAs, EPI asserts that the IDAs will lease and assign back to EPI their interests in the facilities. EPI states that it will at all times retain operational and management responsibility and control over the facilities, that it will remain the sole certificate holder, and that the proposals will not affect the contract with its customer or the terms and conditions of the services it will provide.

9. The Empire connector facilities are in Genesee, Ontario, Yates, Schuyler, Chemung, and Steuben Counties, New York. In addition to the lease and leaseback agreements, EPI entered into payment-in-lieu of tax (PILOT) agreements with each IDA in these counties. Further, EPI entered into four separate community benefit agreements (CBA) with the IDAs in Yates and Chemung Counties, the Schuyler County Partnership for Economic Development, Inc. (Schuyler County Partnership) and the Finger Lakes Regional Telecommunications Development Corporation (Finger Lakes Telecommunications) in Ontario County.<sup>6</sup>

10. EPI contends that it is seeking the tax exemptions in order to keep the total costs of the Empire connector facilities closer to projected levels. Specifically, EPI now estimates that it will cost \$177,000,000 to construct the Empire connector facilities, which is a \$32,771,000 increase.<sup>7</sup> EPI contends that the lease and leaseback proposals herein will reduce its estimate for Other Taxes from \$4,325,870 to \$2,439,140, partially offsetting some of the increases in construction costs.<sup>8</sup> Despite the offset in costs, EPI

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<sup>6</sup> The Schuyler County Partnership and Finger Lakes Telecommunications are not-for-profit corporations.

<sup>7</sup> EPI's October 12, 2007 response to a data request at Question 1.

<sup>8</sup> *Id.* at Question 2.

estimates its cost of service will be \$31,155,914, an increase of \$3,272,900 from the first-year annual cost of service approved in the December 21 Order. EPI indicates that it is not seeking to change its initial rates, but acknowledges that it will need to make a filing to justify its recourse rates, or to propose alternative rates, to be effective no later than three years after the in-service date.

### **B. Lease and Leaseback Agreements**

11. Since it had not commenced construction of the Empire connector facilities at the time the agreements were executed, EPI asserts that the proposed lease agreements provide for the IDAs to acquire ownership interests in the pipeline facilities in two phases. First, EPI states that it leased to the respective IDAs any property, equipment, or improvements it had acquired in each of the six counties as of July 20, 2007. EPI contends that its easement rights were transferred to the IDAs by assignment. Second, EPI states that it intends to lease and assign to the IDAs within 60 days of commencing commercial operation of the Empire connector facilities its remaining interests in real property, easement rights, and additional equipment and improvements in the facilities acquired after July 20, 2007.

12. Under the leaseback agreements, EPI will make rental payments of \$1.00 per year to the respective IDAs. Each agreement is for 10, 15, or 25 years depending on the county. EPI contends that it is not required to take any action to reacquire the facilities upon the expiration of the agreements. EPI also states that it has the right to terminate the agreements at any time and reacquire the facilities for \$1.00.

13. EPI emphasizes that the agreements do not allow an IDA to interrupt, obstruct, or modify in any way EPI's ability to provide transportation services and that EPI will retain operational and management responsibility and control over the facilities. EPI contends that the IDAs' ownership interest in the facilities is for the sole purpose of conferring financial assistance to EPI.

### **C. PILOT and CBA Agreements**

14. EPI asserts that the PILOT agreements document the exemption of the Empire connector facilities from real property taxes and establish the payment amounts that EPI will make in lieu of taxes. The property tax exemption and payments in lieu of taxes will commence no earlier than the commercial operation of the facilities. EPI contends that these payments are fixed amounts for the term of each PILOT agreement and are not subject to change based on the assessed value of the facilities.

15. According to EPI, each CBA establishes the amount of the fixed annual fee that EPI will pay to the IDAs in Chemung and Yates Counties, the Schuyler County Partnership, and Finger Lakes Telecommunications to fund projects for the benefit of the host community. Under the agreements, each entity has the discretion to determine what

municipal works will be funded. Except for the CBA between EPI and Finger Lakes Telecommunications, EPI can terminate the CBAs at any time, which will also terminate the lease, leaseback, and PILOT agreements.

16. The CBA between EPI and Finger Lakes Telecommunications provides for the funding of a fiber optic ring in Ontario County. The term of the CBA is for 25 years, with fixed payments commencing September 1, 2009. EPI states that it agreed to a 25-year payment commitment to enable Finger Lakes Telecommunications to obtain financing for its portion of the project costs. Unlike the other CBAs, this CBA can only be terminated upon payment in full of all amounts due.

#### **D. Pre-Granted Authorization to the Reacquire Facilities**

17. EPI also requests pre-granted authority to reacquire each IDA's interests in the Empire connector facilities upon termination of the lease and leaseback agreements. EPI contends that no customers will be harmed as a result of its reacquisition of full ownership of the Empire connector facilities, that there will be no change in jurisdictional service to its customers, and that the Commission does not need to speculate about the potential risk to customers at the time of the termination of the lease and leaseback agreements.

### **III. Interventions**

18. Notice of EPI's petition to amend was published in the *Federal Register* on September 20, 2007 (72 Fed. Reg. 54,648). There were no motions to intervene, notices of intervention, or protests to the application.

### **IV. Discussion**

19. Since the proposals herein involve facilities certificated for natural gas service in interstate commerce subject to the jurisdiction of the Commission, the proposals are subject to the requirements of subsections (c) and (e) of section 7 of the Natural Gas Act.

#### **A. Lease and Leaseback Proposals**

20. The preliminary determination order analyzed EPI's original proposals to serve as the upstream supply link for the Millennium project in light of the Certificate Policy Statement<sup>9</sup> and found that the proposals were in the public convenience and necessity.<sup>10</sup>

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<sup>9</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999); *order on clarification*, 90 FERC ¶ 61,128; *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

<sup>10</sup> *Empire*, 116 FERC ¶ 61,074, at P 52.

Specifically, the preliminary determination order found that EPI appropriately designed its incremental rates for its connector facility customers and concluded that since EPI proposed incremental rates, existing customers on Empire's system would not subsidize the proposals. Further, the preliminary determination order found that there would not be any adverse effects on existing pipelines or their customers. Finally, the preliminary determination order found that adverse impacts to landowners and communities affected by the project would be minimal, since approximately 50 percent of the connector facilities followed utility or road corridors and EPI received survey permission from 98 percent of landowners along the route.

21. In making a preliminary determination that EPI's original proposals were in the public interest, we found that the proposals would serve the growing natural gas markets in New York City and Long Island, would add pipeline capacity and increase deliverability for electric generation and local distribution company growth, enhance natural gas supply and storage options, and enhance price stability in the New York City area.

22. The December 21 Order authorized EPI's proposals based on the above findings and the representations in EPI's application for the project, including the fact that the proposed facilities would be owned by EPI. Granting EPI's request for amended certificate authority that will continue to authorize the construction and operation of the Empire connector facilities, but permit EPI to transfer a passive ownership interest to those facilities to IDAs in the counties where the facilities are located and lease them back on a long-term basis, will not change any of the above-described findings in the December 21 Order. Further, EPI demonstrates that its construction costs have increased substantially, causing an increase in the project's cost of service, and that the tax benefits from the lease and leaseback proposals will partially offset the increase in construction costs. Thus, we find that EPI's proposals will keep total costs closer to the levels projected in the December 21 Order. For these reasons, we find that the public convenience and necessity require the amendment of EPI's certificate to permit EPI to implement its proposals herein.

### **B. Pre-Granted Authorization**

23. EPI requests pre-granted authority to reacquire each IDA's interests in the Empire connector facilities upon the termination of the lease agreements for each county. EPI contends that pre-granted authority is appropriate because it does not seek to abandon jurisdictional service, but merely seeks to reacquire each IDA's ownership interest, when the lease and leaseback agreements terminate. EPI contends that no customers will be harmed as a result of its reacquisition of full ownership of the Empire connector facilities, that there will be no change in service to its customers, and that the Commission does not need to speculate about the potential risk to customers at the time of the termination of the lease and leaseback agreements. Finally, since the lease and leaseback agreements

vary in length from 10 to 25 years, EPI asserts that pre-granted authorization is in the public interest because it will avoid the need for six applications by EPI over 25 years that merely reflect a termination of the lease and leaseback agreements.

24. In its petition to amend, EPI cites several cases, but we need only discuss *Liberty Gas Storage, LLC (Liberty)*.<sup>11</sup> In *Liberty*, Liberty proposed to transfer legal title to its storage facilities in Calcasieu Parish, Louisiana to the Industrial Development Board of Calcasieu Parish (Development Board) to gain exemption from real property taxes. At the time of the title transfer, the Development Board agreed to lease the storage facilities back to Liberty. The Development Board had no operational or managerial control over the storage facilities. On the termination of its lease of the facilities from the Development Board, Liberty stated that “it will have the right to repurchase the . . . facilities for a predetermined price” and that “it intends to exercise that right.”<sup>12</sup>

25. We will grant EPI’s request for authority to reacquire the ownership interests from the IDAs at the termination of the respective leases of ownership interests to the IDAs. In contrast to the situation in *Liberty*, where Liberty would need to buy back the ownership interest in its facilities but was seeking pre-granted abandonment of its authorization to lease capacity from the Development Board, here ownership of the facilities will automatically revert to EPI on expiration of EPI’s lease of ownership interests in the facilities to the IDAs. We find it appropriate to pre-grant authority to EPI to recover that ownership of the facilities necessary to its provision of jurisdictional service.

26. 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) EPI’s certificate of public convenience and necessity to construct and operate the Empire connector facilities is amended solely to permit a transfer of an ownership interest to IDAs in six New York counties and the leaseback of the facilities by EPI, as more fully described in the body of this order and in the application.

(B) The amended certificate authorization is conditioned on EPI’s acceptance of such authority in accordance with section 157.20(a) of the regulations.

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<sup>11</sup> *Liberty*, 117 FERC ¶ 61,224 (2006).

<sup>12</sup> *Id.* at P 17.

(C) EPI shall inform the Commission of the effective date of the transfer of title of the Empire connector facilities to the respective IDAs.

(D) EPI's request for pre-granted authorization is granted.

(E) In all other respects, the December 21 Order shall remain in full force and effect.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.