

126 FERC ¶ 61,160  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Macquarie Cook Energy, LLC  
Constellation Energy Commodities Group, Inc.

Docket No. RP09-341-000

ORDER GRANTING REQUEST FOR TEMPORARY WAIVERS

(Issued February 23, 2009)

1. On February 4, 2009, Macquarie Cook Energy, LLC (Macquarie) and Constellation Energy Commodities Group, Inc. (Constellation) (collectively Applicants) filed a request for a temporary waiver of various Commission capacity release policies and regulations in order to facilitate the acquisition by Macquarie of Constellation's wholesale natural gas trading portfolio in the United States. Applicants state that the acquisition by Macquarie of Constellation's portfolio of natural gas agreements is part of a larger transaction in which Constellation seeks to exit the wholesale natural gas commodity trading business in the United States and has agreed to sell its wholesale natural gas trading portfolio as an integrated package to Macquarie. In light of the administrative challenges presented by the acquisition and integration by Macquarie of Constellation's natural gas agreements, which include both natural gas purchase and sale agreements, as well as natural gas transportation and storage agreements, Applicants seek expedited treatment of their filing and request that the waivers be granted on or before February 23, 2009, the expected closing date of the first phase of their transaction. For the reason discussed below, and for good cause shown, the Commission grants the requested temporary waivers.

**Background**

2. Applicants state that Constellation selected Macquarie to acquire its wholesale natural gas trading portfolio after conducting a sales process in which a large number of potential purchasers were invited to submit bids and several went through an auction process. Applicants are seeking temporary waiver of the Commission's capacity release policies and regulations so that they may expeditiously consummate their transaction and minimize disruption to Constellation's customers, and so that Constellation may exit the wholesale natural gas commodity trading business in an efficient and orderly manner. Upon completion of the transaction, Macquarie will become the owner of substantially all of Constellation's wholesale natural gas agreements in the United States used to support

trading functions. Constellation will not transfer to Macquarie certain interstate transportation/storage contracts used to support Constellation Energy Group's (CEG) retail gas business and contracts necessary to serve CEG-owned power plants or power plants for which there is a tolling agreement in effect. Macquarie also will be stepping into Constellation's shoes as a supplier of natural gas for CEG's retail business. As part of the overall transaction, the interstate transportation/storage contracts supporting the retail assets will be transferred to a Special Purpose Entity for lien and collateral purposes.

3. Applicants request that the Commission act expeditiously in light of Constellation's intention to discontinue its wholesale natural gas commodity trading business. Applicants state that they have executed a purchase and sale agreement, and are working diligently to execute the comprehensive documentation required to consummate the transaction. Applicants state that they will close the transaction after any and all necessary governmental approvals (including the waiver requested here) are received, and also are working to have the closing on the first phase of their transaction by February 23, 2009. Applicants state that the closing of the transaction will occur in two phases. In the first phase, Constellation will on or about February 23, 2009, transfer to Macquarie certain natural gas storage capacity rights, associated transportation capacity, and related natural gas inventory. In the second phase, Constellation will transfer transportation capacity, remaining storage capacity rights and physical gas trading agreements to Macquarie, and Constellation will also transfer the retail assets to the special purpose entity as part of the gas supply obligation that Macquarie is undertaking in the transaction. Applicants state that they will provide notice to the Commission of the date of each phase of the closing. Applicants request that the waiver be effective for a period of 90 days following each phase of the closing of the transaction. Applicants state that granting this waiver will serve the public interest because it will allow for the transfer of Constellation's natural gas assets to Macquarie in an orderly, expeditious manner that will ensure customers receive service and supplies without disruption.

4. In light of Constellation's desire to exit the wholesale natural gas commodity trading business and the parties' desire to consummate the transaction promptly, as well as the difficult environment facing U.S. and international credit and capital markets, the Applicants request a temporary waiver of the Commission's capacity release policies and regulations. Such policies include the shipper-must-have-title policy, the prohibition on buy-sell arrangements, and the prohibition on tying arrangements. Applicants also state that the transfer of Constellation's wholesale natural gas trading portfolio of purchase and supply agreements together with transportation and storage agreements may also be viewed as contrary to the Commission's prohibition against tying the release of interstate pipeline capacity to any extraneous condition, or the Commission's restrictions for capacity releases below or above the maximum rate.

5. Applicants have not yet determined exactly how Constellation's wholesale natural gas agreements will be administered by Macquarie following consummation of the transaction. Applicants state that immediately following consummation of the transaction, Macquarie will begin the process of integrating Constellation's wholesale natural gas agreements into its portfolio. Macquarie will also become the primary wholesale natural gas supplier for the retail assets. Applicants request that the waiver be effective to facilitate consummation of the transaction. Applicants state that the temporary waiver will only be used for the limited purpose of completing the transaction and integrating Constellation's natural gas agreements into Macquarie's business. Applicants state that the administrative process involved with integrating Constellation's wholesale natural gas agreements with those of Macquarie will be complex. Applicants state that this process will require the transfer of natural gas agreements, including pipeline and storage service agreements. Applicants state that the transfer of the jurisdictional transportation and storage agreements is intended to be accomplished by means of permanent releases or assignment pursuant to the applicable tariff provisions of the transportation and storage providers to the extent possible. Applicants state that the transfer to Macquarie from Constellation of the other natural gas agreements will be by assignment and novation. Applicants state that these contracts involve numerous counterparties and contain varying provisions for completing assignments under the circumstances. Applicants state that any necessary consents will not have been obtained before execution of the agreement, and securing necessary consents promptly thereafter will require time.

6. Although Applicants will make every effort to maintain compliance with the Commission's natural gas orders, policies and regulations at all times, Applicants nonetheless seek a waiver of these orders, policies and regulations in the event that the integration of Constellation's wholesale natural gas trading portfolio into Macquarie's business results in an inadvertent or possibly unavoidable deviation from the Commission's policies or regulations. Consistent with the waivers granted in similar circumstances,<sup>1</sup> Applicants seek a waiver for a 90-day period following each phase of the closing of the transaction.

### **Public Notice and Interventions**

7. Public notice of the Applicant's filing was issued on February 5, 2009, providing for interventions, comments, and protests to be filed by February 11, 2009. Pursuant to

---

<sup>1</sup>Citing, *Barclays Bank PLC and UBS AG*, 125 FERC ¶ 61,383 (2008) (*Barclays*); *Northwest Pipeline Corp. and Duke Energy Trading and Marketing*, 109 FERC ¶ 61,044 (2004) (*Duke*); *Wasatch Energy, LLC and Northwest Pipeline Corporation*, 118 FERC ¶ 61,173 (2007) (*Wasatch*); *Sempra Energy Trading Corp.* 121 FERC ¶ 61,005 (2007) (*Sempra Energy*); *Bear Energy LP*, 123 FERC ¶ 61,219 (2008) (*Bear Energy*).

Rule 214 (18 C.F.R. § 385.214 (2008)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Comments in support of the Applicants' request for waiver were filed by Centerpoint Energy Gas Transmission Company and ANR Pipeline Company. Dominion Resources, Inc. (Dominion) submitted comments on the filing. While Dominion takes no position as to whether the Commission should grant the waivers at issue, it expresses concern about the policy implications of the Commission's apparent trend towards granting increasingly broad waivers without conditions for an open and transparent process. Dominion references its request for clarification of policy regarding waivers of applicable requirements to facilitate integrated transfers of marketing businesses which it filed in Docket No. RM09-7-000 on February 6, 2009. Dominion asserts that the policy questions raised in its request in Docket No. RM09-7-000 are implicated by the Applicants' requests in this proceeding. Dominion contends that the proposed transaction described by Applicants appears inconsistent with the Commission's transparency objectives, and absent further explanation, could be discriminatory.

8. On February 12, 2009, the Applicants filed an answer in response to the comments of Dominion. Applicants submit that Dominion's request for a policy review should not stand in the way of their urgent waiver request, which Applicants have shown to be supported by precedent and to be in the public interest based on the facts and circumstances presented in the request. Applicants state that the prompt sale of Constellation's wholesale natural gas trading portfolio to Macquarie is critical to the restructuring of CEG's business. Applicants state that sale of the wholesale natural gas commodity trading business will relieve CEG of significant credit requirements. Applicants state that the sale includes an integrated package of not only interstate natural gas transportation and storage agreements, but other assets as well, e.g., natural gas purchase and supply agreements, data systems and technology. Additionally, Applicants state that most of Constellation's wholesale natural gas employees are expected to move to Macquarie as a result of this sale. Applicants state that the sale was negotiated and must take place on an integrated basis. Applicants state that the sale will also facilitate Macquarie's broader participation in the wholesale natural gas commodity trading business in the U.S. Applicants submit that Macquarie is a financially strong and sophisticated company and the natural gas marketplace is benefitted from its expanded presence here. Applicants state that Macquarie's valuation of Constellation's wholesale natural gas commodity trading business is dependent on Macquarie's ability to lock in the current value of the business as soon as possible.

9. Applicants assert that they adequately supported their request for waiver but provide additional information in response to Dominion. Applicants state that Constellation has contracts on nineteen interstate natural gas pipelines for transportation and storage service,<sup>2</sup> and contracts for similar services on some non-jurisdictional pipelines. It also has natural gas purchase and sale contracts. It uses these assets on an integrated basis. Certain of the purchase contracts are associated with specific transportation; certain transportation is linked to storage, and certain gas supply arrangements are to serve Constellation customer.

10. Applicants state that Constellation contacted 46 parties including domestic and international energy marketers and financial institutions about the proposed sale of its natural gas commodity trading business. Applicants state that according to Constellation, eighteen parties participated in management presentations and confidential data review. Applicants state that after a first round of bids, four parties participated in a second round of due diligence. Applicants state that two final bids were received and Macquarie was determined to have the best overall bid. Applicants state that they notified representatives of interstate pipelines of their waiver request and no objection was raised. Applicants state that they are not attempting to shield any information from disclosure and the postings associated with the various releases contemplated under the waiver request will identify replacement shippers in a transparent manner.

11. Applicants conclude that the sale must take place promptly and on an integrated basis so that CEG can realize the legitimate value of its wholesale natural gas trading business. Applicants state that any forced disaggregation of Constellation's various transportation and commodity contracts risks disruption of its integrated wholesale natural gas commodity trading business and stranding of assets. Also, Applicants state that keeping the total package of assets together facilitated the sale of Constellation's natural gas commodity trading business as a going concern. Applicants state that approval of their waiver request will enable CEG to reduce its credit requirements, and allow many of its employees to continue their work in these difficult times. Applicants assert that the waiver is also urgently needed to ensure continued, uninterrupted supply and service to customers. Applicants assert that absent a grant of the waiver request, it will be highly uncertain whether or when these things occur.

### **Discussion**

12. The Commission has reviewed Applicants' request for waiver, as supplemented by their answer to Dominion, and finds that the waiver request is adequately supported and consistent with previous waivers that the Commission has granted under similar circumstances. Accordingly, for good cause shown the Commission will grant the

---

<sup>2</sup> The pipelines are identified in footnote 15 of Applicants' answer.

requested waivers including waivers of the shipper-must-have-title policy, the prohibitions on buy-sell arrangements and tying arrangements, and the restrictions on capacity releases below or above the maximum rate.

13. The Commission finds that our actions here are consistent with the recent decisions in *Bear Energy* and *Sempra Energy* where the Commission granted waivers of various policies and regulations relating to the transfer of interstate pipeline transportation capacity in order to facilitate the transfer of natural gas supply and transportation contracts and other assets as a result of various types of corporate restructurings, including corporate mergers and sales of entire business units. In *Bear Energy*, the Commission waived applicable Commission regulations and policies, including the shipper-must-have-title policy, in connection with the merger of the Bear Stearns Companies Inc. with JPMorgan Chase & Co., including the consolidation of the two companies natural gas trading and marketing businesses. In *Sempra Energy*, the Commission granted a similar waiver in connection with the formation of a joint venture between Sempra Energy and the Royal Bank of Scotland (RBS to be known as RBS Sempra Commodities, including the consolidation of their gas marketing activities).

14. The transaction at issue in this case, as in *Bear Energy* and *Sempra Energy*, goes beyond a simple transfer of interstate pipeline capacity from one company to another, or even a transfer of pipeline capacity together with related gas purchase and sale agreements. Constellation is, in essence, selling its entire gas commodity trading business unit to Macquarie, with the result that its employees will transfer to Macquarie and Macquarie will obtain such other related Constellation assets as its data systems and technology. The Commission adopted its capacity release program in Order No. 636 in order to permit shippers to “reallocate unneeded firm capacity” to those who need it and promote efficient load management by the pipeline and its customers.<sup>3</sup> The Commission did not contemplate that the capacity release posting and bidding requirements would necessarily apply in the cases of the merger or sales of entire business units as part of a corporate restructuring, including, as here, the transfer of transportation contracts, supply contracts, employees, data systems and technology. The Commission finds that the capacity release mechanism is not suited to these types of complex, integrated deals which do not permit the disaggregation of assets.<sup>4</sup>

---

<sup>3</sup> *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37058 (June 30, 2008), FERC Stats. & Regs., Regulations Preambles ¶ 31,271, at P 119 and n.119, *order on reh’g*, Order No. 712-A, 73 Fed. Reg. 72692 (Dec. 1, 2008), FERC Stats. & Regs. ¶ (2008).

<sup>4</sup> The situation at issue here, as well as in *Bear Energy* and *Sempra Energy* differs from that in such cases as *Duke* and *Wasatch*, where the marketers simply wanted to release transportation capacity in conjunction with supply contracts in order to exit

(continued...)

15. Further, given the financial difficulties that many energy-related companies are facing, and the difficult environment facing U.S. and international credit and capital markets, the Commission needs to be able to respond to requests for waivers related to complex business transactions in a flexible and expedited manner. The Commission finds that a rigid adherence to certain policies or regulations could have unintended, negative financial implications for the affected companies. In this case, the Applicants have adequately supported the need for the waivers and their expedited request. As Applicants have stated, granting the waivers by the anticipated closing date will relieve Constellation of credit requirements, allow Constellation to realize the legitimate value of its wholesale natural gas trading business, permit Macquarie to lock in the current value of the business as soon as possible, and allow many of Constellation's employees to continue their work. The Commission will continue to evaluate waiver requests on a case-by-case basis and will grant any necessary waivers based on a balancing of the facts and circumstances in each case with the purposes underlying particular regulations and policies.

The Commission orders:

(A) The temporary waivers requested by the Applicants are granted for 90 days following each phase of the closing of the transaction, as discussed more fully above.

(B) Applicants will provide notice to the Commission in this docket of each phase of the closing of the transaction.

By the Commission. Commissioner Kelliher is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

certain natural gas marketing activities, and no other assets or employee transfer was involved. In those cases, it may be more practicable for the marketers to follow posting and bidding requirements for interstate capacity.