

127 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wyckoff Gas Storage Company LLC

Docket No. CP03-33-005

ORDER AMENDING CERTIFICATE

(Issued May 1, 2009)

I. Introduction

1. On March 2, 2009, Wyckoff Gas Storage Company, LLC (Wyckoff) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Parts 157 and 284 of the Commission's regulations seeking amendment of certificate authority granted by the Commission in an order issued on October 6, 2003.¹ The requested certificate amendment would authorize Wyckoff to transfer a passive ownership interest in certain facilities at its authorized storage field in Steuben County, New York to the Steuben County Industrial Development Agency (SCIDA) and lease back the facilities to qualify for sales, use, and property tax exemptions. Wyckoff also requests that the certificate amendment be made effective retroactive to March 1, 2009. Finally, Wyckoff requests pre-granted authority to reacquire SCIDA's passive ownership interest in the facilities upon termination of the agreements between it and SCIDA. For the reasons stated below, we will grant the requested certificate amendment with the retroactive effective date.

II. Background and Proposal

2. The October 6 Order authorized Wyckoff, among other things, to construct, and operate a natural gas storage facility in Steuben County, New York and to charge market-based rates for its storage services. The facilities are currently under construction, and are expected to be completed and ready for the commencement of commercial operations in April 2009.

¹ *Wyckoff Gas Storage Co., LLC*, 105 FERC ¶ 61,027 (2003) (October 6 Order). Since the original certificate order, Wyckoff's certificate has been amended on three occasions to reflect changes in the sizing and location of Wyckoff's facilities and changes in the timing of construction of the project. 115 FERC ¶ 61,036 (2006); 115 FERC ¶ 62,324 (2006); 124 FERC ¶ 62,192 (2008).

3. In the instant application, Wyckoff states that it has entered into lease, leaseback, and payment in lieu of taxes (PILOT) agreements with SCIDA, in which Wyckoff will lease its facilities to SCIDA and concurrently lease the facilities back from SCIDA. Under the agreements, SCIDA will have a passive ownership interest in Wyckoff's facilities, thus rendering the facilities exempt from real property taxes and New York sales and use taxes. Wyckoff explains that the transactions will yield tax benefits because New York law provides that property owned or leased by governmental entities such as SCIDA is exempt from real property, sales, and use taxes. Instead of tax payments, Wyckoff will make substitute payments to SCIDA according to a schedule attached to the PILOT agreement. Wyckoff contends that the benefits of the transaction include lower tax payments, which will enhance Wyckoff's ability to provide storage services at competitive rates. From the perspective of SCIDA, Wyckoff asserts that the transaction will promote economic development in Steuben County.

4. Under the arrangement, Wyckoff will retain, at all times, operational and managerial control of, and responsibility for, the facilities. Wyckoff states that it will remain the sole holder of the certificate of public convenience and necessity issued for the project, and that the transaction will not affect the terms and conditions of the services that Wyckoff will provide. Wyckoff's proposal does not involve any construction or other activities that could affect the environment or any landowners.

5. Wyckoff states that the term of the agreements extends through December 31, 2029, although Wyckoff can terminate the agreements at any time, subject to payment and notice requirements. SCIDA can terminate the agreements upon default by Wyckoff. Upon termination of the agreements, Wyckoff asserts that ownership of the facilities will revert to Wyckoff. Wyckoff requests pre-granted authority permitting it to reacquire SCIDA's passive ownership interests in the facilities upon termination of the agreements.

6. The lease, leaseback, and PILOT agreements provide that they will become effective on the later of March 1, 2009, or the effective date of the Commission's approval. Wyckoff requests that the Commission make the requested authorization retroactive to March 1, 2009, explaining that the agreements must, under New York law, be effective on March 1, 2009, in order to qualify for the entire property, sales, and use tax exemptions for the 2009 tax year. Without the retroactive effective authorization and the benefit from the 2009 tax year exemptions, Wyckoff's loss would be approximately \$750,000.

III. Notice, Interventions, and Comments

7. Public notice of Wyckoff's application was published in the *Federal Register* on March 20, 2009.² No interventions, protests, or comments were filed.

IV. Discussion

A. Certificate Amendment

8. Since Wyckoff seeks amended certificate authority for its facilities, which are used for the storage of natural gas in interstate commerce subject to the jurisdiction of the Commission, the proposed amendment is subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

9. The October 6 Order analyzed Wyckoff's proposals in light of the Certificate Policy Statement³ and found that the proposals were in the public convenience and necessity.⁴ Specifically, the order found that since Wyckoff was a new company with no existing customers, risk of subsidization was not present.⁵ Further, the order found that the storage facilities would serve a growing market for firm and interruptible storage services, which would help meet the needs of the gas-fired electric generation market, help prospective customers meet peak period needs, minimize pipeline imbalances, and enhance load factors responsive to intra-month swings.⁶ The order found that these benefits of the storage facility to the operations of the relevant markets outweighed any remaining adverse effects on existing customers, other pipelines, or on landowners and communities.⁷

10. The October 6 Order authorized Wyckoff's proposal based on the above findings and the representations in Wyckoff's application for the project. Granting Wyckoff's request for amended certificate authority that will permit Wyckoff to transfer a passive

² 74 Fed. Reg. 11,927 (2009).

³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,277 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000); *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁴ October 6 order, 105 FERC ¶ 61,027 at P 44.

⁵ *Id.* P 19.

⁶ *Id.* P 43.

⁷ *Id.* P 44.

ownership interest in the facilities to SCIDA and lease them back on a long-term basis, will not change any of the above described findings from the October 6 Order. Further, the tax benefits to Wyckoff from the lease and leaseback agreements will lower the cost of Wyckoff's storage project and enhance its ability to provide competitive storage services. We note that the PILOT transaction between Wyckoff and SCIDA is similar to transactions the Commission has approved in other proceedings.⁸ For these reasons, we find that the public convenience and necessity require the amendment of Wyckoff's certificate to permit implementation of its proposal to convey a passive ownership interest in certain facilities to SCIDA and to lease the facilities back on a long-term basis.

11. We will also grant Wyckoff's request for pre-granted authority to reacquire SCIDA's ownership interest at the termination of the respective leases. This action will ensure that the facilities at issue will continue to be used for jurisdictional interstate services when the lease and leaseback agreements expire. Thus, consistent with prior orders, ownership of the facilities will automatically revert to Wyckoff upon expiration of Wyckoff's lease of ownership interests in the facilities to SCIDA.⁹

B. Retroactive Authorization

12. Wyckoff requests that the amended certificate authority be granted retroactively to March 1, 2009, claiming that otherwise it will lose its property, sales, and use tax exemptions for the 2009 tax year. Our general policy is not to grant retroactive certificate authority.¹⁰ However, we have discretion to exercise our equitable authority to grant

⁸ See *Millennium Pipeline Co., L.L.C.*, 124 FERC ¶ 61,139 (2008) (*Millennium*); *Tennessee Gas Pipeline Co.*, 121 FERC ¶ 61,303 (2007) (*Tennessee*); *Empire Pipeline, Inc.*, 121 FERC ¶ 61,129 (2007) (*Empire*); *Liberty Gas Storage, LLC*, 117 FERC ¶ 61,224 (2006).

⁹ See *Millennium*, 124 FERC ¶ 61,139 at P 30; *Empire*, 121 FERC ¶ 61,129 at P 25.

¹⁰ See, e.g., *Panhandle Eastern Pipeline Co.*, 58 FERC ¶ 61,231, at 61,732 (1992) (*Panhandle Eastern*) (stating that "as a matter of policy, the Commission does not issue retroactive certificate authorization"); *Mobil Producing Texas & New Mexico, Inc.*, 55 FERC ¶ 61,090, at 61,274 (1991) (*Mobil Producing*) (stating that the Commission has a policy of not granting certificates retroactively). But see *Michigan Consolidated Gas Co., Interstate Storage Division*, 35 FERC ¶ 61,203, at 61,476 (1986) (*Michigan Consolidated*) (issuing retroactive certificate amendment to avoid customers' paying for services not received by them).

certificate and abandonment authority retroactively in circumstances where we find that such action is warranted.¹¹

13. We have used our discretion to grant retroactive authorization where there would be a specific monetary loss to a party.¹² We have declined to grant retroactive authority when the applicant has failed to provide a reason for the request or failed to show specific monetary loss.¹³ Here, Wyckoff demonstrated that if retroactive authorization to March 1, 2009, is not granted, it will lose the entire property, sales, and use tax exemptions for the 2009 tax year, amounting to a loss of \$750,000. Thus, we find that Wyckoff has shown that it will experience a specific monetary loss without retroactive authorization, and we will make the authorization retroactive to March 1, 2009.

14. The Commission, on its own motion, received and made a part of the record all evidence, including the application, as amended and supplemented, and exhibits thereto, submitted in this proceeding, and upon consideration of the record,

The Commission orders:

(A) Wyckoff's certificate of public convenience and necessity to construct and operate its natural gas storage facility shall be amended to permit a transfer of a passive ownership interest in certain facilities to SCIDA and the leaseback of the facilities by Wyckoff, as more fully described in the body of this order and in the application.

(B) Wyckoff's request for retroactive authorization to March 1, 2009, is granted.

(C) Wyckoff's request for pre-granted authorization to reacquire SCIDA's leasehold interest upon termination of the agreements is granted.

¹¹ *Tennessee*, 121 FERC ¶ 61,303 at P 13.

¹² *Southwest Gas Transmission Co.*, 91 FERC ¶ 61,007, at 61,035-36 (2000); *Transcontinental Gas Pipe Line Corp.*, 73 FERC ¶ 62,025, *order granting reh'g*, 73 FERC ¶ 61,301, at 61,843 (1995); *Michigan Consolidated*, 35 FERC at 61,476.

¹³ *Tennessee*, 121 FERC ¶ 61,303 at P 13; *Panhandle Eastern*, 58 FERC at 61,732; *Mobil Producing*, 55 FERC at 61,274.

(D) In all other respects, the October 6 Order, as amended, shall remain in full force and effect.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.