

134 FERC ¶ 61,102
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Connector Gas Pipeline, L.P.

Docket No. CP07-441-002

ORDER DISMISSING REQUEST FOR DECLARATORY ORDER
WITHOUT PREJUDICE

(Issued February 11, 2011)

1. On September 22, 2010, the State of Oregon (Oregon), acting by and through the Department of State Lands (DSL), filed a Petition for Declaratory Order pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure.¹ Oregon asks the Commission to declare: (1) that Pacific Connector Gas Pipeline, L.P. (Pacific Connector) has the ability to make bona fide attempts to comply with certain state permitting requirements in accordance with the Commission's Order Granting Authority Under Section 3 of the NGA and Issuing Certificate;² (2) that Oregon is not attempting to "thwart" construction of the pipeline; and 3) such state requirements are not unreasonably delaying the project. As discussed below, we will dismiss the Petition without prejudice.

Background

2. On December 17, 2009, the Commission issued an order authorizing Jordan Cove Energy Project, L.P., under section 3 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) import terminal on the North Spit of Coos Bay in Coos County, Oregon.³ The Commission also issued a certificate of public convenience and necessity to Pacific Connector under section 7 of the NGA to construct and operate a

¹ 18 C.F.R. § 385.207(a)(2) (2010). Oregon also requests an exemption from the filing fee set forth in 18 C.F.R. § 381.302; we grant this exemption pursuant to 18 C.F.R. § 381.108 (exempting States from such fees).

² *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009) (*reh'g pending*).

³ *Id.*

234-mile-long, 36-inch-diameter interstate natural gas pipeline extending from the outlet of the LNG terminal to a point near Malin, in Klamath County, Oregon.

3. Both the December 17, 2009 Order and the May 1, 2009 Final Environmental Impact Statement (EIS) prepared for the project address potential compensatory mitigation measures for project impacts on wetlands. The December 17, 2009 Order states that such mitigation

will be determined by the Army Corps as part of the Clean Water Act (CWA) section 404 permit process, and by the Oregon DSL as part of the state removal-fill permit process.⁴

4. As set forth in both the December 17, 2009 Order and the EIS, Pacific Connector was previously informed that DSL would require Pacific Connector to obtain landowner authorization before processing the state removal-fill permit application.⁵

5. The December 17, 2009 Order states that Pacific Connector is “expected to acquire all necessary permits, easements, and licenses prior to construction.”⁶ The December 17, 2009 Order adds that compliance with appropriate state and local regulations is required where no conflict exists with federal law.⁷ To the extent a conflict arises between the requirements of a state or local agency and the Commission’s certificate conditions, the December 17, 2009 Order notes that federal authorization will preempt the state or local requirements.⁸

Oregon’s Petition

6. Oregon explains that, in 2008, Pacific Connector submitted an application to DSL for a removal-fill permit, which DSL subsequently deemed incomplete for lack of landowner authorization, among other issues.⁹ Pacific Connector re-submitted the application in February 2010. Oregon states that on March 5, 2010, DSL determined that

⁴ See EIS at 4.3-58; 129 FERC ¶ 61,234 at P 108.

⁵ 129 FERC ¶ 61,234 at P 163.

⁶ *Id.*

⁷ *Id.* n. 157 (citing *Texas Eastern Transmission*, 121 FERC ¶ 61,003, at P 12 (2007)).

⁸ *Id.* P 164.

⁹ Oregon cites to Ch. 460 Oregon Laws 2001, SB 529 (amending ORS 196.825), which defines an “applicant” for a removal-fill permit to mean “a landowner or person authorized by a landowner to conduct a removal or fill activity.” See Petition at 3.

this application was also incomplete for lack of landowner authorization, as well as other items that Oregon asserts needed to be addressed.¹⁰

7. Oregon states that Pacific Connector requested a “contested case hearing” on DSL’s March 5, 2010 determination. Pacific Connector and Oregon agreed on a briefing schedule, which was to be completed on September 22, 2010.¹¹ On August 27, 2010, Pacific Connector filed a complaint in federal district court alleging that the entire state removal-fill permit program is preempted by the NGA and violates the Commerce Clause.¹² Oregon adds that, also prior to the September 22, 2010 briefing schedule deadline, Pacific Connector performed “what the State believes is its only attempt to obtain landowner authorization,” culminating in Pacific Connector’s June 2010 report to DLS that it had obtained written authorization from 91 of the 220 affected landowners and conducted face-to-face meetings with the remaining (and ultimately unwilling) landowners, thereby satisfying the landowner authorization requirements.¹³

8. Oregon asserts that there is no explanation of how Pacific Connector satisfied the landowner authorization requirement, “other than it had already decided to object to the requirement through the state contested proceeding and by filing a federal lawsuit asserting the entire permit program is preempted by the Natural Gas Act.”¹⁴

9. Oregon argues that the Commission has previously held that merely because a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission’s and another agency’s requirements; rather, a “rule of reason” must apply to both the State’s exercise of power and an applicant’s “*bona fide* attempts” to comply with State and local requirements.¹⁵ In that vein, Oregon argues that Pacific Connector’s actions demonstrate that it has not made a reasonable, *bona fide* attempt to comply with the state landowner authorization requirement by engaging in good faith negotiations with landowners to obtain necessary rights to the property. Oregon argues that, while it is adhering to its statutory responsibilities in processing the removal-fill permit

¹⁰ Petition at 4.

¹¹ Oregon notes that the purpose of the contested case proceeding is to determine whether Pacific Connector’s removal/fill application is “incomplete due to lack of written authorization from all relevant owners of property consenting to the application.” See Petition, Exhibit DSL-10.

¹² Petition at 5.

¹³ Petition at 8-9.

¹⁴ Petition at 9.

¹⁵ *Maritimes & Northeast Pipeline*, 81 FERC ¶ 61,166, at 61,731 (1997).

application, Pacific Connector is thwarting the process by refusing to comply. Oregon notes that Pacific Connector does not plan to start construction until the second quarter of 2013, and that the company must obtain many other federal approvals in the next two or more years.¹⁶ Oregon states that this demonstrates that the state is not unreasonably delaying Pacific Connector's implementation of the pipeline, and that Pacific Connector has ample time to comply with state permit requirements.

10. Accordingly, Oregon asks that the Commission declare: (1) that the State removal-fill process, including the requirement to obtain landowner authorization, does not create a conflict where Pacific Connector has the ability to comply yet has not made a bona fide attempt to comply; (2) the State is not attempting to "thwart" construction of the pipeline; and (3) the State removal-fill permit process is not unreasonably delaying the project.

Discussion

11. The Commission's regulations provide that a party may petition for declaratory relief for the purpose of terminating a controversy or removing uncertainty.¹⁷ To the extent that Oregon asks that we remove uncertainty regarding Pacific Connector's obligation to make bona fide attempts to comply with the state removal-fill requirements, as we note above, the December 17, 2009 Order states the Commission expects Pacific Connector to acquire all necessary permits, easements, and licenses prior to construction. Further, we confirm Oregon's stated position that a rule of reason must govern both the State and local authorities' exercise of their power and an applicant's bona fide attempts to comply with State and local requirements.¹⁸

12. Oregon also asks that we declare that Pacific Connector has failed to make bona fide attempts, and that the State's exercise of its statutory responsibilities has been reasonable. However, because implementation of the Oregon statute at issue here is the subject of a pending State proceeding between the parties, and the State proceeding is not currently delaying the construction of authorized facilities, we will defer to the ongoing State proceeding so that Pacific Connector and Oregon may continue efforts to resolve their issues.¹⁹ As such efforts continue, we emphasize the Commission's longstanding

¹⁶ Petition at 13-14.

¹⁷ 18 C.F.R. § 385.207(a)(2). Whether to provide declaratory relief under this provision is discretionary. *See Camille E. Held*, 57 FERC ¶ 61,080, at 61,293 (1991).

¹⁸ *Maritimes & Northeast Pipeline*, 81 FERC ¶ 61,166 at 61,731.

¹⁹ As noted earlier, Oregon states that Pacific Connector filed suit in federal district court asserting that the State's permit program is preempted by the NGA. We have previously stated that in the event compliance with a State or local condition

(continued...)

precedent that, just as interstate pipelines are expected to acquire all necessary permits, easements, and licenses prior to construction,²⁰ State and local agencies, through application of state or local laws, may not prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.²¹

13. At this time, there are no issues with respect to the Commission's jurisdiction requiring our resolution. Given the procedural posture of this matter, including the pending contested case hearing between Oregon and Pacific Connector before the Oregon Department of State Lands, as well as the pending federal court suit, we conclude that the best course of action is to dismiss the Petition for Declaratory Order, without prejudice. Should issues within our jurisdiction arise in the future, Oregon may refile its Petition and seek appropriate relief.

The Commission orders:

The Petition for Declaratory Order filed by the State of Oregon in this proceeding on September 22, 2010, is dismissed, without prejudice.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

conflicts with a Commission certificate, parties may bring the matter before a federal court for resolution. See *Maritimes & Northeast Pipeline*, 81 FERC ¶ 61,166 at 61,731.

²⁰ *Texas Eastern Transmission*, 121 FERC ¶ 61,003 at P 12 (007) (stating that applicants are required to comply with appropriate State and local regulations where no conflict exists with federal law).

²¹ *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).