

UNITED STATES OF AMERICA 92 FERC ¶ 61,094
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
William L. Massey, Linda Breathitt,
and Curt Hébert, Jr.

Certification of New Interstate
Natural Gas Pipeline Facilities

Docket No. PL99-3-002

ORDER FURTHER CLARIFYING STATEMENT OF POLICY

(Issued July 28, 2000)

On September 15, 1999, the Commission issued a Statement of Policy (Policy Statement) regarding its policy for certificating new pipeline construction.¹ On February 9, 2000, in Docket No. PL99-3-001, the Commission issued an order clarifying the Statement of Policy.² Six parties filed requests for rehearing, reconsideration, or clarification of the February 9 order.³ This order addresses those requests.

I. Background

¹Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy, 88 FERC ¶ 61,227 (1999).

²Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 (2000).

³American Public Gas Association (APGA); FPL Energy, Inc. (FPL Energy); KeySpan Gas East Corp. and The Brooklyn Union Gas Co., (Keyspan); Pennsylvania Office of Consumer Advocate (Pennsylvania OCA); Process Gas Consumers Group, American Iron and Steel Institute, Georgia Industrial Group, American Forest and Paper Association, Alcoa, Inc., and United States Gypsum Co. (Process Gas); and Texas Eastern Transmission Corp. and Algonquin Gas Transmission Co. (Texas Eastern).

In the Policy Statement, the Commission explained the analytical steps it will use to evaluate proposals for certificating new construction. In this analysis, the threshold question applicable to an existing pipeline's proposal is whether the project can proceed without subsidies from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on its existing customers, existing pipelines in the market and their captive customers, or the economic interests of landowners and communities affected by the route of the new pipeline. Where residual adverse effects on the three interests remain after the pipeline makes an effort to minimize them, the Commission will evaluate the project by balancing the evidence of the project's public benefits against its residual adverse effects. The Policy Statement set forth in detail the considerations the Commission will apply to each of these steps. After analyzing the application based on these considerations, the Commission will approve an application for a certificate only if the public benefits outweigh any adverse effect.⁴

The Commission also stated that customers with a right of first refusal (ROFR) on pipelines with incrementally priced vintages of capacity can exercise their ROFR at their original contract rate except when the pipeline is fully subscribed and there is a competing bid for the capacity which is higher than the existing customer's maximum rate. In that case, the existing customer could be required to match the highest competing bid up to a maximum rate which could be either an incremental rate or a rolled-up rate in which costs for expansions are accumulated to yield an average expansion rate.

In the February 9 order clarifying the Policy Statement, the Commission explained that, to adjust the maximum rate applicable to shippers exercising their ROFR, the pipeline must establish a mechanism for reallocating costs between the historic and incremental rates so that all rates remain within the pipeline's cost-of-service. This mechanism can be established either through a general section 4 rate case or through the filing of pro forma tariff sheets to provide the Commission and parties with an opportunity to review the proposal prior to implementation. Once the review is complete, the pipeline can then implement the mechanism through a limited section 4 rate filing.

⁴ If there are no adverse effects on any of these interests, no balancing of benefits against adverse effects would be necessary and the Commission would proceed to a preliminary determination or a final order.

The Commission explained that when an existing customer's contract expires, and the conditions established in the Policy Statement exist (fully subscribed expansion subject to incremental rates, at least one bid above the existing rate, and a rate mechanism established in advance), the existing customer should be treated similarly to new customers for pipeline capacity, who face rates higher than the pre-expansion historic rate. When there is insufficient capacity to satisfy all the demands for service on the system, a higher matching rate will improve the efficiency and fairness of capacity allocation by allowing new shippers who place greater value on obtaining capacity than the existing shipper to better compete for the limited capacity that is available. Based on this rationale, the Commission further clarified that it would not mandate a one-time contract renewal for existing ROFR customers at their current maximum rate.

Finally, the February 9 order clarified the effective date of the Policy Statement and the process applicable to a shipper's ROFR at the termination of its existing contract. The requests for rehearing, reconsideration or clarification address the effective date and the ROFR pricing policy.

Contemporaneously with the February 9 Order Clarifying Policy Statement, the Commission issued Order No. 637, the final rule in Docket Nos. RM98-10-000 and RM98-12-000.⁵ In Order No. 637, the Commission amended Part 284 of its open access regulations to, among other things, narrow the ROFR to remove economic biases in the current rule, while still protecting captive customers' ability to resubscribe to long-term capacity. The Commission also discussed the interaction of the changes to the ROFR mechanism in Order No. 637 with the ROFR pricing policy set forth in the Policy Statement.

II. Requests for Rehearing, Reconsideration and/or Clarification

A. The Effective Date of the Policy Statement

⁵Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services, 63 FR 10156 (Feb. 25, 2000), III FERC Stats. & Regs. Preambles ¶ 31,091 (February 9, 2000).

Texas Eastern contends that the February 9 order was unresponsive to its request for clarification that the new policy applies to all certificate orders issued after September 15, 1999, regardless of the filing date of the underlying certificate applications. Texas Eastern states that its confusion arises due to the concurring opinion to the Policy Statement by three Commissioners which states that they would not apply the policy to certificate applications filed before July 29, 1998, the date on which the Commission issued its Notice of Proposed Rulemaking (NOPR) proposing, among other things, to make changes to its policies with respect to certificating pipeline construction activities.⁶

Texas Eastern contends that a certificate application's filing date should not determine whether the Policy Statement is applicable; it should apply to all certificate orders issued after September 15, 1999. To do otherwise, it argues, would result in unduly discriminatory treatment of similarly situated certificate applicants.

B. The Right of First Refusal

Because the February 9 order was issued contemporaneously with Order No. 637 and because both orders addressed the ROFR pricing policy, APGA, FPL Energy, Keyspan, and Process Gas filed their petitions in both the Order No. 637 proceeding and in this Policy Statement proceeding. Philadelphia OCA filed two separate requests for rehearing on the ROFR issue, one in this proceeding and the other, jointly with the National Association of State Utility Consumer Advocates and the Ohio Office of Consumers' Counsel, in the Order No. 637 proceeding. Its arguments in the two rehearing requests are substantially the same. These petitioners argue that the ROFR pricing policy is inconsistent with the NGA, the Policy Statement, and Commission regulations. They also ask the Commission to clarify how the policy will work in specific factual situations.

III. Discussion

The purpose of the Policy Statement is to provide the natural gas industry with guidance by stating the analytical framework the Commission will use to evaluate proposals for certificating new construction. In the Policy Statement, the Commission also explains the new pricing policy for capacity subject to the right of first refusal. A policy statement is not a rule, and generally objections to such a statement are not directly reviewable. Rather, such review must await implementation of the policy in a specific

⁶ Regulation of Short-term Natural Gas Transportation Services 63 Fed. Reg. 42,982 (August 11, 1998), FERC Stats. & Regs., Proposed Regulations 1988-1998 ¶ 32,533 (1998).

case.⁷ Therefore, the Commission declines to consider the issues raised in the requests for rehearing and reconsideration, but will consider such issues and arguments in the specific cases in which they arise.

⁷See, e.g., Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 75 FERC ¶ 61,026 (1996), citing American Gas Assoc. v. FERC, 888 F.2d 136, 151-2(D.C. Cir. 1989).

As to Texas Eastern request for clarification of the effective date of the Policy Statement, we note that Texas Eastern among others raised this issue on rehearing in Independence Pipeline Company, Docket Nos. CP97-315-000 et al.,⁸ in which the certificate applications were filed prior to issuance of the NOPR.⁸ The Commission found that it would be unfair to apply the new Policy Statement to the underlying certificate applications since the applicants had no notice that the Commission was considering a change in its certificate policy at the time they filed their applications. Thus, the issue raised by Texas Eastern in its rehearing request regarding the effective date of the Policy Statement in this proceeding was raised in a specific case, the appropriate forum for such review.

In Order No. 637-A, issued May 19, 2000, the Commission responded to the issues raised by the petitioners in this proceeding with respect to the ROFR pricing policy.⁹ Since the Commission addressed at length certain generally applicable concerns raised by the petitioners, we need not repeat our responses here. A number of the petitioner's questions about the ROFR pricing policy do not have general application but are specific to the factual circumstances on a particular pipeline system. As we stated in Order No. 637-A, such complex factual situations should be addressed as they arise in individual pipeline proceedings to implement the ROFR pricing policy.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

⁸91 FERC ¶ 61,102 (2000).

⁹Regulation of Short-term Natural Gas Transportation Services, Order No. 637-A, 65 Fed. Reg. 35,705 (June 5, 2000), III FERC Stats. & Regs. Regulations Preambles ¶ 31,099 (slip op. at 234-254)(May 19, 2000).