

109 FERC ¶ 61,350
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

GulfTerra Texas Pipeline, L.P.

Docket No. PR00-9-003

ORDER ON REHEARING

(Issued December 27, 2004)

1. On February 25, 2004, the Commission issued an Order on Rehearing and Denying Late Intervention¹ addressing GulfTerra Texas Pipeline, L.P.'s (GulfTerra) request for rehearing. The February 25, 2004 Order directed GulfTerra to file within 45 days a recalculation of rates and a plan for refunds due to shippers, as previously determined by the Commission's June 11, 2002 Order on Staff Panel.² The February 25, 2004 Order also required GulfTerra to file, within three years of the date of the order, a new application for rate approval, pursuant to section 284.123(b)(2) of the Commission's regulations.³ GulfTerra filed a Request for Rehearing regarding the triennial rate filing requirement. As discussed below, the Commission denies GulfTerra's request for rehearing.

Background

2. GulfTerra is a large intrastate pipeline performing interstate transportation services pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA).⁴ It has over 6,200 miles of pipelines running throughout Texas.⁵

¹ 106 FERC ¶ 61,184 (2004).

² 99 FERC ¶ 61,295 (2002).

³ 18 C.F.R. § 284.123(b)(2)(2004).

⁴ 15 U.S.C. §3301-3432 (2000).

⁵ 106 FERC ¶ 61,184 at P 14, n.10 *citing* Staff Panel transcript at 11.

3. GulfTerra's predecessor company, PG&E Texas Pipeline, L.P., originally filed a petition on December 20, 1999 for rate approval pursuant to section 311 of the NGPA and section 284.123(b)(2) of the Commission's regulations. It proposed for the first time to offer firm interstate transportation service, parking and lending service, and to continue its interruptible interstate transportation service. When agreement could not be reached with an intervenor, the matter was referred to a staff panel, pursuant to section 284.123(b)(2)(ii) of the Commission's regulations.⁶

4. The Commission's Order on Staff Panel required certain rate design changes, including a separate gathering rate and unbundling of this rate from the transmission rate. The order also directed GulfTerra to retain mileage-based rates, to modify its proposed discount adjustment, to use depreciation rates approved by the Texas Railroad Commission, to remove charitable contributions from its cost of service, and to base its rates on data for 1999.

5. GulfTerra filed a timely request for rehearing of the Commission's Order on Staff Panel regarding the rulings for unbundling of gathering and transmission, the depreciation rate and the refund obligation. On February 25, 2004, the Commission denied GulfTerra's request for rehearing. In addition, the Commission directed GulfTerra to file, within three years of the date of the order, a new application for rate approval, pursuant to section 284.123(b)(2) to justify its existing rates or establish a new maximum rate. On March 26, 2004, GulfTerra filed a Request for Rehearing of this filing requirement.

GulfTerra's Request for Rehearing

6. GulfTerra requests rehearing of the February 25, 2004 Order directing that it file a triennial rate re-justification, subject to a refund obligation, because it contends that this filing is not required by the NGPA or the Commission's regulations. Further, GulfTerra considers this filing requirement to be burdensome, and contrary to the NGPA's objective of easing the regulation of intrastate pipelines. As evidence of the potential regulatory burden, GulfTerra notes that the instant rate case commenced over four years ago and, consequently, it has been conducting its interstate business subject to a potential refund going back for a four year period. GulfTerra states that the possibility of this refund has created an uncertainty which hinders its ability to formulate long range business and commercial plans. GulfTerra contends that the new requirement that it file another rate case in three years only perpetuates these unreasonable burdens.

⁶ 18 C.F.R. § 284.123(b)(2)(ii)(2004).

7. GulfTerra further argues that a triennial rate filing requirement will make it less competitive with pipelines which qualify for Natural Gas Act (NGA) section 1(c) status, known as Hinshaw pipelines.⁷ Under the NGA, if all the gas a pipeline receives from out-of-state, within, or at the border of a state, is consumed at the state and the pipeline is regulated by a state commission, it is not subject to NGA jurisdiction. Without this regulatory exemption, these pipelines would be subject to Commission regulation. However, the Commission authorizes Hinshaw pipelines to transport gas that would otherwise be subject to NGA jurisdiction by obtaining a blanket certificate under section 284.224 of the Commission's regulations. That certificate authorizes the Hinshaw pipelines to transport interstate gas on the same basis that intrastate pipelines are authorized to transport gas under section 311 of the NGPA. GulfTerra points out that section 284.224(e)(i) of the Commission's regulations provides that Hinshaw pipelines performing such transportation will be subject "to the same rates and charges, terms and conditions and reporting requirements that apply to a transaction authorized for an intrastate pipeline under section 284.123." Yet, the Commission does not require Hinshaw pipelines to file new petitions for rate approval every three years. Rather, it only requires such pipelines to file triennial cost and throughput information. *Consumers Energy Co.*, 94 FERC ¶ 61,287 (2001). GulfTerra believes it is similarly situated to Hinshaw pipelines and argues that the Commission should allow it to make the same filings submitted by Hinshaw Pipelines. Alternatively, it requests that the Commission accept the annual financial disclosures it provides the Railroad Commission of Texas in place of the triennial filings.

Discussion

8. The Commission denies the request for rehearing. For the reasons discussed below, the Commission finds that the regulatory requirements the Commission imposes on intrastate and Hinshaw pipelines performing interstate service area as similar as possible, given the different statutes under which it regulates the two types of pipelines. In particular, while the three-year filing requirement the Commission imposes on the two types of pipelines are different, the Commission finds that the filing requirement imposed on intrastate pipelines is no more burdensome and, in some respects, may be less burdensome than the filing requirement imposed in Hinshaw pipelines.

9. The Commission permits both intrastate and Hinshaw pipelines to elect, under section 284.123(b)(2)(i) of the Commission's regulations, to use a rate determined by the Commission to be fair and equitable.⁸ Under that option, the pipeline must file the

⁷ 15 U.S.C. §717 (c).

⁸ Section 284.224(e)(i) of the Commission's regulations provides that Hinshaw
(continued)

proposed rates and charges with the Commission, together with “information showing the proposed rates and charges are fair and equitable.”⁹ The Commission does not require intrastate and Hinshaw pipelines to comply with the detailed requirements concerning the data that interstate pipelines must file to support a request for a rate change under sections 154.312 or 154.313 of our regulations. Upon filing the petition for approval, the intrastate or Hinshaw pipeline may immediately commence the transportation service, and charge and collect the proposed rate, subject to refund, without the five-month suspension typically imposed on interstate pipeline rate increases. Also, as in this case, when a rate filing by an intrastate or Hinshaw pipeline is contested, the Commission uses advisory, non-evidentiary proceedings to resolve the issues, rather than setting the case for an evidentiary hearing before an Administrative Law Judge, as it does for interstate pipeline rate cases. This is a form of lighter-handed regulation that allows intrastate and Hinshaw pipelines to remain regulated by the states for most of their business, and to only be regulated by the Commission with respect to specific interstate services subject to section 311 of the NGPA or the NGA.

10. The Commission has, however, found that as part of this overall, more light-handed regulation of intrastate and Hinshaw pipelines, it must review rates approved under section 284.123(b)(2) for both types of pipelines every three years in order to ensure that the rates affecting interstate services remain fair and equitable.¹⁰ As already described, the Commission engages in a less burdensome review of the rate proposals of intrastate and Hinshaw pipelines when approving rates as fair and equitable, than it uses with interstate pipelines. Moreover, the Commission does not require intrastate or Hinshaw pipelines to file annually the comprehensive financial and technical reports, statements, and schedules required of interstate pipelines by Part 260 of the Commission’s regulations. Also, rates for interstate transportation services by intrastate and Hinshaw pipelines under section 284.123(b)(2) are not subject to review by a state regulatory agency. Requiring periodic rate filings with the Commission is thus the only means by which the Commission can be assured that the intrastate and Hinshaw pipeline

pipelines will be subject “to the same rates and charges, terms and conditions and reporting requirements that apply to a transaction authorized for an intrastate pipeline under section 284.123.”

⁹ 18 C.F.R. § 284.123(b)(2)(i)(2004).

¹⁰ *See, for example, Arkansas Western Gas Company*, 56 FERC ¶ 61,407 (1991), reh’g denied, 58 FERC ¶ 61099 (1992).

rates remain fair and equitable for interstate transportation, and determine whether those rates have become unfair or inequitable because the cost-of-service data upon which the rates are based have become stale.

11. The primary difference in the Commission's regulation of intrastate and Hinshaw pipelines is the procedural vehicle through which the three-year rate review is performed. This difference arises from the difference in the statutes under which we regulate the two types of pipelines. The Commission regulates interstate service performed by intrastate pipelines under the NGPA. The Commission regulates interstate service performed by Hinshaw pipelines under the NGA. For the reasons discussed in full in *Green Canyon Pipe Line Co.*, 98 FERC ¶ 61,041 at 61,122-3 (2002), the Commission has broad conditioning authority under NGPA section 311(c), which it has consistently exercised to require intrastate pipelines to file new petitions for rate approval every three years. However, the United States Court of Appeals for the District of Columbia Circuit has held that the Commission cannot require pipelines subject to its NGA jurisdiction to make new rate filings under NGA section 4.¹¹ Consistent with that finding, the Commission in *Consumers* only imposed a triennial informational filing on the Hinshaw pipelines performing interstate service under a section 284.224 certificate.

12. As permitted by NGPA section 311(c), the Commission requires intrastate pipelines performing NGPA section 311 service to file every three years a new petition for rate approval pursuant to section 284.123(b)(2) to justify their existing rates or a changed rate for their section 311 services.¹² The Commission's regulations do not specify what supporting information these intrastate pipelines must provide in their triennial petitions. As a result, these intrastate pipelines may submit to the Commission whatever information they believe supports their requests, consistent with the lighter-handed approach the Commission takes to intrastate pipeline regulation. By contrast, we require a Hinshaw pipeline to make detailed informational filing every three years, showing cost and throughput data in the form specified in section 154.313 of the Commission's regulations so as to allow the Commission to determine whether any change to the pipeline's rate should be ordered pursuant to NGA section 5. Pursuant to section 154.313, a Hinshaw pipeline must file sixteen information schedules, including detailed information about their (1) overall cost-of-service by function, (2) rate base by

¹¹ *Public Service Commission of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989).

¹² See *Green Canyon Pipe Line*, 98 FERC ¶ 61,041 (2002); *Michigan Consolidated Gas Company*, 68 FERC ¶ 61,311 (1994); and *Tejas Gas Pipeline Company*, 66 FERC ¶ 61,253 (1994).

function, (3) accumulated deferred income taxes, (4) regulatory assets and liabilities, (5) cost of plant by functional classification, (6) accumulated provisions for depreciation, depletion and amortization and abandonment by functional classifications, (7) working capital, (8) rates of return, (9) revenues and billing determinations by rate schedule, (10) operation and maintenance expenses, and (11) various other costs and work papers. These very specific requirements as to the information Hinshaw pipelines must file contrast with the more general requirements concerning the data intrastate pipelines must file to support their petitions for rate approval.

13. While the three-year filing requirement the Commission imposes on intrastate and Hinshaw pipelines are different, the Commission finds that the requirements imposed on intrastate pipelines are no more burdensome than those imposed on Hinshaw pipelines. The primary burden GulfTerra complains of is the fact that the proposed rates in the petition for rate approval it must file would be subject to refund. However, the rates filed by GulfTerra or any other intrastate pipeline in its triennial rate filing would only be subject to refund to the extent the pipeline proposed to increase its rates. There is no requirement that GulfTerra propose a rate increase in its triennial rate filing. It could propose to leave its rates unchanged, or to decrease its rates. In that event, there would be no refund obligation. Similarly, while the Commission only requires Hinshaw pipelines to file cost and revenue data in their triennial filings, if the Hinshaw pipeline desired to increase its rates it would have to file an actual petition for rate approval. In that situation, its proposed rate increase would be subject to refund just like an intrastate pipeline. In short, intrastate and Hinshaw pipelines are each subject to refund obligations in the identical circumstances --- if they seek a rate increase in their triennial filings. For these reasons, the Commission concludes that the different procedural vehicles the Commission uses to implement the three-year rate review requirement on these two types of pipelines does not cause any competitive disadvantage for the intrastate pipelines vis-a-vis the Hinshaw pipelines.

The Commission orders:

GulfTerra's request for rehearing is denied as discussed herein.

By the Commission. Commissioner Brownell dissenting with a separate statement.

(S E A L)

Linda Mitry,
Deputy Secretary.

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GulfTerra Texas Pipeline Company, L.P.

Docket No. PR00-9-003

(Issued December 27, 2004)

BROWNELL, Commissioner, dissenting:

The majority denies rehearing and continues the practice of imposing a triennial rate filing requirement with attendant refund obligation on intrastate pipelines providing Section 311 services. I oppose such action for the reasons set forth in Green Canyon Pipe Line Company, L.P., 98 FERC ¶ 61,041 (2001) and GulfTerra Texas Pipeline Company, L.P., 106 FERC ¶ 61,184 (2004). I do not believe that the majority has adequately responded to the arguments raised by GulfTerra in its petition for rehearing.

GulfTerra asserts that the filing requirement and potential refund obligation create rate uncertainty that makes it extremely difficult for GulfTerra to formulate long range business and commercial plans. Furthermore, GulfTerra argues that the rate filing requirement is unduly discriminatory because the other entities providing essentially the same type of services, Hinshaw pipelines and interstate pipelines, do not have such a burden.

The majority responds that the regulatory requirements imposed on Section 311 intrastate pipelines and Hinshaw pipelines are “as similar as possible”. Further, the majority opines that the filing requirement imposed on Section 311 pipelines “in some respects, may be less burdensome than the filing requirement imposed on Hinshaw pipelines”. The majority explains the lesser burden as follows: Hinshaw pipelines must report specific cost and revenue data to allow the Commission to act under section 5, but the Commission does not specify the information that must be filed by the intrastate pipeline because “these intrastate pipelines may submit to the Commission whatever information they believe supports their requests.” Lastly, the majority notes that rates only become subject to refund if the intrastate pipeline seeks a rate increase and concludes that the different “procedural vehicles” cause no competitive disadvantage.

The response is unconvincing. The majority responds that the different procedural vehicles are necessary because we regulate the two types of pipelines under different enabling statutes. However, the Commission did impose a rate filing requirement on Hinshaw pipelines and changed its policy only when the United States Court of Appeals for the District of Columbia Circuit determined that such a condition

was not permissible under the NGA.¹³ GulfTerra cites Arkansas Western Gas Company, 56 FERC ¶61,407 at 62,476-7 (1991), *reh'g denied*, 58 FERC ¶61,099 (1992) in which the Commission stated "... Congress intended that regulation of rates for intrastate transportation under the NGPA be less burdensome than regulation of rates for intrastate transportation under the NGA." GulfTerra also cites *AGD v FERC*, 824 F.2d 981, 1039-40 (D.C. Cir. 1987) where the DC Court of Appeals stated that "... §311 shall not trigger the Commission's NGA jurisdiction. This seems an unequivocal expression of intent that NGPA regulation should not replicate the burdens of the NGA." It seems odd that we impose a rate filing requirement under the NGPA that we can not impose under the NGA and nothing in the NGPA or our regulations implementing the NGPA requires such a condition.

Moreover, there is a fundamental legal difference between the procedural vehicles. The Hinshaw pipeline files a cost and revenue study and the Commission has a section 5 burden of proof to change the rates. The Commission can also use the information reported by interstate pipelines pursuant to Part 260 of the regulations to take section 5 action. In contrast, the filing requirement imposed on intrastate pipelines shifts the burden of proof from the Commission to the applicant, a section 4 burden. The Commission has placed intrastate pipelines in a different, more burdensome legal posture than Hinshaw pipelines or interstate pipelines.

For these reasons, I respectfully dissent.

Nora Mead Brownell
Commissioner

¹³ *Public Service Commission of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989)