134 FERC ¶ 61,072
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.

National Energy & Trade, L.P. Docket No. IN11-3-000
Mission Valley Pipeline Company

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued January 31, 2011)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement), National Energy & Trade, L.P., (NET), and Mission Valley Pipeline Company (Mission Valley). This order is in the public interest because it resolves the investigation of NET and Mission Valley regarding the Commission's open access transportation program, including the competitive bidding requirements for long-term, discounted rate capacity releases, and the shipper-must-have-title requirement. NET has agreed to pay a civil penalty of $500,000.[1]

Background

2. NET is a privately-held partnership based in Houston, Texas, that buys, sells, and schedules natural gas and natural gas transportation capacity on a number of pipelines on a daily, monthly, and longer-term basis. NET's corporate parent is NET Holdings Management, LLC, which owns five intrastate pipelines, one of which, Mission Valley, was involved in certain capacity releases. NET and Mission Valley are affiliates and have approximately 40 employees.

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[1] Settlement negotiations commenced before the Revised Policy Statement on Penalty Guidelines issued. Those guidelines are therefore not applicable to the settlement of NET's and Mission Valley's violations. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 at P 1, n.2 (2010).

3. Enforcement's investigation of NET and Mission Valley arose during the course of another investigation into apparent "flipping" transactions.[2] As a result of that investigation, Enforcement discovered apparent flipping transactions involving NET and Mission Valley. Enforcement then investigated NET's and Mission Valley's capacity release activities during the period from August 2005 to May 2008.

4. Soon after the commencement of Enforcement's investigation, NET and Mission Valley engaged outside counsel and a consultant, both of whom prepared reports analyzing the conduct under investigation. NET voluntarily disclosed that Mission Valley was involved in shipper-must-have-title violations related to the transactions under investigation.

Violations

A. Circumvention of the Competitive Bidding Requirement for Released Capacity

5. Section 284.8(h) of the Commission's regulations requires that a shipper releasing firm capacity for a term longer than 31 days and at a price less than the maximum tariff rate must post the capacity for competitive bidding on the pipeline's Electronic Bulletin Board.[3] The regulations also provide that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2), a discounted, short-term release may not

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[2] Flipping is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2010). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the posting and bidding requirements, that creates a long-term, noncompetitive discounted rate release. *See, e.g.*, *In re Puget Sound Energy, Inc.*, 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Corporation*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Company*, 121 FERC ¶ 61,088 (2007).

[3] 18 C.F.R. § 284.8(h)(2) (2008). The Commission's regulations were subsequently amended to exempt certain releases from competitive bidding, although non-exempt releases still must be competitively bid. *Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 (2008).

be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

6. The prior posting requirement for long-term, discounted rate releases promotes natural gas market transparency by providing notice to all interested shippers of the availability of released capacity. The competitive bidding requirement, in turn, ensures that the released capacity will go to the shipper who values it most. Together, the posting and bidding requirements are integral components of the Commission's pipeline open access program, and promote transparency, market efficiency, and the elimination of undue preference and discrimination in the natural gas transportation market.

7. Between November 1, 2006, and March 31, 2007, NET released 4.2 Bcf of discounted rate capacity to two affiliated replacement shippers on an alternating monthly basis without posting the capacity releases for bidding. The replacement shippers were not affiliated with NET.

8. Enforcement concluded that NET's releases to the affiliated replacement shippers were flipping transactions that violated the Commission's posting and bidding requirements at 18 C.F.R. § 284.8. Enforcement also concluded that NET's releases caused harm to natural gas transportation markets because they impeded transparency and denied other market participants an opportunity to bid for discounted, long-term releases of capacity that may not have otherwise been available from the pipeline or other releasing shippers. Enforcement also determined that NET did not earn unjust profits as a result of the flipping transactions that are the subject of this Agreement.

B. Shipper-Must-Have-Title Requirement Violations

9. A central requirement of the Commission's open access transportation program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. The shipper-must-have-title requirement is reflected in the FERC gas tariffs of interstate pipelines providing open access transportation services. Although the specific language of each interstate pipeline's tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline.[4] Without the shipper-must-have-title

[4] *Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

requirement, it is unlikely that shippers would use capacity release, since capacity holders could transport gas over the pipeline for another entity.

10. Mission Valley violated the shipper-must-have-title requirement periodically between August 2005 and March 2008 by transporting 17.6 Bcf of NET-titled gas on capacity held by Mission Valley. Mission Valley could have avoided these violations by releasing its capacity to NET consistent with the Commission's regulations. Such a release would have informed market participants of Mission Valley's and NET's pipeline transportation activities. Violations of the shipper-must-have-title requirement interfere with the Commission's oversight of natural gas markets and with the Commission's goal of market transparency. Enforcement determined that Mission Valley did not earn unjust profits as a result of the shipper-must-have-title violations that are the subject of this Agreement.

Stipulation and Consent Agreement

11. Enforcement, NET, and Mission Valley resolved Enforcement's investigation by means of the attached Agreement. Mission Valley admits that it committed the shipper-must-have-title violations. NET neither admits nor denies Enforcement's conclusion that it engaged in flipping violations.

12. NET agrees to pay a $500,000 civil penalty to the United States Treasury.[5] The first payment of $250,000 is due within ten days after the issuance of this order accepting and approving the Agreement. The remaining $250,000 is due six months after the issuance of this order accepting and approving the Agreement.

13. NET and Mission Valley also must submit semi-annual compliance monitoring reports to Enforcement for a period of one year, with the option of a second year at staff's discretion. Each compliance report shall advise of any violations of 18 C.F.R. § 284.8 or the shipper-must-have-title requirement and describe any new and existing compliance program measures, including training, and alert Enforcement to any additional violations of open access transportation requirements that may occur.

Determination of the Appropriate Civil Penalty

14. Pursuant to section 22(a) of the Natural Gas Act (NGA), the Commission may assess a civil penalty up to $1 million per day per violation for as long as the

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[5] Although the payment is due and payable by NET, the payment is settlement of the violations described herein by both NET and Mission Valley.

violation continues.[6] In approving the Agreement and the $500,000 civil penalty, Enforcement considered the factors set forth in section 22(c) of the NGA[7] and the Revised Policy Statement on Enforcement.[8] We conclude that the penalty determination in the instant matter is a fair and equitable resolution of this matter and is in the public interest, as it reflects the nature and scope of Enforcement's conclusions concerning NET's and Mission Valley's transactions. The penalty also reflects that NET did not self-report the flipping transactions, but that Mission Valley subsequently voluntarily disclosed its shipper-must-have-title violations shortly after Enforcement commenced its investigation, and that NET's and Mission Valley's cooperation with Enforcement's investigation was exemplary.

15. We conclude that the civil penalty and compliance monitoring reports specified in the Agreement are fair and equitable, and in the public interest.

<u>The Commission orders</u>:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[6] 15 U.S.C. § 717t-1(a) (2006) (added by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B), 119 Stat. 594, 691 (2005)) (authorizing the Commission to impose civil penalties "of not more than $1,000,000 per day per violation for as long as the violation continues").

[7] 15 U.S.C. § 717t-1(c) (2006).

[8] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 54-71 (2008). *See* note 1 *supra*.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Energy & Trade, LP	)	Docket No. IN11-3-000
Mission Valley Pipeline Company, LP	)	

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and National Energy & Trade, LP (NET) and Mission Valley Pipeline Company (Mission Valley) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2010), into whether NET and Mission Valley violated the Commission's open access transportation program, including the competitive bidding requirements for long-term, discounted rate capacity releases, and the shipper-must-have-title requirement.

II. STIPULATED FACTS

Enforcement, NET, and Mission Valley hereby stipulate and agree to the following facts:

A. Background

1. NET is a privately-held partnership based in Houston, Texas, that buys, sells, and schedules natural gas and natural gas transportation capacity on a number of pipelines on a daily, monthly, and longer-term basis. NET's corporate parent is NET Holdings Management, LLC, which owns five intrastate pipelines, one of which, Mission Valley, was involved in certain capacity releases. NET and Mission Valley are affiliates and have approximately 40 employees.

2. Enforcement's investigation of NET and Mission Valley arose from an earlier investigation into Constellation NewEnergy, Gas Division (Constellation),[1]

[1] *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008).

which self-reported that it had engaged in "flipping" transactions as a replacement shipper.[2] As a result of that investigation, Enforcement discovered apparent flipping transactions involving NET and Mission Valley. Enforcement then investigated NET's and Mission Valley's capacity release activities during the period from August 2005 to May 2008.

3. Soon after the commencement of Enforcement's investigation, NET and Mission Valley engaged outside counsel and a consultant, both of which prepared reports analyzing the conduct under investigation. NET voluntarily disclosed that Mission Valley was involved in shipper-must-have-title violations related to the transactions under investigation.

B. Summary of Transactions

1. Flipping Transactions

4. The Commission's regulations at the relevant time required that a shipper releasing any firm capacity on a pipeline for a term longer than 31 days and at a price less than the maximum tariff rate must post the capacity for competitive bidding on the pipeline's Electronic Bulletin Board.[3] The regulations also provided that a discounted release for 31 days or less is exempt from the competitive bidding requirement, but must be posted for informational purposes within 48 hours of the release. Under 18 C.F.R. § 284.8(h)(2) at the relevant time, a discounted, short-term release may not be rolled-over, extended, or in any way continued without complying with the posting and bidding requirements.

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[2] Flipping is a term that describes transactions that avoid the posting and bidding requirements for discounted rate firm capacity at 18 C.F.R. § 284.8 (2010). Flipping is typically a series of short-term releases of discounted rate capacity to two or more affiliated replacement shippers on an alternating monthly basis, without complying with the posting and bidding requirements, that creates a long-term, noncompetitive discounted rate release. *See, e.g.*, *In re Puget Sound Energy, Inc.*, 127 FERC ¶ 61,070 (2009); *In re Anadarko Petroleum Corporation*, 127 FERC ¶ 61,069 (2009); *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Company*, 121 FERC ¶ 61,088 (2007).

[3] 18 C.F.R. § 284.8(h)(2) (2008). The Commission's regulations were subsequently amended to exempt certain releases relating to qualifying asset management arrangements from the competitive bidding requirement. *Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 (2008).

5. Between November 1, 2006, and March 31, 2007, NET released 4.2 Bcf of discounted rate capacity to two affiliated replacement shippers on an alternating monthly basis without posting the capacity releases for bidding. The replacement shippers were not affiliated with NET.

6. Enforcement concluded that NET's releases to the affiliated replacement shippers were flipping transactions that violated the Commission's posting and bidding requirements at 18 C.F.R. § 284.8. Enforcement also concluded that NET's releases caused harm to natural gas transportation markets because they impeded transparency and denied other market participants an opportunity to bid for discounted, long-term releases of capacity that may not have otherwise been available from the pipeline or other releasing shippers.

7. Enforcement determined that NET did not earn unjust profits as a result of the flipping transactions that are the subject of this Agreement.

2. Shipper-Must-Have-Title Requirement

8. A central requirement of the Commission's open access transportation program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of each interstate pipeline's tariff varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline.[4]

9. Soon after the commencement of Enforcement's investigation, NET informed Enforcement that Mission Valley was involved in shipper-must-have-title violations as a result of shipping NET-titled gas on Mission Valley capacity periodically from August 2005 through March 2008. Mission Valley shipped an aggregate of 17.6 Bcf of gas in these transactions.

10. Mission Valley's transportation of NET-titled gas using Mission Valley's transportation capacity violated the Commission's shipper-must-have-title requirement. Mission Valley could have avoided these violations by releasing its capacity to NET consistent with the Commission's regulations. Such a release would have informed market participants of Mission Valley's and NET's activities

[4] *Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

on the pipelines. Violations of the shipper-must-have-title requirement interfere with the Commission's oversight of natural gas markets and with the Commission's goal of market transparency.

11. Enforcement determined that Mission Valley did not earn unjust profits as a result of the shipper-must-have-title violations that are the subject of this Agreement.

C. <u>Self-Corrective Action</u>

12. NET and Mission Valley ceased the transactions that are the subject of this Agreement prior to Enforcement's investigation into these matters. NET discontinued its flipping transactions in October 2007, shortly after learning of the Commission's settlement in *BP Energy*.[5] Mission Valley ceased its shipper-must-have-title violations in March 2008.

13. Despite NET's and Mission Valley's cessation of their transactions and violations prior to Enforcement's investigation, Enforcement found that NET and Mission Valley did not focus on compliance with the Commission's open access transportation program. As a result, NET's and Mission Valley's operational personnel lacked sufficient familiarity with the Commission's requirements for the release or use of interstate pipeline capacity. After Enforcement initiated its investigation, NET engaged outside consultants and legal counsel to assist NET and Mission Valley with a comprehensive review of their interstate pipeline and gas storage and transportation transactions. This review resulted in NET voluntarily disclosing Mission Valley's violations of the shipper-must-have-title requirement. In addition, NET and Mission Valley have amended or terminated all contracts associated with violations, have provided training on the Commission's open access transportation requirements to their employees, and have significantly increased their compliance measures by formulating and implementing an enhanced regulatory compliance program. NET's and Mission Valley's cooperation with Enforcement's investigation was exemplary.

III. <u>REMEDIES AND SANCTIONS</u>

14. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation, NET and Mission Valley agree with the facts as stipulated. Mission Valley agrees that its transportation of NET-titled gas using Mission Valley's transportation capacity violated the Commission's shipper-must-

[5] *In re BP Energy Company*, 121 FERC ¶ 61,088 (2007).

have-title requirement. NET, however, neither admits nor denies Enforcement's conclusion that NET's release of discounted rate capacity in alternating months to affiliated replacement shippers between November 1, 2006, and March 31, 2007, violated 18 C.F.R. § 284.8. Nonetheless, in view of the costs and risks of litigation, and in the interest of resolving these matters without further proceedings, NET and Mission Valley agree to undertake the obligations set forth in this Agreement.

15. Neither the stipulated facts nor the existence of this Agreement constitute an admission by NET or Mission Valley that their conduct unfairly or inappropriately impacted any third party.

A. Civil Penalty

16. NET shall pay a civil penalty of $500,000 to the United States Treasury.[6] NET shall pay $250,000 by wire transfer, within ten days after the Effective Date of this Agreement, as defined below. NET shall pay the remaining $250,000 by wire transfer, within six months after the Effective Date of this Agreement, as defined below.

B. Compliance Monitoring

17. NET and Mission Valley shall make semi-annual compliance monitoring reports to Enforcement for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than ten days after the end of the second calendar quarter after the quarter in which the Effective Date of this Agreement falls. The second report shall be submitted six months later. Each compliance report must: (1) advise Enforcement of any violations by NET or Mission Valley of the requirements of 18 C.F.R. § 284.8, or the shipper-must-have-title requirement; (2) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period, including a description of the training provided to all relevant personnel concerning the Commission's capacity release policies, and a list of the personnel that have received such training and when the training took place; and (3) include an affidavit executed by an officer of NET and Mission Valley that the compliance reports are true and accurate. Upon request by Enforcement, NET and Mission Valley must provide to Enforcement documentation to support its reports. After the receipt of the second semi-annual report, Enforcement may, at its sole

[6] Although the payment is due and payable by NET, the payment is settlement of the violations described herein by both NET and Mission Valley.

discretion, require NET and Mission Valley to submit semi-annual reports for one additional year.

IV. TERMS

18. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. After such order is issued, this Agreement shall resolve the matters specifically addressed herein as to NET, Mission Valley, its affiliates, agents, officers, directors and employees, both past and present, and any successor in interest to NET and Mission Valley.

19. Commission approval of this Agreement in its entirety and without material modification shall release NET and Mission Valley and forever bar the Commission from holding NET and Mission Valley, and their affiliates, agents, officers, directors and employees, both past and present, liable for any and all administrative or civil claims arising out of, related to, or connected with the matters subject to the investigation addressed in this Agreement.

20. Failure to make a timely civil penalty payment, or to comply with the compliance reporting requirements agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Natural Gas Act (NGA), and may subject NET and Mission Valley to additional action under the enforcement and penalty provisions of the NGA.

21. If NET does not make the civil penalty payments at the time agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations[7] from the date those payments are due, in addition to the penalty specified above.

22. The Agreement binds NET and Mission Valley, and their agents, successors, and assigns. The Agreement does not create any additional or independent obligations on NET or Mission Valley, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in Section III of this Agreement.

23. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or

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[7] 18 C.F.R. § 154.501(d) (2010).

representative of Enforcement, NET, or Mission Valley has been made to induce the signatories or any other party to enter into the Agreement.

24. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement, NET, nor Mission Valley shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by the parties.

25. In connection with the payment of the civil penalty provided for herein, NET and Mission Valley agree that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 22(a) of the NGA.[8] NET and Mission Valley waive findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

26. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.

27. The undersigned representative of NET and Mission Valley affirms that he has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his knowledge, information and belief, and that he understands that the Agreement is entered into by Enforcement in express reliance on those representations.

28. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:

[8] 15 U.S.C. § 717t-1(a) (2006).

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Norman C. Bay
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date

1/7/10

Jerry Dearing
Vice President, NET General Partners, LLC,
on behalf of National Energy & Trade, L.P.
and Mission Valley Pipeline Company

Date

Document Content(s)

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