

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Association of Gas Consumers

v.

Docket No. RP01-223-001

All Sellers of Natural Gas In
The United States of America
In Interstate Commerce

ORDER DENYING REHEARING

(Issued January 29, 2004)

1. On December 4, 2002, the National Association of Gas Consumers (NAGC) filed a request for rehearing of the Commission's order in National Association of Gas Consumers v. All Sellers of Natural Gas In The United States of America In Interstate Commerce.¹ The Commission denies the request for rehearing for the reasons discussed below. This order benefits the public because it explains the scope of the Commission's jurisdiction over natural gas sales and the actions it has taken to maintain just and reasonable prices for such sales.

Background

2. On February 1, 2001, NAGC² filed a complaint against all sellers in the interstate market for natural gas in the United States. NAGC asked the Commission to issue an

¹ 101 FERC ¶ 61,161 (2002) (November 2002 Order).

² NAGC's members are municipal natural gas systems located throughout the United States. In addition, NAGC's members include a number of State Joint Action Agencies, such as the Kansas Municipal Utilities, Kansas Municipal Gas Agency, the Intermountain Gas Agency, and the Municipal Gas Commission of Missouri.

immediate order setting a benchmark price for natural gas sales in interstate commerce at \$2.74 per million British thermal units (MMBtu)³ for a three-year period beginning January 1, 2001. NAGC requested the Commission to rule that any sales above \$2.74 per MMBtu would be subject to complaints filed at the Commission for refunds of any amounts found to be unjust and unreasonable. In the alternative, NAGC requested that the Commission set the level of the natural gas prices for investigation and hearing as unjust and unreasonable and, upon the conclusion thereof, order that sellers refund excessive prices to consumers.

3. On November 4, 2002, the Commission dismissed NAGC's complaint, along with complaints seeking the regulation of natural gas prices at the California border. The Commission explained that the complaints (particularly those seeking action with respect to gas sold at the California border) had been overtaken by events, and, furthermore, that under the Natural Gas Wellhead Decontrol Act of 1989 (Wellhead Decontrol Act)⁴ and the Commission's regulations implementing that Act,⁵ natural gas prices have been effectively decontrolled.⁶ The Commission stated that the disparity between the price of natural gas sold at the California border and the price of gas sold elsewhere had ended.

Discussion

4. According to NAGC, the Commission erred in concluding that the level of natural gas prices in the United States since January 1, 2001 and projected through December 31, 2003 did not require further action by the Commission.

5. NAGC also argues that the Commission erred in ruling that the Wellhead Decontrol Act precludes it from issuing any order under Sections 4 and 5 of the Natural

³ NAGC uses a price projected by a model that is "an average production weighted U.S. wellhead gas price through 2010 of approximately \$2.74 [per MMBtu]." See National Petroleum Council, Meeting the Challenges of the Nation's Growing Natural Gas Demand at 20 (December 15, 1999), available at <<www.npc.org>> (NPC Report).

⁴ Pub. L. No. 101-60, 103 Stat. 157 (1989).

⁵ 18 C.F.R. § 284.402 (2003).

⁶ The November 2002 Order noted that the Commission's jurisdiction is limited only to sales for resale of domestically produced gas by interstate and intrastate pipelines, local distribution companies and affiliates of any of the foregoing.

Gas Act (NGA)⁷ to order refunds of unjust and unreasonable natural gas prices adversely affecting interstate commerce in the United States.

6. NAGC requests a \$2.74 per MMBtu benchmark price on gas sales nationwide, which raises the issue of the Commission's jurisdiction over the gas commodity portion of natural gas at state borders. In fact, the Commission's jurisdiction over natural gas sales is quite limited.

7. The NGA gives the Commission jurisdiction to regulate sales for resale in interstate commerce.⁸ However, the Commission's NGA jurisdiction to regulate the prices charged by sellers of natural gas has been substantially narrowed by the Natural Gas Policy Act of 1978 (NGPA)⁹ and the Wellhead Decontrol Act. The Wellhead Decontrol Act removed "first sales" as defined in the NGPA, from the Commission's "sale for resale" jurisdiction.¹⁰ NGPA Section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution

⁷ 15 U.S.C. §§ 717c and 717d (2000).

⁸ Section 1(b) of the NGA, 15 U.S.C. § 717(1)(a), states that:

The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

⁹ 15 USC §§ 3301 et seq. (2000).

¹⁰ Section 601(b)(1)(A) of the NGPA, 15 U.S.C. § 3431(b)(1)(A), as amended by the Wellhead Decontrol Act states, "Except as otherwise provided in this subsection, for purposes of Sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable."

company (LDC).¹¹ In addition, under Section 3(b) of the NGA, all gas imported from countries with free trade agreements, such as Canada and Mexico, have first sale status even when sold by pipelines, LDCs or affiliates. However, NGPA Section 2(21)(B) expressly excludes from first sale status any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own production. Therefore, the Commission's jurisdiction under the NGA includes all sales for resale by interstate and intrastate pipelines and LDCs and their affiliates, other than their sales of their own production.¹² But the Commission does not have commodity jurisdiction over pipelines, LDCs or their affiliates' natural gas sales to end users (direct sales or retail sales). Consequently, the Commission cannot impose a cap on gas sales except to the extent they are sales for resale by pipelines, LDCs, or their affiliates.

¹¹ NGPA Section 2(21)(A), 15 U.S.C. §3301(21)(A), states:

General Rule.- The term "first sale" means any sale of any volume of natural gas- (i) to any interstate pipeline or intrastate pipeline; (ii) to any local distribution company; (iii) to any person for use by such person; (iv) which precedes any sale described in clauses (i),(ii), (iii); and (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act.

¹² The Commission's jurisdiction also includes a category of sales by entities that are not affiliated with any pipeline or LDC. Such entities are those making sales for resale of gas that was previously purchased and sold by an interstate or intrastate pipeline or LDC or retail customer.

8. Furthermore, the blanket sales certificates¹³ issued pursuant to Section 284.402 of the Commission's regulations,¹⁴ by their own terms, do not give the Commission any more jurisdiction over the sale of gas than the statutes discussed above.

9. NAGC argues that the Commission's jurisdiction is not so limited that price caps on natural gas sold by interstate pipelines, LDCs and their affiliates would not be warranted. NAGC, however, has failed to provide a reasoned basis for instituting the price of \$2.74 per MMBtu for all natural gas sales nationwide. NAGC has failed to justify how a single price would compensate and take into account factors that affect the price of gas, such as costs of exploration, development, production, different markets and differing levels of investment in gas supply infrastructure. NAGC has failed to show that imposing a price cap over a portion of the natural gas market will not disrupt the competitive natural gas market, and will not place an undue burden or a competitive disadvantage on jurisdictional sellers. Furthermore, the NPC report that NAGC uses to establish the benchmark of \$2.74 per MMBtu incorporates many assumptions into its model to derive a projected price for natural gas. The NPC warned that:

the price output of the model is not to be used as a forecast, but rather as an indicator of the relative influence of the critical factors and assumptions. Seasonal factors that affect prices, such as abnormal weather and demand fluctuations, have not been taken into account. The market will ultimately determine the price of natural gas.¹⁵

¹³ These certificates were granted in two final rules issued by the Commission: Order No. 636 and Order No. 547. See Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs. ¶ 30,939 (1992), order on reh'g, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (1992), order on reh'g, Order No. 636-B, 61 FERC ¶ 61,272 (1992), aff'd in part, rev'd in part, *United Distribution. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 137 L. Ed. 2d 845, 117 S. Ct. 1723, 117 S. Ct. 1724 (1997), on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997), order on reh'g, Order No. 636-D, 83 FERC ¶ 61,210 (1998); and Order No. 547, Regulations Governing Blanket Marketer Sales Certificates, FERC Stats. & Regs. ¶ 30,957 (1992), order on reh'g and clarification, 62 FERC ¶ 61,239 (1993).

¹⁴ 18 C.F.R. § 284.402.

¹⁵ NPC Report at 23.

NAGC has failed to show that its suggested price is a just and reasonable price, as required under Section 5 of the NGA, 15 U.S.C. § 717d.

10. In any event, the Commission has taken several steps, which include investigations into allegations of natural gas market manipulation,¹⁶ to restore confidence in the nation's energy markets. The Commission addressed the process by which price indices influence and reflect the formation of wholesale prices for natural gas and electricity.¹⁷ The Commission staff drafted discussion papers, held technical conferences, and reviewed numerous comments on the issue of price formation with respect to natural gas. On July 24, 2003, the Commission issued the Policy Statement on Natural Gas and Electric Price Indices,¹⁸ which provided guidance on desirable characteristics of a good price index and the terms under which companies or individuals should report prices to index developers.

11. The Commission also amended its regulations regarding the blanket certificates for unbundled gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of gas at negotiated rates in interstate commerce to require that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales.¹⁹ The purpose of the code of conduct is to ensure the integrity of the gas sales market that remains subject to the Commission's jurisdiction. The Commission explicitly adopted in Order No. 644 the standards set forth in the policy statement on price indices.²⁰ The Commission also stated that any violation of Order No. 644 may result in disgorgement of unjust profits, suspension or revocation of a pipeline's or a marketer's blanket certificate or other appropriate non-monetary remedies.²¹

12. In addition, the Commission's Office of Market Oversight and Investigations (OMOI) actively monitors natural gas prices and underlying supply-demand fundamentals for potential pricing anomalies. When gas prices spiked in February of

¹⁶ See Final Report on Price Manipulation in Western Markets, Docket No. PA02-000 (March 2003).

¹⁷ See Natural Gas Price Formation, Docket No. AD03-7-000 (2003).

¹⁸ 104 FERC ¶ 61,121 (2003).

¹⁹ See Amendments to Blanket Sales Certificates, Order No. 644, 105 FERC ¶ 61,217 (2003), 68 Fed. Reg. 66,323 (November 26, 2003).

²⁰ Id. at P 71.

²¹ Id. at P 95.

2003, OMOI mounted a detailed investigation of gas trading behavior and reasons for the high prices. OMOI is currently working with the Commodities Futures Trading Commission to determine the cause of current gas price increases. The Commission believes that these actions are sufficient at this time to maintain just and reasonable market-based prices. The Commission is continuing to monitor natural gas prices, however, and will take further action as warranted.

13. But NAGC's complaint does not provide a basis for any further action. Section 385.206 of the Commission's regulations requires the complaining party to, among other things, clearly identify the action or inaction which is alleged to violate the applicable statutory standards or regulatory requirements and explain how the action or inaction violates applicable statutory standards or regulatory requirements.²² NAGC's argument appears to be that market-driven prices for natural gas are unjust and unreasonable under the NGA, but without any statement as to what action or inaction causes the prices to be unjust and unreasonable. NAGC also provides no explanation of how the sales of natural gas violate the NGA, even for the limited category of gas sales over which the Commission has jurisdiction. While NAGC has sought specific relief, it has failed to provide the basis for the relief.

14. For the reasons discussed above, we deny NAGC's request for rehearing.

The Commission orders:

NAGC's request for rehearing is hereby denied.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

²² See 18 C.F.R. § 385.206.