

106 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

B-R Pipeline Company

Docket No. CP01-418-001

ORDER ON REHEARING

(Issued February 18, 2004)

1. On October 3, 2003, the Commission issued B-R Pipeline Company (B-R) a blanket certificate pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 284 of the Commission's regulations subject to certain conditions.¹ For the reasons discussed herein, this order dismisses in part and denies in part the request filed by B-R on November 3, 2003, for rehearing of the October 3 Order.

BACKGROUND

2. The Kelso-Beaver Pipeline is a 17-mile long pipeline that crosses the border between Oregon and Washington. The pipeline's capacity is 200,913 Dth per day. It was constructed by Portland General Electric Company (Portland General) and KB Pipeline Company (KB) pursuant to a certificate issued by the Commission on October 24, 1991.²

3. On April 13, 2000, the Commission granted B-R a certificate to acquire an interest in the Kelso-Beaver Pipeline from Portland General.³ B-R's 10.5% ownership interest

¹ B-R Pipeline Company, 105 FERC ¶ 61,025 (2003).

² 57 FERC ¶ 61,095 (1991).

³ 89 FERC & 61,312 (1999) (preliminary determination on non-environmental issues), and 91 FERC & 61,042 (2000) (order granting certificate and abandonment authority and denying rehearing of preliminary determination order). Of its original 90% interest in the Kelso-Beaver Pipeline, Portland General retained a 79.5% interest in the pipeline.

represents capacity of 21,095 Dth per day. B-R currently uses its capacity in the pipeline to transport gas for the manufacturing plant of its affiliate, US Gypsum, in Rainier, Washington, under case-specific certificate authority pursuant to Part 157 of the Commission's regulations.⁴

4. While the Commission granted B-R case-specific certificate authority to transport US Gypsum's gas, the Commission directed both B-R and Portland General to apply within 30 days for Part 284 open-access blanket transportation certificates if either received additional requests for firm or interruptible transportation service on the Kelso-Beaver Pipeline or if US Gypsum requested that its service be converted to Part 284 service.⁵ Portland General received a request for service, triggering the Commission's condition that both Portland General and B-R Pipeline file applications for Part 284 blanket transportation certificates to provide open access service.⁶

5. The Commission's October 3 Order in this proceeding issued B-R a Part 284 blanket certificate to provide open access firm and interruptible transportation. The order granted B-R's request for a waiver of the requirement that it maintain an interactive website, but denied B-R's request for waivers of the Commission's open access reporting requirements and marketing affiliate rules. The October 3 Order approved certain elements of B-R's proposed cost of service and modified others. In particular, the Commission required the elimination from rate base of a purchase premium paid to Portland General for B-R's 10.5% tenancy in common share of the Kelso Beaver Pipeline.

6. B-R requests rehearing of the October 3 Order's denial of B-R's requests for (1) waiver of the Commission's regulations governing relations with marketing affiliates and (2) inclusion of its acquisition premium in rate base.

⁴ KB uses its capacity in the pipeline to transport gas under case-specific Part 157 certificate authority for its affiliate, Northwest Natural Gas Company, a Hinshaw in Oregon. Portland General uses its capacity in the pipeline to transport gas for use as fuel in its electric generation plant.

⁵ 89 FERC & 61,312 at p. 61,954 (preliminary determination); 91 FERC ¶ 61,042 at p. 61,153 (certificate order).

⁶ Summit Power NW, LLC, subsequently withdrew its request for transportation service because its plans to construct an electric generation facility have been postponed indefinitely. See 105 FERC ¶ 61,025 at P 8.

REQUEST FOR WAIVER OF MARKETING AFFILIATE RULES

7. On rehearing, B-R renews its request for waiver of the Commission's regulations governing Part 284 pipelines' relations with their marketing or brokering affiliates, including the standards of conduct in section 161.3 and section 250.16. These provisions require Part 284 pipelines that conduct transportation transactions with marketing or brokering affiliates to maintain tariff provisions to resolve complaints by shippers and potential shippers, to maintain logs showing certain information for all transportation contracts, and to make available transportation discount information.

8. In the October 3 Order, the Commission found that B-R is subject to the Commission's marketing affiliate rules, since B-R uses its capacity in the Kelso-Beaver Pipeline to transport gas for its affiliate, US Gypsum, which occasionally sells excess gas. The Commission considered B-R's arguments regarding the impact that compliance with the marketing affiliate rule would have on B-R, since it presently relies on the staff of its affiliate, US Gypsum, to manage B-R's interest in the Kelso-Beaver Pipeline.⁷ In view of the large size of B-R's corporate parents,⁸ however, the Commission concluded in its October 3 Order that B-R had not demonstrated why it is necessary to share personnel with US Gypsum.

9. On rehearing, B-R reiterates that its interest in the Kelso-Beaver Pipeline is operated by US Gypsum personnel and that it would be uneconomic to hire new staff just to ensure that its personnel are separate from US Gypsum's.⁹ B-R asserts that it simply is not economical for it, the owner of a small interest in a 17-mile pipeline with one firm shipper, to hire separate staff versed in pipeline operations, tariffs and regulations solely because B-R may someday provide interruptible service for one or a few other shippers whose collective payments would not cover the additional expense of separate staff.¹⁰ B-R also emphasizes that US Gypsum's past sales of excess gas have not included any gas transported by B-R, and that US Gypsum does not intend to sell any gas transported by B-R.¹¹ Finally, B-R argues that Commission precedent supports the position that an

⁷ 105 FERC ¶ 61,025 at P 52 et seq.

⁸ Id. at P 54.

⁹ B-R's November 3, 2003 rehearing request at p. 3.

¹⁰ Id. at pp. 3 and 8.

¹¹ Id. at p. 6.

affiliate's sales of excess gas supplies purchased for its own use will not cause the pipeline to become subject to the marketing affiliate rules, unless the affiliate's sales occur after the gas has been transported by the pipeline.¹² Since B-R filed its request for rehearing, the Commission has issued a new rule, Order No. 2004, governing affiliate relationships of both electric and gas transmission companies.¹³ In Order No. 2004, the Commission has expanded the scope of the regulations to encompass transmission providers' relations with affiliates other than their marketing affiliates.¹⁴ US Gypsum purchases natural gas for use as fuel at its plants around the country, purchases gas transmission capacity for the delivery of gas supplies to its manufacturing plants, and makes occasional sales of gas supplies in excess of the supplies needed at its plants.¹⁵

10. Order No. 2004 requires each interstate gas pipeline and electric transmission provider to comply with the order's requirements by June 1, 2004.¹⁶ The rule requires that all such transmission providers operate independently of their energy affiliates and provide certain information about affiliate relationships on their websites.¹⁷ As defined in Order No. 2004, an affiliate is an "energy affiliate" for purposes of the new rule if it is involved in transmission transactions with the gas or electric transmission provider; or manages or controls the transmission provider's capacity; or buys or sells natural gas or electric energy; or engages in financial transactions relating to the sale or transmission of natural gas or electricity.¹⁸

¹² Citing Tuscarora Gas Transmission Company, 94 FERC ¶ 61,325 at p. 62,211 (2001), citing National Fuel Gas Supply Corporation, 68 FERC ¶ 61,210 (1994).

¹³ Standards of Conduct for Transmission Providers, Docket No. RM01-10-000, Order No. 2004, 105 FERC ¶ 61,248 (2003), reh'g pending.

¹⁴ 18 C.F.R. § 358.3(d).

¹⁵ B-R and its affiliates filed a request for rehearing of Order No. 2004 arguing, among other things, that the standards of conduct should not apply where an affiliate is not transporting the gas it sells on its affiliated pipeline. This issue is pending before the Commission in that proceeding.

¹⁶ 18 C.F.R. § 385.4(e).

¹⁷ 18 C.F.R. § 385.4(b).

¹⁸ See Order No. 2004 at P 40, 18 C.F.R. §385.3(d)

11. Order No. 2004 required gas pipelines and electric transmission providers to file compliance plans within 60 days of the date of the rule's publication in the Federal Register. On February 10, 2004, B-R filed in this proceeding a copy of its February 9, 2004 request in Docket No. TS04-103-000 for exemption from the requirements of Order No. 2004. Inasmuch as the Commission's rules governing relationships between market affiliates have changed substantially since the original order in this case, we are dismissing B-R's request for rehearing on this issue. The dismissal will be without prejudice to consideration of B-R's pending request in Docket No. TS04-103-000 for exemption from the requirements of Order No. 2004. Consideration of B-R's arguments in that proceeding will allow the Commission a more appropriate forum to address all relevant considerations in light of the new rule.

REQUEST TO INCLUDE ACQUISITION PREMIUM IN RATE BASE

12. B-R's purchase price for its capacity in the Kelso-Beaver Pipeline exceeded Portland General's depreciated original cost for that capacity by \$1,012,767. The Commission allowed B-R to charge a transportation rate to its affiliate, US Gypsum, based on the full purchase price, including the acquisition premium.¹⁹ However, as the October 3 Order in this proceeding explained, this did not imply that the acquisition premium could be included in a generally applicable Part 284 rate in the event B-R began providing services for shippers other than its affiliate in the future.²⁰

13. When jurisdictional facilities are acquired by one company from another, the Commission's historical practice has been to require that such facilities be reflected in the

¹⁹ B-R argued that the Commission should apply only light-handed regulation to B-R's service for US Gypsum because, *inter alia*, "the level of charges will only be of interest within the overall corporation." 89 FERC ¶ 61,312 at p. 61,950.

²⁰ See 105 FERC ¶ 61,025 at P 33. While the Commission did not prohibit B-R from charging its affiliate US Gypsum a rate that would recover the acquisition premium that B-R had agreed to pay, the Commission recognized the need for certain accounting requirements in view of its condition that B-R apply for a Part 284 open access certificate if new requests for service on the Kelso-Beaver Pipeline were received. Since it would be necessary for B-R to provide cost of service information to support proposed rates for any new services to non-affiliates, the Commission required B-R to maintain records separately to identify the original cost, related accumulated depreciation, the amount paid in excess of the net book value, and related future depreciation on this amount. See 89 FERC ¶ 61,312 at p.61,956.

acquiring company's rate base at no more than their depreciated original cost.²¹ The Commission makes exceptions only when the applicant can show its acquisition of existing facilities at more than their net book value will result in substantial benefits to ratepayers.²²

14. As set out in Longhorn Partners Pipeline (Longhorn),²³ a company purchasing gas facilities at more than their depreciated original cost must meet a two-prong test in order to include the entire purchase price in rate base. First, the acquiring company must show that the facilities will be converted from one public use to a different public use or that the asset will be placed in FERC-jurisdictional service for the first time.²⁴ Second, the acquiring company must also show clear and convincing evidence that its acquisition of the facilities will still provide substantial, quantifiable benefits to ratepayers even if the full purchase price, including the acquisition premium (*i.e.*, the portion above the depreciated original cost) is included in rate base for rate-making purposes.²⁵ In the October 3 Order in this proceeding, the Commission found that B-R had not satisfied the Longhorn test.²⁶

15. On rehearing, B-R argues that since its purchase of its capacity in the Kelso-Beaver Pipeline, there has been a substantial change in the use of that previously underutilized capacity, since B-R currently is using the capacity to provide firm service for US Gypsum under case-specific certificate authorization pursuant to Part 157 of the regulations and, in addition, has now agreed to make any unused capacity available to

²¹ See, e.g., United Gas Pipe Line Company (United Gas), 25 FPC 26, at p. 30 (1961).

²² See, e.g., Cities Service Gas Company (Cities Service), 4 FERC ¶ 61,268 at 61,596 (1978) (Commission approved inclusion of full purchase price in rate base because gas consumers would be benefited by Cities Services' converting 473-mile crude oil pipeline purchased at more than net book value, rather than constructing new pipeline at significantly greater cost.).

²³ 73 FERC ¶ 61,355 (1995).

²⁴ Id. at p. 61,112.

²⁵ Id.

²⁶ 105 FERC ¶ 61,025 at P 35.

other shippers on an open access basis under a Part 284 blanket certificate. B-R asserts that it should be deemed to have satisfied the first part of the two-prong Longhorn test.

16. The Commission has never found Longhorn's first prong, or “new service,” standard to be satisfied in any case where facilities used by a jurisdictional company to provide gas service are acquired by another jurisdictional company which continues to use the facilities for gas service. The Commission also has never found that standard to be satisfied in a case, as here, where a jurisdictional company using the facilities to provide jurisdictional service to a customer under one subpart of the Commission’s regulations accepts authorization to provide service under a different subpart of the regulations because it “might someday provide interruptible transportation to one or a few other shippers.”²⁷

17. Where facilities are already dedicated to jurisdictional gas service, an acquiring pipeline’s use of those facilities in order to continue providing jurisdictional gas service does not constitute a new public service, regardless of whether the facilities were previously underutilized or idle. In situations where an interstate pipeline acquires facilities and converts them to transport a different product, as when a crude oil pipeline is converted to transport gas or petroleum products, or where an interstate pipeline purchases gas facilities that were not previously subject to the Commission’s jurisdiction, the selling pipeline’s customers were not paying rates for interstate gas services regulated by the Commission. Thus, Longhorn's “new service” test ensures that natural gas customers will not pay more than the cost of facilities as of the time they are dedicated to jurisdictional gas service. Since B-R’s capacity was previously used for jurisdictional gas service, B-R cannot satisfy this part of the Longhorn test.

18. Further, assuming B-R had satisfied the first prong of the Longhorn test, the Commission would deny rehearing because B-R also has failed to satisfy the second prong of the test, under which a pipeline must establish what benefits consumers will realize from its acquisition of facilities at a price exceeding their net book value.²⁸ Moreover, the pipeline must present evidence by which the alleged benefits can be measured in dollar terms relative to the acquisition premium. If the benefits to ratepayers cannot be measured in dollar terms, the acquisition premium cannot be included in rate base.²⁹

²⁷ B-R’s November 3, 2003 rehearing request at p. 8.

²⁸ Enbridge Pipelines (KPC), 100 FERC ¶ 61,260 at P 52 (2002).

²⁹ Id. at P 49.

19. In support of its position that its acquisition of capacity in the Kelso-Beaver Pipeline meets Longhorn's substantial benefits test, B-R points out that its purchase of an interest in the pipeline provided the occasion for the Commission to impose the condition triggering the requirement that both Portland General and B-R apply for Part 284 certificates. Thus, B-R asserts its acquisition has led to 90% of the pipeline's capacity becoming subject to the Commission's open access regulations, resulting in a substantial public benefit. B-R asserts that this would not have occurred but for its agreement to pay a premium for its capacity.

20. B-R points out the acquisition premium in its purchase price resulted in a corresponding reduction in Portland General's rate base used for calculating its Part 284 rates.³⁰ B-R further argues that any new ratepayers who receive Part 284 transportation service on the Kelso-Beaver Pipeline will not be shippers who have relied on that pipeline for service previously. Therefore, B-R argues, no ratepayers will be paying twice for the facilities used to provide them gas service.

21. Finally, B-R emphasizes that the Commission approved the purchase price including the acquisition premium when it certificated B-R's acquisition of its interest in the Kelso-Beaver Pipeline. Therefore, B-R argues it would be unfair for the Commission to deny B-R's inclusion of the acquisition premium in rate base for purposes of determining the rates it can charge for any Part 284 transportation services that it provides in the future.

22. As described above, B-R's arguments are based on the premise that exclusion of its acquisition premium from rate base is unfair to B-R and that inclusion of the acquisition premium would not be unfair to any new shippers that receive service from B-R under its Part 284 blanket certificate. These arguments are not responsive to the second prong of the Longhorn test, which requires B-R to present evidence making it possible to quantify the benefits consumers will realize from B-R's decision to acquire its pipeline capacity at a price exceeding its net book value.³¹

³⁰ When Portland General sold part of its interest in the Kelso-Beaver Pipeline to B-R, Portland General accounted for the portion of the sales price above its depreciated original cost in its depreciation account, thereby reducing its rate base by the same amount, \$1,012,766. 89 FERC at 61,956.

³¹ Enbridge Pipelines (KPC), 100 FERC ¶ 61,260 at P 52 (2002).

23. Quantifying any benefits of B-R's acquisition requires evidence regarding possible alternatives that any new shippers might have to requesting service from B-R. The analysis would explore reasonable alternatives, such as the availability of economical service from other pipelines and the economic feasibility of constructing new facilities.³² Of particular relevance in this case is the fact that if B-R had not purchased underutilized capacity from Portland General, potential new shippers could have requested service from Portland General. Rates for service by Portland General using the same capacity would not involve the issue of an acquisition premium. If Portland General had unused capacity and refused to seek authorization from the Commission to accommodate a new service request, the shipper could file a complaint with the Commission. As it stands, the record in this proceeding lacks any evidence on which the Commission could find that B-R's acquisition of capacity in the Kelso-Beaver Pipeline will yield substantial and quantifiable benefits to shippers justifying inclusion of B-R's acquisition premium in its Part 284 rate base.

24. In any event, US Gypsum created B-R in order to obtain transportation service on the Kelso-Beaver Pipeline and agreed to pay rates that would recover the acquisition premium paid by B-R. The Commission allowed B-R to calculate its rates for US Gypsum on a cost of service that includes the acquisition premium. Since US Gypsum has contracted for all of B-R's capacity on a firm basis, US Gypsum's rates should fully recover B-R's acquisition premium. Thus, if B-R provides any Part 284 services in the future, inclusion of the acquisition premium in B-R's Part 284 rates would increase those shippers' rates and allow B-R to recover more than its acquisition premium.

25. In conclusion, the Commission finds that B-R has not met the standards in Longhorn or provided any other evidence sufficient to justify departure from the Commission's policy of excluding acquisition premiums from rate base.

The Commission orders:

B-R's request for rehearing is dismissed in part and denied in part.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

³² Id. at P 55.