

104 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Nornew Energy Supply, Inc.
and
Norse Pipeline, L.L.C.

Docket No. CP01-94-004

ORDER DISCLAIMING JURISDICTION

(Issued July 30, 2003)

1. On January 16, 2002, the Commission issued an order (January 16 order) granting Nornew Energy Supply, Inc. (Nornew) the necessary certificate authorization to acquire from Norse Pipeline, L.L.C. (Norse) certain pipeline facilities and to construct and operate facilities and transport natural gas for the Board of Public Utilities of Jamestown, New York (Jamestown BPU) to Jamestown BPU's Samuel A. Carlson Generating Station (Carlson Station).¹ Additionally, the January 16 order found that certain information submitted by Norse was insufficient to permit the Commission to conclude that its remaining facilities perform the primary function of gathering.² Consequently, the January 16 order directed Norse to show cause why the Commission should not find that Norse, independently or in conjunction with any affiliates, is engaged in the interstate transportation of natural gas. Further, the January 16 order directed Norse to provide certain information regarding its system.³

¹Nornew Energy Supply, Inc., et al., 98 FERC ¶ 61,018 (2002).

²This information was filed in response to the Commission's direction in an order issued on December 14, 2000 (December 14 order) in Docket No. CP99-600-000 that Norse provide evidence that the primary function of any of its facilities continues to be gathering that is exempt from the Commission's jurisdiction pursuant to Section 1(b) of the Natural Gas Act (NGA). See National Fuel Gas Supply Corporation, 93 FERC ¶ 61,276 (2000), reh'g denied, 94 FERC ¶ 61,136 (2001).

³In the January 16 order, the Commission found that Norse failed to respond fully to a August 10, 2001 data request from Commission staff, and detailed the additional information Norse was to include in its response to the show cause order.

2. On April 26, 2002, the Commission issued an order (April 26 order) denying requests for rehearing and clarification of the January 16 order. In the April 26 order, the Commission detailed further the deficiencies in Norse's August 28, 2001 data response and March 1, 2001 compliance filing.

3. In this order, the Commission finds, based on information provided by Norse in response to the January 16 and April 26 orders and an April 24, 2002 Commission staff data request (April 24 data request), that Norse's facilities are exempt gathering facilities under NGA Section 1(b).

Background

Docket No. CP99-600-000

4. In June 1999, Nornew and National Fuel Gas Distribution Corporation (National Fuel) filed bids in response to the Jamestown BPU's proposal to provide natural gas supply and transportation service to its Carlson Station. Nornew was the successful bidder. Nornew's accepted bid relied on moving gas through Norse's Mayville Line,⁴ and then through a new 7.3-mile line constructed by Nornew, to deliver the gas to Carlson Station. The bid specifications required that all of the capacity of Nornew's new 7.3-mile pipeline be leased to the Jamestown BPU for twenty years, with lease payments beginning October 1, 2000.⁵

5. In August 1999, National Fuel filed a petition in Docket No. CP99-600-000 for a declaratory order requesting that the Commission resolve certain issues regarding the jurisdictional status of Norse and Nornew resulting from Nornew's agreement to provide transportation service for the Jamestown BPU using its new 7.63-mile pipeline and Norse's existing facilities. National Fuel contended that while Norse and Nornew had theretofore limited their activities to gathering, exempt from the Commission's

⁴The Mayville Line was owned by Norse and historically operated by Norse to move local gas production in New York to Norse's interconnection with Tennessee Gas Pipe Line Company (Tennessee) at Mayville, New York.

⁵On July 23, 1999, Jamestown BPU and Nornew entered into a lease agreement, under which the total transportation price to the Carlson Plant incorporated Nornew's costs of arrangements with Norse for transporting the gas to Nornew's new 7.3-mile delivery line, plus Nornew's costs of building, maintaining and operating the pipeline to be leased to Jamestown BPU.

jurisdiction under Section 1(b) of the NGA, Norse's and Nornew's services under the agreement with the Jamestown BPU amount to transportation of gas in interstate commerce subject to the Commission's jurisdiction.

6. The December 14 order⁶ found that, notwithstanding Norse's and Nornew's claim that only local supplies would be delivered to the Jamestown BPU and no interstate gas would flow into its system, Jamestown BPU's gas is to be delivered by Tennessee to Norse by means of a backhaul arrangement, a form of jurisdictional transportation service by displacement. Additionally, the Commission found that under the supply arrangement at issue, Norse also would be engaging in jurisdictional transportation service.

7. Based on its jurisdictional findings, the Commission directed Norse and Nornew to file pro forma tariff sheets and applications for NGA Section 7(c) certificates of public convenience and necessity to provide interstate natural gas transportation service to the Jamestown BPU. The Commission also required Norse to provide evidence that the primary function of any of its facilities continues to be gathering that is exempt from the Commission's jurisdiction pursuant to Section 1(b) of the NGA.

Docket Nos. CP01-94-000, CP01-95-000, and CP01-96-000

8. In light of the jurisdictional determination in the December 14 order, Norse and Nornew rearranged their business activities in an effort to enable Norse to remain an exempt gatherer pursuant to Section 1(b) of the NGA, and to allow Nornew to provide interstate transportation to Jamestown BPU. Nornew, an affiliate of Norse, would become a FERC regulated pipeline⁷ consisting of approximately 26.63 miles of pipeline (the 19-mile Mayville Line and the newly constructed 7.63-mile line) located in Chautauqua County, New York.⁸ Specifically, Nornew and Norse agreed that, subject to Commission approval, Nornew would purchase from Norse the 19-mile Mayville Line and appurtenant facilities extending from an interconnection with Norse in Mayville, New York to the 7.63-mile, 8-inch pipeline Nornew constructed for service to the Carlson Station. Prior to transferring the Mayville Line to Nornew, Norse owned and operated

⁶See note 2, infra.

⁷See Nornew Energy Supply, Inc. and Norse Pipeline, L.L.C., 95 FERC ¶ 61,134 (2001).

⁸Prior to the December 14 order, Nornew was a producer and gatherer of natural gas in New York and operated the Falconer gathering system in New York. Nornew has since sold the Falconer gathering system to Nornew, Inc., another affiliate.

approximately 336 miles of pipeline, ranging from 2 to 12 inches in diameter, located in southwestern New York and northwestern Pennsylvania. Norse purchased these facilities, then known as the Project Penny System, from Columbia Gas Transmission Corporation in June 1999, at which time the Commission determined the facilities performed primarily a gathering function.⁹

9. On March 1, 2001, Norse and Nornew filed applications in Docket Nos. CP01-94-000, CP01-95-000, and CP01-96-000 seeking the necessary NGA Section 7 certificate authorization for Nornew to transport natural gas for the Jamestown BPU to Jamestown BPU's Carlson Station. The filing in Docket No. CP01-94-000 included information submitted by Norse in response to the Commission's requirement in the December 14 order that Norse provide evidence that the primary function of any of its remaining facilities continues to be gathering. The January 16 order found Nornew's proposal to be in the public convenience and necessity, and granted the requested authorizations, subject to several limitations and conditions.

Show Cause Order

10. The January 16 order also found that Norse failed to provide information sufficient to permit the Commission to conclude that its remaining facilities perform the primary function of gathering. Accordingly, the January 16 order directed Norse to show cause why it, independently or in conjunction with Falconer Pipeline, South Jamestown Gathering System (SJGS) or other affiliates, should not be found to be engaged in jurisdictional activities.¹⁰

11. The January 16 order noted that both Norse and Columbia Gas Transmission Corporation (Columbia) represented that the operation of the Project Penny facilities would not change significantly after Norse acquired them from Columbia, *i.e.*, the only gas that was expected to flow into the facilities would be local production from the wells directly connected to the acquired facilities or from new gathering facilities that Norse hoped to construct that would connect new local production into the Project Penny

⁹See *Columbia Gas Transmission Corporation and Norse Pipeline, L.L.C.*, 85 FERC ¶ 61,191 (1998), *reh'g denied*, 86 FERC ¶ 61137 (1999), *aff'd sub nom. Lomak Petroleum Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000).

¹⁰The January 16 order included other findings not relevant to Norse's jurisdictional status.

facilities.¹¹ In this proceeding, physical and operational changes and Norse's future plans to serve new industrial customers, along with National Fuel's allegations that Norse, Nornew and its affiliates operate their facilities on a coordinated, integrated basis, suggested that a detailed reexamination of Norse's claim of non-jurisdictional gathering status was warranted.

12. The Commission disagreed with Norse's contention that its August 28, 2001 response fully addressed an August 10, 2001 data request from Commission staff. Specifically, the Commission directed Norse to identify the volumes delivered to each specific entity at each delivery point with sufficient information to demonstrate the extent to which local, in-state production has been sufficient to make deliveries at each of its delivery points. Norse was directed to include a description of the location of each delivery point and the direction of flow of gas at each delivery point, clarify the average volumes of gas gathered on its system, and identify the volumes of gas received from and delivered to each of its affiliates.

13. Norse was also instructed to provide a detailed map of its system depicting the local distribution companies, other third party gatherers, current end-users/customers, all potential end-users/customers that Norse and/or its affiliates have solicited to serve through Norse's facilities, and wells attached to the facilities. The January 16 order also provided that Norse's map must depict how gas flows to its delivery points and through the Mayville line transferred to Nornew. Finally, Norse was directed to provide a written description of its gas flow on its system, including all deliveries and receipts from and into its system.

14. In its request for rehearing of the January 16 order, Norse contended that it had already provided a detailed primary function analysis demonstrating that, following the sale of the Mayville Line to Nornew, its facilities, have a primary function of gathering. However, Norse asked for guidance regarding the exact information that the Commission requires in order to determine Norse's jurisdictional status.

¹¹Id. In the order denying rehearing in Columbia's abandonment proceeding, the Commission added, in discussing the non-jurisdictional status of the Project Penny facilities, that they were not delivering gas off the system to city or farm taps, but that they gathered gas produced from local wells and transported it directly to the interstate lines of Tennessee. See Columbia Gas Transmission Corporation and Norse Pipeline, LLC., 86 FERC ¶ 61,137 at 61,486-87 (1999) .

15. In addition to the January 16 order's discussion of the inadequacies of Norse's earlier submissions, Commission staff on April 24, 2002, directed the April 24 data request to Norse detailing the information needed to understand how Norse's and/or its affiliates' systems operate as a whole and whether or not their primary function still is gathering with any other services being incidental to gathering.

Discussion

16. In its May 15, 2002 response (May 15 response) to the April 24 data request, Norse identified the volumes of gas flowing through its system on a monthly and annual basis for each month from June 1999, when Nornew submitted its bid to provide jurisdictional service for Jamestown BPU, through February 2002. During this period, approximately 95 percent of Norse's throughput was delivered into Tennessee and other interstate pipeline systems.

17. Norse also provided detailed maps of its system depicting the length, diameter, and identity of each individual line; interconnections with all interstate pipelines, intrastate pipelines, LDC's, other third party gatherers; all current end-users/customers served by Norse's and its affiliates' lines and potential end-users/customers that Norse and/or its affiliates have solicited to serve through Norse's facilities; the location of all wells attached to Norse's facilities, including Norse and affiliate-owned wells and third-party wells; the direction of the flow of gas both prior to and after the transfer of the facilities to Nornew; and the location of compressors and valves on Norse's system.

18. Norse reported the system's gas flow volumes by shipper and nature of business (interstate pipeline, LDC, etc.) of shipper; by receipt meter and nature of business of receipt point operator; and by delivery meter and nature of business of delivery point operator. The response also indicates the state of origin of gas used to render deliveries to each entity; a description of the flow for each delivery point indicating how the gas is gathered; and the specific route the gas follows through the pipeline(s). Norse further described the pipeline configurations in place to ensure that only indigenous New York gas is delivered to and from non-jurisdictional affiliate facilities serving New York end-users.

19. The May 15 response also explained Norse's request for 16 new delivery points with National Fuel in New York and Pennsylvania. These were requested by National Fuel as prior identification of locations where gas could be delivered to National Fuel to accommodate future shipper requests for deliveries of gathered gas.

20. Norse states in response to questions about the regulatory status of the Falconer facilities that the New York State Public Service Law is satisfied by the demonstration that all gas being delivered by entities under New York Public Service Commission (NYPSC) jurisdiction to New York end-users is gas indigenous to New York. While the NYPSC issued a Certificate of Environmental Compatibility and Public Need for the Falconer Pipeline facilities to Nornew, not the transferee owner, Nornew, Inc., Nornew states that it has conferred with the NYPSC legal counsel and is prepared to file for whatever regulatory approval is required.

21. Norse reiterates that its customers are not end-users, defined by Norse as entities which "burn natural gas." Though the customers do receive gas from Norse and deliver it to end-users, Norse's customers are producers, gatherers, marketers, and other shippers who cause locally produced gas to be delivered into Norse's gathering system for delivery downstream to interstate pipelines or to non-interstate pipeline operators of downstream delivery points. Although Norse does not make deliveries to end-users, Norse states that the Commission has recognized that gathering facilities can deliver to end-users, LDCs, intrastate pipelines, and other gatherers.¹²

22. Based on the information provided by Norse in its May 15 response, we find that Norse's facilities are gathering facilities, exempt from the Commission's jurisdiction under NGA Section 1(b). While Norse's deliveries to entities other than interstate pipelines are a change in the circumstances represented to the Commission in Columbia's 1998 abandonment proceeding,¹³ these volumes are a sufficiently small percentage (approximately 5 percent) of Norse's throughput that it is reasonable to conclude that its primary function remains gathering.

¹²Although there are circumstances where the Commission has recognized the delivery of natural gas directly to consumers from a gathering facility, it is worth noting that delivery of gas for direct consumption is not an activity that is normally associated with gathering. See *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84,90 (1963). ("production" and "gathering" are terms "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." [Emphasis added.]) Since Norse does not deliver gas to end-users, we do not need to decide in this case whether or under what circumstances the delivery of gas to consumers would be inconsistent with finding the primary function of a facility is gathering.

¹³See *Columbia Gas Transmission Corporation and Norse Pipeline, L.L.C.*, 85 FERC ¶ 61,191 (1998), reh'g denied, 86 FERC ¶ 61137 (1999), aff'd sub nom. *Lomak Petroleum Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000).

23. National Fuel has also alleged that the operational integration among Norse and its affiliates, including Falconer and SJGS justifies the Commission's assertion of its jurisdiction over Norse and its affiliates. Based on Norse's May 15 response, we find no basis for concluding that Norse is engaged in jurisdictional activities in conjunction with any of its affiliates. Norse has successfully isolated its affiliate recipient entities' systems from any other than indigenous New York-produced gas by use of valve configuration. Deliveries to the affiliated Falconer system in New York are confined to gas from portions of the Norse system which are isolated from any gas gathered in Pennsylvania. Gas gathered by Norse from Pennsylvania flows only to delivery points with interstate pipelines. Norse's interconnection with Nornew has been flanged off to prevent flow of jurisdictionally transported gas from Nornew to Norse. The affiliate Falconer therefore can deliver only indigenous New York gas to its two end-user customers and National Fuel. Norse's affiliate SJGS delivers only New York gas to its New York end user customers and National Fuel. Gas gathered by SJGS from Pennsylvania is delivered to Norse for further delivery to Tennessee. Norse does not deliver gas to SJGS and does not receive gas from Falconer or Nornew.

24. Based on the above, the Commission finds that gathering is the primary function of Norse's facilities. However, the Commission emphasizes that this finding is based on Norse's current operations and activities as represented in its data responses. If circumstances change and if, specifically, gas flows are reversed or new connections made such that gas is transported in interstate commerce, Norse must file for a Section 7 certificate under the NGA

The Commission orders:

In Docket No. CP01-94-004, the Commission determines that Norse's facilities are gathering facilities exempt from the jurisdiction of the Commission pursuant to Section 1(b) of the NGA.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.