

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Enogex Inc.

Docket No. PR02-10-004

ORDER ON CLARIFICATION

(Issued December 22, 2004)

1. On March 1, 2004, Apache Corporation (Apache) sought clarification of the Commission's order issued on January 30, 2004.<sup>1</sup> In the January 30, 2004 Order, the Commission denied rehearing of a May 9, 2003 order<sup>2</sup> in which the Commission instructed Enogex, Inc. (Enogex) to revise its Statement of Operating Conditions (SOC) to remove provisions providing a preference for dedicated gas for purposes of scheduling and curtailment. In this order, we grant Apache's request for clarification. Our determination benefits the public by clarifying our jurisdiction with regard to gathering.

**Background**

2. Effective January 1, 2002, Enogex merged its intrastate pipeline system with that of its affiliate Transok, Inc., to create a single intrastate pipeline within the State of Oklahoma. The merged Enogex system transports gas delivered both to intrastate Oklahoma markets and to interconnections with interstate pipelines in Oklahoma. Enogex performs interruptible interstate transportation service pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA). An affiliate of Enogex formerly owned by Transok, Enogex Gas Gathering, L.L.C. (Enogex Gathering), gathers gas and delivers it into the merged Enogex pipeline system.

3. On December 18, 2001, Enogex filed a petition for approval of new maximum system-wide rates for its NGPA section 311 interruptible transportation service on its expanded Oklahoma intrastate pipeline system. The petition included an SOC for the combined system. It provided that after firm intrastate service, the next highest priority

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<sup>1</sup> Enogex Inc., 106 FERC ¶ 61,093 (2004) (January 30, 2004 Order).

<sup>2</sup> Enogex Inc., 103 FERC ¶ 61,161 (2003) (May 9, 2003 Order).

of service went to interruptible shippers who had committed their entire output to be transported by Enogex. For other interruptible shippers transporting non-dedicated gas, priority was assigned according price, with the shipper paying the higher unit rate receiving a higher priority of service.

4. In our previous orders, we required Enogex to refile its SOC to remove the priority given to dedicated gas for purposes of scheduling and curtailment. The Commission asserted that under Enogex's SOC, interruptible customers that do not dedicate their output to Enogex would have priority inferior to that of interruptible dedicated gas customers. The Commission found that this priority procedure is unduly discriminatory. With the preference for dedicated gas eliminated, interruptible capacity would be allocated based on price, which is consistent with Commission policy.

### **Motion for Clarification**

5. Apache filed a request for clarification, asking the Commission to clarify that Enogex's SOC does not apply to the priority provided by contract to dedicated gas on the former Transok gathering system. In addition to its section 311 transportation agreement, Apache entered into a Gathering and Compression Agreement (GCA) with Transok on January 1, 1998. The GCA provides for Apache's dedication of its natural gas reserves from wells connected to Transok's gathering systems and from future wells in the surrounding area. In return, Transok agreed to a gathering rate discount and priority over other shippers at receipt and delivery points on its gathering systems. The gathering agreement differs from the transportation agreement in that it provides that "in the event the terms hereof conflict with General Terms and Conditions, the terms hereof shall prevail." (The gathering service at issue is now performed by Enogex Gathering, an affiliate of Enogex).

6. However, Apache asserts that Enogex has informed Apache that, due to the Commission's orders in this proceeding, it cannot honor the dedication priority in Apache's GCA with Enogex Gathering. Apache contends that gathering is exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act and that the Commission has long held that there is a jurisdictional gathering exemption applicable to Section 311 of the NGPA as well. Apache notes that Enogex's SOC does not govern gathering. By its own terms, it applies to "transportation service" under "Transportation Service Agreements". Service under the SOC consists of Enogex's acceptance of gas for transportation at its receipt points and the transportation of gas through Enogex's "Transportation Facilities". Apache notes that Enogex's receipt points are downstream of the gathering facilities owned by Enogex Gathering. In addition, the defined term "Transportation Facilities" does not include gathering facilities.

7. Enogex filed an answer to Apache's motion. Enogex asserts that the Commission should not insert itself into any contractual issues concerning the GCA beyond a declaration that the Commission does not have jurisdiction. Enogex states that in correspondence with Apache dealing with GCA contractual issues, Enogex has consistently maintained that any dispute concerning the GCA will be governed and resolved pursuant to the terms of the GCA. Enogex asserts that it did not inform Apache that it cannot honor the dedication priority in Apache's GCA. Instead, Enogex argues that it has consistently maintained that Oklahoma law mandates nondiscriminatory treatment in providing gathering services, and has advised Apache of its opinion that this Commission's decision that a priority based on dedicated gas is discriminatory could be instructive to an Oklahoma forum considering a non-discriminatory provision of Oklahoma law.

### **Discussion**

8. We will grant the motion for clarification. In the prior orders in this proceeding, we found that Enogex's dedicated gas provision for purposes of scheduling and curtailment was unduly discriminatory. However, our finding does not apply to any agreements for gathering service entered into by Apache and Enogex's affiliate, Enogex Gathering, because those agreements are beyond the scope of our jurisdiction.

9. The Commission has decided there is a jurisdictional gathering exemption applicable to section 311 of the NGPA.<sup>3</sup> The exemption is grounded in section 2(16), which defines "Intrastate Pipeline" as a person "engaged in the transportation of natural gas (*not including gathering*) which is not subject to the jurisdiction of the Commission under the Natural Gas Act..." (emphasis added). The Commission's jurisdictional authority under NGPA section 311 therefore extends only to transportation service performed by an intrastate pipeline, not to service by an entity performing solely gathering.

10. The Commission's authority under NGPA section 311 parallels its authority under the NGA. Gathering is exempt from the Commission's jurisdiction under NGA section 1(b). Under that provision, the Commission has jurisdiction to regulate the transportation and sale for resale of natural gas in interstate commerce and any natural gas company engaged in that transportation or sale. Section 1(b) states, however, that the Commission's jurisdiction does not extend to facilities used for the production or gathering of natural gas. Because the NGA does not further define gathering, the

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<sup>3</sup> See *Louisiana Intrastate Gas Corp.*, 69 FERC ¶ 61,022 at 61,090 n.5 (1994), citing *Sandy Hook Pipeline Inc.*, 58 FERC ¶ 61,179 (1992) and *Tex/Con Gas Pipeline Co.*, 53 FERC 61,316 (1990).

Commission has over the years, developed a number of legal tests to determine which facilities are non-jurisdictional gathering facilities.<sup>4</sup> However, there is no need to apply those tests here since neither party argues that the GCA in question governs jurisdictional facilities.

11. Notwithstanding that jurisdictional limitation, the Commission has historically exercised jurisdiction over gathering services provided directly by interstate pipelines on the theory that such gathering services are provided “in connection with” the interstate transportation of gas.<sup>5</sup> However, we find that the gathering here is not “in connection with” transportation because the gathering service is being performed by a separate affiliate of Enogex which performs only gathering services.<sup>6</sup> In *Arkla Gathering Services Co.*,<sup>7</sup> the Commission stated that it has not asserted “in connection with” jurisdiction to regulate rates charged for gathering services performed by affiliates. In *Arkla*, the Commission stated that as a general matter, it lacked jurisdiction over companies that perform only a gathering function. The Commission stated that whether they are independent or affiliated with an interstate pipeline, such gathering entities are not natural gas companies under the NGA. However, in *Arkla* the Commission did maintain that it could, under certain circumstances, reassert jurisdiction over a jurisdictional pipeline’s gathering affiliate where such action is necessary to accomplish the Commission’s policies for the transportation of natural gas in interstate commerce. Although the relevant statute in *Arkla* was the NGA, we see no reason not to apply its reasoning to the instant case, which addresses gathering services under the NGPA, since the Commission has held that its jurisdiction under the NGPA parallels its jurisdiction under the NGA.

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<sup>4</sup> The Commission relies on the modified “primary function test,” which includes consideration of several physical and geographic factors. See *Amerada Hess Corporation*, 52 FERC ¶ 61,268 (1990) and *Farmland Industries, Inc.*, 23 FERC ¶ 61,063 (1983).

<sup>5</sup> See, e.g., *Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004), *Northern Natural Gas Co.*, 43 FERC ¶ 61,473 (1988), *reh’g denied*, 44 FERC ¶ 61,384 (1988), *aff’d Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8<sup>th</sup> Cir. 1991).

<sup>6</sup> *Arkla Gathering Services Co.*, 67 FERC ¶ 61,257, *order on reh’g*, 69 FERC ¶ 61,280 (1994), *reh’g denied*, 70 FERC ¶ 61,079, *reconsideration denied*, 71 FERC ¶ 61,297 (1995), (*Arkla*) *aff’d Conoco Inc. v. FERC*, 90 F3d. 536 (D.C. Cir. 1996) (*Conoco*).

<sup>7</sup> *Id.*

12. In the instant case, the gathering is being performed by Enogex's affiliate, Enogex Gas Gathering, LLC. Further, no special circumstances of the type discussed in *Arkla* have been alleged. Accordingly, we find it appropriate to grant the motion for clarification. The January 30, 2004 Order was not intended to apply to the priority provided by contract to dedicated gas on the former Transok gathering system, as the Commission has no authority under the NGA or the NGPA to regulate the former Transok gathering system without evidence of special circumstances as discussed in *Arkla*.

13. In addition, Enogex appears to be concerned about the impact clarification may have on proceedings before Oklahoma fora. However, determining whether our previous finding that a priority given to dedicated gas is discriminatory could be used as persuasive authority in an Oklahoma forum is entirely up to the state fora. We make no such determination here.

The Commission orders:

The motion for clarification is granted.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.