113 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Unocal Keystone Gas Storage, LLC Docket No. PR05-19-000

ORDER ACCEPTING FILING AND REJECTING REQUEST FOR WAIVER

(Issued December 15, 2005)

1. On August 10, 2005, Unocal Keystone Gas Storage, LLC (Keystone), a Hinshaw natural gas storage facility in the State of Texas, filed a revised Operating Statement, effective September 1, 2005, and requested a waiver of the Commission's "shipper must have title" policy for off-system capacity it may acquire to provide interstate storage services. The Commission accepts for filing the revised Operating Statement, but rejects the request for waiver of the Commission's shipper must have title policy, as discussed below.

Background

2. Keystone holds a limited jurisdiction blanket certificate pursuant to section 284.224 of the Commission's regulations to provide certain storage and hub services in interstate commerce pursuant to its Operating Statement.[1] The Commission has authorized Keystone to charge market-based rates for storage, park and loan,[2] and interruptible wheeling services, based upon a finding that Keystone lacks market power in offering its storage and hub services.[3] Keystone's facilities include five storage caverns and laterals to interconnect with three interstate natural gas pipelines. The laterals include: (1) approximately 3.8 miles of 16-inch diameter pipeline with a maximum capacity of 280 MMcf per day connecting with El Paso Natural Gas Company

[1] *Unocal Keystone Gas Storage, LLC,* 100 FERC ¶ 61,310 (2002) (Certificate Order).

[2] *Id.* (the Certificate Order approved Keystone's proposal to charge market-based rates for its storage and park and loan services).

[3] *Unocal Keystone Gas Storage, LLC,* 106 FERC ¶ 61,033 (2004) (Expansion Order) (the Expansion Order authorized Keystone to charge market-based rates for new interruptible wheeling services).

(El Paso), (2) approximately 6 miles of 16-inch diameter pipeline with a maximum capacity of 150 MMcf per day connecting with Transwestern Pipeline Company (Transwestern), and (3) approximately 2.5 miles of 16-inch diameter pipeline with a maximum capacity of 200 MMcf per day connecting with Northern Natural Gas Company (Northern Natural).

Keystone's Filing

3. Keystone proposes to make a number of revisions to its Operating Statement, which are primarily to fix minor errors, to modify and clarify existing provisions and definitions, and to make various other clean-up changes. Keystone asserts that, with the exception of a new section 24, concerning the use of off-system capacity, it is not proposing any new service or new rates in this filing, but is merely revising its Operating Statement.

4. Keystone proposes a new section 24 which would allow Keystone to provide transportation and storage services for others using off-system capacity acquired only on the three interconnecting pipelines (El Paso, Transwestern, and Northern Natural) and only under its Operating Statement and the rate approvals approved by the Commission for interstate services. To provide these services, Keystone requests a waiver of the "shipper must have title" policy for the off-system capacity it may acquire to provide interstate storage services.

5. Keystone contends that its request would be fully consistent with well-established Commission policy if it were a fully-jurisdictional, interstate open-access storage facility. Keystone admits that extension of the policy to a Hinshaw facility with a limited jurisdiction blanket certificate requires a "further evolution of Commission policy" but submits that it is warranted because the waiver is needed for Keystone to provide additional choices to customers and to compete with established storage providers.

6. Keystone states that it is willing to accept the requirement of filing an annual informational report that the Commission has required in recent cases. In those cases, the Commission has required that the service provider make an annual informational filing including, for each acquisition of off-system capacity: (i) the name of the off-system provider; (ii) the type, level, term and rate of service contracted for by the service provider; (iii) a description of the geographic location, including boundaries, receipt and delivery points, and segments comprising the capacity; (iv) the operational purpose(s) for which the capacity is utilized; (v) a description of how the capacity is associated with specific transactions involving customers of the service provider; and (vi) the total volumes, by rate schedule and customer, that the service provider has nominated on each off-system provider during the reporting period. In addition, Keystone states that it is willing to limit the amount of off-system capacity that it may hold to the operational limits of its laterals connecting to the interconnecting pipelines.

7. Keystone argues that none of the concerns previously identified by the Commission regarding pipelines or storage providers holding capacity on other interstate pipelines are present in this case. Keystone contends that the reporting requirements will provide the Commission and shippers with the transparency needed to monitor the transactions for any undue discrimination or preference and that any allegations of abuse can be pursued through complaint proceedings. Keystone further emphasizes that, given its documented lack of market power, there is no concern about improperly tying capacity or limiting customer choices. Finally, Keystone notes that it will be fully at risk for the cost of any off-system capacity and that there are no rate or cost allocation issues because Keystone is authorized to charge market-based rates.

Notice and Responsive Pleadings

8. Notice of Keystone's filing was issued August 26, 2005, 70 *Fed. Reg.* 50,310 (2005), with interventions or protests due on or before August 31, 2005. Enstor Operating Company, LLC (Enstor) filed a motion to intervene along with comments in support of the filing. Enstor agrees that the Commission should extend the ability to hold off-system capacity to "non-section 7" storage providers in order to create a level playing field between such providers and their fully-regulated counterparts and to afford storage customers more competitive options. The Commission grants Enstor's motion to intervene.

Discussion

9. The Commission accepts for filing the various revisions to Keystone's Operating Statement, but we will deny Keystone's request for waiver of the Commission's shipper must have title policy in section 24 of the Operating Statement. Keystone correctly notes that the Commission has approved such requests for interstate pipelines, including storage facilities that are subject to all the requirements of Order Nos. 636[4] and 637.[5]

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[4] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 57 *Fed. Reg.* 13,267 (April 16, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A , 57 *Fed. Reg.* 36,128 (August 12, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,950 (August 3, 1992), *order on reh'g*, Order No. 636-B , 57 *Fed. Reg.* 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *remanded in part sub nom.*, *United Distribution Co. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C , 78 FERC ¶ 61,186 (1997), *cert. denied.*, *Associated Gas Distributors v. FERC*, 520 U.S. 1224 (1996), *order on reh'g*, Order No. 636-D , 83 FERC ¶ 61,210 (1998).

[5] *Regulation of Short-Term Natural Gas Transportation Services and Regulation*

(continued)

However, Hinshaw pipelines such as Keystone are not subject to all those requirements. For example, the Commission has held that Hinshaw pipelines performing open access transportation service under section 284.224 of the Commission's regulations need not provide their customers the rights to engage in capacity release, use flexible receipt and delivery points, or segment their capacity.[6] Hinshaw pipelines are also not subject to certain reporting requirements such as the transactional reporting requirements in section 284.13 of the Commission's regulations, as well as those required for accounting, affiliates, and rate case and tariff filings in Part 154 of the Commission's regulations, and in Order Nos. 497,[7] 581,[8] and 2004.[9] The issue raised by Keystone's instant proposal is whether the Commission should waive the shipper must have title policy to permit a Hinshaw Pipeline that is not subject to all the requirements of Order Nos. 636 and 637 to acquire off-system capacity for use as part of its system.[10]

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of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs., Regulations Preambles, 1996-2000 ¶ 31,091 (2000), *order on reh'g,* Order No. 637-A, FERC Stats. & Regs., Regulations Preambles, 1996-2000 ¶ 31,099 (2000), *order denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part, Interstate Natural Gas Association of America v. FERC,* 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002).

[6] Order No. 636-B, 61 FERC ¶ 61,272 n. 26 (1992). *EPGT Texas Pipeline Co.*, 99 FERC ¶ 61,295 at 62,252 (2002), *reh'g denied*, 106 FERC ¶ 61,184 (2004). *Bay Gas Storage Co.*, 111 FERC ¶ 61,345 at P 26 (2005).

[7] *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines,* Order No. 497, FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988).

[8] *Revision to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies*, Order No. 581 (1995), FERC Stats. & Regs., Regulation Preambles 1991-1996 ¶ 31,026 (1995).

[9] *Standards of Conduct for Transmission Providers,* Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g,* Order No. 2004-A, 107 FERC ¶ 61,032 (2004), *order on reh'g,* Order No. 2004-B, 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, 109 FERC ¶ 61,325 (2004); *order on rehearing*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *pending appeal* (D.C. Circuit Nos. 04-1178, *et al.*)

[10] In *Atlanta Gas Light Co.*, 84 FERC ¶ 61,119 (1998), the Commission granted waiver of the shipper must have title policy to a Hinshaw pipeline, but that was for a limited period only, to enable state commissions and local distribution companies to implement retail unbundling.

10. The shipper must have title policy requires that shippers transporting gas on an interstate pipeline subject to our NGA jurisdiction must have title to the gas supply being transported. As we found in *Texas Eastern Transmission Corporation*,[11] this policy ensures that shippers on interstate pipelines can only permit others to use their capacity by releasing it pursuant to the capacity release mechanism set forth in section 284.8 of the Commission's regulations. Order No. 636 adopted the capacity release mechanism in order to eliminate the potential for firm capacity holders to unduly discriminate in their assignment of capacity and facilitate the development of a secondary transportation market.[12] The capacity release regulations do this by requiring that all capacity release transactions that are for less than the maximum rate and for more than a month be posted for bidding to see if anyone else is willing to bid more up to the maximum rate, and all capacity release transactions are capped at the maximum rate.[13]

11. In *Texas Eastern Transmission Corporation,*[14] the Commission found that it is not necessary to apply the shipper must have title policy where interstate pipelines acquire off-system capacity on other interstate pipelines "since the purpose of the policy – nondiscriminatory, efficient allocation of capacity with transparency – is met by the requirement that the pipeline treat the acquired capacity as though it were part of its own system" and thus would "be subject to the Commission's Open Access Rules at all times.

[11] 94 FERC ¶ 61,139 at 61,531 (2001).

[12] Order No. 636 at 30,416-17. *See also Northern Illinois Gas Co.*, 90 FERC ¶ 61,308 at 62,000 (2000).

[13] Before Order No. 636, the Commission authorized pipelines to obtain certificates for capacity brokering programs that would allow customers to assign their capacity to other customers and to engage in certain "buy/sell" programs. In Order No. 636, the Commission decided that it could not monitor the capacity brokering programs adequately to ensure against undue discrimination in the allocation of capacity. Therefore, the Commission adopted the capacity release program, and in concurrent orders terminated the capacity brokering program, *Algonquin Gas Transmission Company*, 59 FERC ¶ 61,032 (1992), and stated it would not authorize any more buy/sell transactions, *El Paso Natural Gas Company and Transwestern Pipeline Company*, 59 FERC ¶ 61,031 (1992).

[14] 93 FERC ¶ 61,273 (2000), *reh'g denied*, 94 FERC ¶ 61,139 (2001), *reh'g and clarification denied*, 95 FERC ¶ 61,056 (2001) (*TETCO*). In this order, and in subsequent orders granting requests for waiver of the shipper must have title policy, the Commission has required an interstate pipeline to file an affirmative statement that it will transport gas for others on the acquired capacity pursuant to its open access tariff and subject to its Commission-approved rates. *TETCO*, 95 FERC ¶ 61,056 at 61,140.

This means, among other things, that unused capacity will be subject to the capacity release provisions of the acquiring pipeline's tariff or may be sold on an interruptible basis by the off-system pipeline."[15] The Commission has subsequently granted such requests for interstate pipelines that have open-access tariffs satisfying the requirements of Order Nos. 636 and 637 on file with the Commission.[16]

12. The three pipelines on which Keystone proposes to acquire off-system capacity are El Paso, Transwestern, and Northern Natural, which are all interstate pipelines subject to all of the requirements of Order Nos. 636 and 637. These interstate pipelines must offer shippers firm transportation service, capacity release, flexible receipt and delivery points, a right to segment to the extent operationally feasible, and a right of first refusal for long-term firm shippers to extend their contracts, all of which are designed to enable customers to make efficient use of interstate pipeline capacity. If Keystone purchased that capacity and then offered it under its own tariff, this off-system capacity would no longer be subject to all of the requirements of Order Nos. 636 and 637. Customers buying their capacity from Keystone would not receive the capacity release rights and other significant Order Nos. 636 and 637 benefits described above, with the result that the interstate pipeline capacity acquired by Keystone would not be used as efficiently as it would if it were sold under these three pipelines' open-access tariffs. This contrasts with the situations such as *TETCO*, where the Commission granted waiver of the shipper must have title requirement to an interstate pipeline, because the off-system capacity acquired by such a pipeline would continue to be offered under a tariff that fully complies with the requirements of Order Nos. 636 and 637. Moreover, our decision in *TETCO* expressly relied on the fact that customers would have capacity release rights with respect to the off-system capacity acquired on other interstate pipelines.

13. We also reject Keystone's argument that the protective limitations outlined above – namely, the proposed annual reporting requirements and limitations on its authority to hold off-system capacity to identified pipelines and specified amounts – should allay any concerns the Commission may have concerning the waiver of the shipper must have title policy. Order Nos. 636 and 637 require interstate pipelines to comply with much more extensive reporting requirements than are applied to Hinshaw pipelines, which enable both the Commission and third parties to monitor the presence of undue discrimination, and to monitor market activity in general. In particular, interstate pipelines must post

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[15] *TETCO I*, 93 FERC ¶ 61,273 at 61,885-85.

[16] *See, e.g., Transwestern Pipeline Co.*, 92 FERC ¶ 61,215 (2000); *Transok Ozark Gas Transmission, L.L.C.*, 97 FERC ¶ 61,362 (2001); *Texas Gas Transmission Corp.*, 97 FERC ¶ 61,250 (2001); *Caledonia Energy Partners, L.L.C.*, 111 FERC ¶ 61,095 (2005); *Starks Gas Storage LLC*, 111 FERC ¶ 61,105 (2005); *Freebird Gas Storage, LLC*, 111 FERC ¶ 61,054 (2005).

transactional information in advance on their website,[17] whereas Hinshaw pipelines are required to submit a more limited range of transaction information after the fact, on an annual basis.[18] In addition, interstate pipelines, unlike Hinshaws, are required to submit an additional annual report, FERC Form 2, and must comply with the Commission's affiliate reporting requirements.[19] Thus, we find that the proposed annual reporting requirements are not an adequate substitute for the reporting requirements imposed on interstate pipelines, much less the rights granted to customers under an open-access tariff that complies with Order Nos. 636 and 637, and that, in any case, they would not be sufficient to prevent Keystone from engaging in unduly discriminatory or preferential conduct.

14. Finally, contrary to Keystone's assertions, granting Keystone's request for waiver of the Commission's shipper must have title requirement would go beyond what the Commission has granted to interstate storage companies, which are subject to a more stringent regulatory regime than Hinshaw pipelines such as Keystone. In particular, proposed section 24 of Keystone's Operating Statement would in effect allow it to provide interstate transportation service at market-based rates without specifying any geographic limitations on the area in which it can provide such transportation service. The Commission has not approved market-based rates for long-haul transportation service and in the instances where it has granted a *TETCO* waiver to interstate pipelines with market-based rate authority, it has only done so with respect to storage services and for interstate transportation services provided within the geographic market for which that entity's market power study demonstrated that it lacked market power.[20] Thus, Keystone's reliance on *Starks* and other cases where we have granted market-based rate authority to interstate storage providers is misplaced.

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[17] 18 C.F.R. § 284.13 (2005).

[18] 18 C.F.R. § 284.126 (2005).

[19] 18 C.F.R. Pt. 161 and § 250.16 (2005).

[20] *See, e.g., Starks*, 111 FERC ¶ 61,105 at P 55. In *Starks,* the Commission granted the request of Starks, an interstate pipeline that was subject to the open access requirements of Order No. 636, for a *TETCO* waiver because Starks proposed to offer only storage services, and had proposed no rates or tariff provisions relating to interstate transportation services other than storage, so that Starks would only use the capacity on other pipelines pursuant to *TETCO* to move gas into and out of storage. The Commission further restricted Starks' authorized use of the *TETCO* waiver to provide storage service to the geographic area covered by Starks' market power study.

15. Accordingly, Keystone's request for waiver of the Commission's shipper must have title policy is denied because these services would not be provided subject to the Commission's Order Nos. 636 and 637 open access requirements. While we are rejecting Keystone's request in its current form, we would be willing to grant such a request if the conditions under which we originally granted the *TETCO* waiver were present, namely, that Keystone have clear certificate authorization to provide the requested services and have an open-access tariff fully compliant with Order Nos. 636 and 637 on file with the Commission, including an affirmative statement that it would transport gas for others on the acquired capacity pursuant to its open-access tariff and subject to its Commission-approved rates.

16. We direct Keystone to file within 30 days a revised version of its Operating Statement that eliminates section 24.

<u>The Commission orders</u>:

Keystone's revisions to its Operating Statement are accepted for filing, except that its request for waiver of the Commission's shipper must have title policy is denied, as discussed in the body of this order. Keystone is directed to file within 30 days a revised Operating Statement, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.