

128 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Arlington Storage Company, LLC

Docket No. CP08-96-001

ORDER DISMISSING REQUEST FOR REHEARING

(Issued September 17, 2009)

1. In a December 18, 2008 order, the Commission issued a certificate to Arlington Storage Company, LLC (Arlington) authorizing it, among other things, to construct and operate its Thomas Corners Project, a natural gas storage facility in Steuben County, New York.¹ On December 30, 2008, Arlington filed a motion to withdraw the executed precedent agreements it submitted in Exhibit I of its application or, in the alternative, a request for rehearing of the Certificate Order's condition requiring Arlington, prior to commencing construction, "to execute firm service agreements for [the] level of service reflected in the precedent agreements submitted in support of its proposal."²

2. On March 23, 2009, Arlington notified the Commission that it had executed firm storage service agreements for the level of service reflected in each of its precedent agreements, satisfying Ordering Paragraph (E). Accordingly, on March 24, 2009, the Commission's Office of Energy Projects issued a letter order authorizing Arlington to commence construction.

3. Nevertheless, Arlington also filed, on March 23, 2009, a request that the Commission address on the merits its December 30, 2008 motion and rehearing request, which questions the basis and need for the Commission's imposition of the executed-

¹ *Arlington Storage Company, LLC*, 125 FERC ¶ 61,306 (2008) (Certificate Order).

² Ordering Paragraph (E) of the Certificate Order (executed-contract condition). On January 12, 2009, Arlington clarified its December 30, 2008 motion and request for rehearing.

contract condition in market-based storage cases.³ Arlington maintains that its compliance with the executed-contract condition of Ordering Paragraph (E) does not render the issues raised in its December 30, 2008 pleading moot because those issues are “capable of repetition, yet likely to evade review.” Arlington asserts that the industry needs guidance with respect to whether market-based storage projects must secure executed firm service agreements before starting construction.

4. The case-specific issues Arlington raises – whether it may withdraw its precedent agreements from the record, whether it must execute service agreements prior to starting the construction of the Thomas Corners Project, and whether to rescind the Ordering Paragraph (E) condition – no longer require resolution in this case because Arlington has already executed the agreements prior to commencing construction as required by the condition and has clearance to begin construction. Since Arlington has complied with the condition for which it sought rehearing, and has no further obligations pursuant to that condition, and since the company has been granted clearance by the Commission to begin construction, we will dismiss Arlington’s December 30, 2008 motion for withdrawal of Exhibit I and its alternate request for rehearing as moot.⁴

5. However, in its March 23, 2009 filing, Arlington requests that, in order to remove uncertainty on a generic basis, we address whether, as a general matter, the executed-contract condition is appropriately imposed in market-based storage cases. While it has not come to our attention that there is any general uncertainty in the industry regarding our policy, we will nevertheless take this opportunity to provide guidance on this matter. Although precedent agreements are no longer required to be submitted, we confirm that where a certificate applicant has entered into precedent agreements, it is the Commission’s policy to condition the commencement of construction of such natural gas projects, including market-based storage projects, on the execution of service agreements for levels and terms of service represented in those precedent agreements.

³ See “Request of Arlington Storage Company, LLC for Action on December 30 Pleading Dealing With Executed Service Agreement Condition.”

⁴ We note that on January 16, 2009, the Mullins Estate (Mullins) filed a timely request for rehearing and stay of the Certificate Order, and that Mullins also filed objections to Arlington’s December 30, 2008 motion. However, on March 12, 2009, Mullins filed a notice of withdrawal pursuant to Rule 216 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2009), stating that it had settled its dispute with Arlington and, as part of the settlement, was withdrawing from further participation in the proceeding. Pursuant to Rule 216(b), Mullins’ withdrawal was effective 15 days after the date of filing the notice of withdrawal. Accordingly, Mullins’ request for rehearing and various motions are no longer pending before the Commission.

6. The analytical steps the Commission uses to evaluate proposals for new construction are set out in its Certificate Policy Statement.⁵ The threshold requirement of the Certificate Policy Statement is that the applicant be prepared to financially support the project without relying on subsidization from existing customers. New providers of market-based storage, like Arlington, easily satisfy this condition.

7. However, the “no-subsidy” provision is not the only requirement of the Certificate Policy Statement. Once that threshold requirement is met, the Commission still will approve an application for a certificate only if the public benefits from a proposed project outweigh any adverse effects.⁶ The focus of the Commission’s analysis under the Certificate Policy Statement is on the impact of a proposed project on the relevant interests balanced against the benefits to be gained from the project. This is a proportional approach, where the amount of evidence required to establish need will depend on the potential adverse effects of the proposed project. The more interests adversely affected, or the more adverse impact a project would have on a particular interest, the greater the showing of need and public benefits required to balance the adverse impact.⁷ Conversely, where a project presents minimal potential impacts, a lower showing of need is required.

8. The Certificate Policy Statement eliminated the previous requirement that an applicant present precedent agreements or service agreements to demonstrate the need for a project. Rather than continuing to rely primarily on one test to establish the need for a project, the Commission established a new policy under which an applicant could rely on a variety of relevant factors to demonstrate need, including, but not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The Commission considers all such evidence submitted by the applicant reflecting on the need for the project.⁸ However, the Certificate Policy Statement made clear that, although

⁵ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁶ *Id.*, 90 FERC ¶ 61,128 at 61,389 and 61,396 (The public benefits could include, among other things, meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.).

⁷ Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749.

⁸ *Id.* at 61,747.

precedent agreements are no longer required to be submitted, they are still significant evidence of need or demand for a project. Indeed, if an applicant has entered into contracts or precedent agreements for the capacity, the Commission will expect it to file the agreements in support of the project.⁹

9. Relevant to Arlington's request for guidance, the Certificate Policy Statement describes a situation where sponsors of a new company proposing to serve a new, previously unserved market "are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application" and explains that "[s]uch a project would not need any additional indicators of need . . . [since] landowners would not be subject to eminent domain proceedings."¹⁰ The Certificate Policy Statement goes on to recognize that it may not be possible for a sponsor to acquire all the necessary right-of-way by negotiation, stating that:

[H]owever, the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation.¹¹

10. Where the applicant has entered into precedent agreements, the Commission's general policy in all certificate cases, whether for construction of natural gas pipeline or storage facilities, at cost-based or market-based rates, is to condition the certificate on the applicant's executing contracts for the level of service and for the terms of service

⁹ *Id.* at 61,748.

¹⁰ *Id.* at 61,749.

¹¹ *Id.*

represented in the precedent agreements before commencing construction.¹² Executed service agreements or contracts, by their very nature, reflect a higher level of commitment than precedent agreements.¹³ In addition, since the Commission ultimately balances a project's demonstrated benefits against its environmental impacts, the requirement that final service agreements be executed prior to the commencement of construction helps to ensure that the evidence of need relied upon in assessing the balance was not illusory.¹⁴

¹² See, e.g., *Tennessee Gas Pipeline Co.*, 125 FERC ¶ 61,100 (2008); *Puget Sound Energy, Inc.*, 118 FERC ¶ 61,076 (2007); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006); *Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,311, at P 27 (2002) and *Transcontinental Gas Pipe Line Corp.*, 92 FERC ¶ 61,285, at 61,975 (2000) (stating “[a]s is the Commission’s practice, any certificate issued in this proceeding will be conditioned on Transco’s having executed contracts for the level of service and for the terms of service represented in the precedent agreements before commencing construction on the [project]”); and *SG Resources Mississippi, L.L.C.*, 101 FERC ¶ 61,029 (2002), *order granting waiver of condition*, 108 FERC ¶ 61,051 (2004) (imposing executed-contract condition in market-based rate storage case, but subsequently waiving condition because the anchor shipper with whom company had executed a precedent agreement was no longer operational and noting that the project imposed no significant burdens on the environment or affected landowners).

¹³ See *Greenbriar Pipeline Co., LLC*, 103 FERC ¶ 61,024, at P 12 (2003) (*Greenbriar*) (finding that because precedent agreements, by themselves, may not provide sufficient assurance that a project will be constructed, a requirement that Greenbriar execute contracts for the level and terms of service represented in the precedent agreements prior to construction was necessary to ensure that the project would not proceed without contractual support).

¹⁴ See *Greenbriar*, 103 FERC ¶ 61,024 at P 12 (holding that while 90 percent subscription of a project under precedent agreements, by itself, warrants project approval, executed contracts are required prior to construction to ensure the project will not proceed without contractual support). See also *Petal Gas Storage, LLC*, 118 FERC ¶ 61,253, *order on rehearing*, 120 FERC ¶ 61,226 (2007) (imposing executed-contract condition in market-based rate storage case consistent with the Commission’s general policy, but eliminating the condition on rehearing after revisiting the criteria of the Certificate Policy Statement and finding 1) sufficient evidence of need without reliance on the precedent agreements; and 2) “since all of the project facilities will be constructed solely on land owned by Petal and within the boundaries of the existing Petal storage facility, there should be minimal, if any adverse impact on associated landowners” and

(continued...)

11. In this case, Arlington's Thomas Corners Project presents a potentially significant impact on one landowner, the Mullins Estate (Mullins). The 27-acre central storage site, housing the storage wells, well pad, compressor station, and metering station, will be located on Mullins' property and will preclude Mullins' use of the land in any capacity. At the time of our Certificate Order, Arlington did not own that 27-acre site and possibly would have needed to acquire it by eminent domain¹⁵ Moreover, the 27 acres represents almost half of the total land Arlington requires for the project facilities,¹⁶ and close to a third of Mullins' property. Thus, the potential existed that Arlington might need to take approximately 50 percent of the total land for project facilities – and virtually all of the land required for its above-ground facilities – from an unwilling landowner.¹⁷

12. The Certificate Policy Statement makes it clear that holdout landowners cannot veto a project; however, in cases involving landowner objections, the applicant will need to make a showing of public benefits proportional to the potential exercise of eminent domain.¹⁸ Here the Commission found in the Certificate Order that Arlington had indeed made such a showing of need for the Thomas Corners Project by submitting six precedent agreements for 100 percent of the capacity Arlington was willing to sell prior to project completion and testing (5.7 Bcf), and 80 percent of the total anticipated working gas capacity of 7.0 Bcf.¹⁹

that “no environmental impacts from approval of this project have been identified.”
120 FERC ¶ 61,226 at P 12.)

¹⁵ While Arlington maintained that it already owned both the mineral and surface rights in Mullins' property required to develop the project, at the time of our order that fact was in dispute and potentially subject to litigation in state court.

¹⁶ Arlington's storage project will permanently require 62.85 total acres for its storage wells, well pad, compressor, metering station, gathering pipeline and new lateral pipeline.

¹⁷ The potential also existed that Arlington would need to exercise eminent domain to obtain a portion of pipeline right-of-way required for one of the laterals from a group of unwilling landowners.

¹⁸ Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749.

¹⁹ The Commission disagrees with Arlington (*see* Arlington's Request for Rehearing at 11) that its filing of the precedent agreements added little to Arlington's statements in its application that commercial interest in the project was strong and that it was finalizing precedent agreements: the precedent agreements provided a greater level

(continued...)

13. Arlington cites six market-based rate storage cases where applicants have filed precedent agreements but the Commission did not require the applicants to execute service agreements prior to construction.²⁰ The fact that we have not always applied our policy consistently does not alter the policy. In none of those cases did the Commission explain why, or even note, that it was not imposing the condition. However, a review of those cases reveals that in each the applicant either owned all necessary property rights, there were no protests from any potentially affected landowners, or where potential adverse impacts on landowners were identified, the Commission found that any such impacts would be minimal.²¹ Thus, these cases are different from the one at hand and appear to have presented facts that may have justified waiver of our policy.

The Commission orders:

Arlington's motion to withdraw Exhibit I or, in the alternative, request for rehearing of the Commission's December 18, 2008 Certificate Order, is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

of certainty that the interest expressed in the open season represented real demand for this particular project.

²⁰ *Northern Natural Gas Co.*, 122 FERC ¶ 61,227 (2008); *Texas Gas Transmission, LLC*, 122 FERC ¶ 61,190 (2008); *Central New York Oil and Gas Co., LLC*, 116 FERC ¶ 61,277 (2006); *MoBay Storage Hub, Inc.*, 117 FERC ¶ 61,298 (2006); *Caledonia Energy Partners, L.L.C.*, 111 FERC ¶ 61,095 (2005); and *Liberty Gas Storage, LLC*, 113 FERC ¶ 61,247 (2005).

²¹ None of the cases involved the placement of significant above-ground facilities on the property of an objecting landowner.