

153 FERC ¶ 61,214  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

KPC Pipeline, LLC

Docket No. TS13-3-001

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. In this order, the Commission denies a request for rehearing (Request for Rehearing) by KPC Pipeline, LLC (KPC) of the Commission's April 7, 2014 order denying KPC's request for a partial waiver (Request for Waiver) of the Commission's Standards of Conduct.<sup>1</sup>

**I. Background**

2. On May 30, 2013, KPC filed the Request for Waiver, seeking a partial exemption from the Commission's Standards of Conduct requirements applicable to natural gas pipelines as set forth in Part 358 of the Commission's regulations.<sup>2</sup> Specifically, KPC requested a waiver that would allow it to enter into transactions with its affiliates engaged in marketing functions without triggering the obligation to comply with the separation of functions and information sharing prohibitions as well as the No-Conduit rule of the Standards of Conduct. KPC explained that it made this request to reduce the costs associated with compliance.<sup>3</sup>

3. In the April 2014 Order, the Commission denied KPC's Request for Waiver explaining that, in evaluating such requests, the Commission considers a number of factors including size of the company, the number of employees and level of interest in transportation on the pipeline, and, where appropriate, whether the pipeline has separated to the maximum extent practicable from its Marketing Affiliates.<sup>4</sup> The Commission

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<sup>1</sup> *KPC Pipeline, LLC*, 147 FERC ¶ 61,016 (2014) (April 2014 Order).

<sup>2</sup> 18 C.F.R. Part 358 (2015).

<sup>3</sup> April 2014 Order, 147 FERC ¶ 61,016 at P 8.

<sup>4</sup> *Id.* P 4.

considered these and other facts and characteristics described in KPC's Request for Waiver and found that the length of KPC's pipeline far exceeded that of other entities that in the past had received waivers as small entities.<sup>5</sup> In addition, the Commission explained that KPC's situation differed from that of two other pipelines that KPC had cited as having previously received partial waivers from the Standards of Conduct, noting that these cases differed on the length of the pipeline facilities, the number of employees, and the percentage of subscribed capacity (as an indicator of the level of interest in the pipeline).<sup>6</sup> The Commission distinguished KPC from Discovery because it had a much shorter pipeline, had no employees of its own but shared 50 employees with non-marketing affiliates, had a lower subscription rate for its capacity, and was ending its affiliation with the entity that triggered its obligation to comply with the Standards of Conduct.<sup>7</sup> Similarly, the Commission concluded that KPC was much larger than Rendezvous, which had 20.8 miles of pipeline facilities, no employees of its own, and a 66 percent subscription rate. In addition, the Commission noted that KPC's stated purpose for seeking the waiver was to create a marketing affiliate and share employees so that it can take advantage of marketplace opportunities by making sales for resale of natural gas using KPC's pipeline capacity.<sup>8</sup>

4. On rehearing, KPC argues that the Commission improperly based its decision entirely on the fact that KPC's pipeline is longer than that of entities granted waivers in the past (1,120 miles of pipeline for KPC, with a total capacity of 159,257 MMBtu/day, compared to pipelines where waivers were granted, ranging from 6 miles to 253 miles) and that the Commission's comparison of KPC to two other pipelines that have been granted partial waivers from the Standards of Conduct was erroneous.

5. More specifically, KPC argues that the Commission's denial of its Request for Waiver was arbitrary and capricious and not supported by substantial evidence.<sup>9</sup> In this regard, KPC argues that the Commission "focused exclusively on the number of miles on the KPC system" in concluding that KPC did not meet the small pipeline criteria<sup>10</sup> It

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<sup>5</sup> *Id.* P 13.

<sup>6</sup> *Id.* P 14. The two other pipelines cited by KPC were Discovery Gas Transmission LLC (Discovery) and Rendezvous Pipeline Company, L.L.C. (Rendezvous). Request for Rehearing at 7.

<sup>7</sup> April 2014 Order, 147 FERC ¶ 61,016 at P 14.

<sup>8</sup> *Id.*

<sup>9</sup> Request for Rehearing at 3.

<sup>10</sup> *Id.* at 4.

argues that the Commission's exclusive reliance on this factor is flawed and requires reversal.<sup>11</sup> It further argues that, even if KPC does not qualify as a small pipeline, the Commission erred by not considering granting it a waiver anyway, based on the totality of circumstances.<sup>12</sup> KPC also argues that, although its Request for Waiver cited the cases of Discovery and Rendezvous, it did not mean to imply that KPC was comparable to those other companies or that its waiver should be denied if its circumstances were distinguishable from those examples.<sup>13</sup>

6. It argues, further, that the Commission failed to consider a number of factors cited by KPC, that: (1) most of its pipeline facilities are small diameter facilities with a limited capacity; (2) many segments of its system are essentially idle; and (3) KPC is a small company with limited operations and limited employees.<sup>14</sup> KPC also asserts that the Commission did not consider how burdensome compliance would be to KPC.<sup>15</sup> Finally, KPC objects that the Commission did not consider that its Request for Waiver was essentially unopposed.<sup>16</sup>

## II. Discussion

7. In responding to KPC's Request for Rehearing, it is important to consider that the Standards of Conduct are the Commission's rules to implement the undue discrimination and undue preference prohibitions of section 4 of the Natural Gas Act (NGA) (and section 205 of the Federal Power Act). The Standards of Conduct specifically prohibit transmission providers from providing undue preferences in favor of their marketing affiliates and wholesale merchant functions (wholesale merchant functions). In addition, the Standards of Conduct are designed to deter undue preferences prohibited by section 4 of the NGA by, among other things, requiring a transmission provider's employees engaged in transmission services to be separate from those engaged in marketing services and requiring that all transmission customers, whether affiliated or non-affiliated, be

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* KPC acknowledges, however, that one of its shippers requested that the waiver only be granted for a three-year term, with KPC able to request renewal. *Id.* at 2.

treated on a non-discriminatory basis.<sup>17</sup> As a tool to prevent discriminatory behavior, the Commission prohibited transmission providers from providing non-public transmission information to its wholesale merchant function in a preferential manner<sup>18</sup> and prohibited anyone from being a conduit to share non-public transmission information (No-Conduit Rule).<sup>19</sup> As the U.S. Court of Appeals for the District of Columbia Circuit stated in upholding the Standards of Conduct, “a pipeline has an obvious incentive to favor its own marketing affiliate; profits to the affiliate are profits to the pipeline.”<sup>20</sup>

8. Although KPC claimed in its Request for Waiver that there is “little risk of KPC acting in an unduly discriminatory manner if the requested waivers are granted, as KPC has substantial unsubscribed capacity available, which it would prefer to sell to unaffiliated shippers if possible,”<sup>21</sup> KPC does not otherwise explain why that risk is low. In fact, KPC’s stated *purpose* of creating a marketing affiliate and sharing employees is to be able to take advantage of marketplace opportunities by making sales for resale of natural gas using KPC’s pipeline capacity.<sup>22</sup> Claiming that one “prefers to sell to unaffiliated shippers if possible” does not eliminate the risk of unduly discriminatory behavior. Moreover, KPC’s proposed structure, under which the KPC employee that markets pipeline capacity on the KPC system would also perform natural gas marketing functions on behalf of the new marketing affiliate,<sup>23</sup> creates a structure whereby that shared individual could engage in unduly discriminatory behavior favoring the marketing affiliate over non-affiliated customers. For example, the shared employee could direct a potential customer seeking transportation to enter into an agreement with the marketing affiliate in lieu of the pipeline. In addition, that shared individual’s knowledge of non-public transmission information as well as non-public customer information creates an

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<sup>17</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280, at P 3 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 at P 2, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2001).

<sup>18</sup> 18 C.F.R § 358.7 (2015).

<sup>19</sup> 18 C.F.R § 358.6 (2015).

<sup>20</sup> *Tenneco Gas v. FERC*, 969 F.2d 1187, 1202 (D.C. Cir. 1992).

<sup>21</sup> Request for Waiver at 2.

<sup>22</sup> April 2014 Order, 147 FERC ¶ 61,016 at P 14.

<sup>23</sup> Request for Waiver at 8.

opportunity that the information can be used in an unduly discriminatory or preferential manner or to the detriment of the market. For example, the shared employee might offer discounted transportation if a potential customer utilizes the marketing affiliate or compete with existing shippers for customers. KPC's claim that there is "low risk" of unduly preferential behavior was not supported in the Request for Waiver nor the Request for Rehearing and we affirm the finding in the April 2014 Order that KPC did not demonstrate good cause to justify a partial waiver from the Standards of Conduct.

9. Moreover, KPC's Request for Rehearing erroneously claims that the Commission did not appropriately consider KPC's facts and circumstances in light of the Commission's criteria for a small pipeline waiver exemption. In the Request for Waiver, KPC urged the Commission to consider it as "small" "despite its length,"<sup>24</sup> thus seemingly acknowledging that its pipeline length is greater than that of other pipelines for which the Commission has granted partial waivers of the Standards of Conduct using the criteria established for a small pipeline exemption. KPC urged the Commission not to focus on its length, but to also consider a number of other factors.<sup>25</sup> However, despite KPC's claim that consideration of the number of miles is inconsistent with Commission policy and arbitrary, it does not provide any support for its claim.

10. In the April 2014 Order, the Commission considered the size of KPC, as well as other factors KPC described in its Request for Waiver. Contrary to KPC's claim, consideration of the length of the pipeline facilities is not reversible error. In fact, it would be inconsistent with 24 years<sup>26</sup> of Commission precedent in evaluating more than 15 waiver requests to ignore the length of the pipeline's facilities in considering whether a pipeline meets the criteria for a small pipeline partial waiver from the Standards of Conduct.<sup>27</sup> The size of the pipeline is one of the factors the Commission consistently

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<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Id.*

<sup>26</sup> As early as 1991, the Commission considered the small size, number of employees, and level of interest in transportation on the pipeline as the criteria to be used in determining whether small pipelines qualified for partial exemptions from the Standards of Conduct. *See Ringwood Gathering Company*, 55 FERC ¶ 61,300 (1991) (43 miles of transmission facilities, three employees, and lack of interest in transmission facilities).

<sup>27</sup> *See Ringwood Gathering Company*, 55 FERC ¶ 61,300 (1991) (43 miles of transmission facilities, three employees and lack of interest in transmission facilities). *See, e.g., Black Marlin Pipeline Co.*, 108 FERC ¶ 61,184, at P 2 (2004) (an order in which the Commission granted waivers to: (1) Black Marlin Pipeline Company

considers in addressing a request for waiver of the Standards of Conduct and it is neither arbitrary nor capricious for the Commission to have considered the length of KPC's pipeline facilities in evaluating whether it met the criteria for a small pipeline partial waiver from the Standards of Conduct.

11. Contrary to KPC's claim that the Commission did not consider other factors, the Commission did in fact consider other factors; KPC erroneously conflates the Commission not being persuaded by KPC's arguments with the Commission not considering those arguments. In fact, the Commission relied upon KPC's factual statements in the Request for Waiver and described them in the April 2014 Order. Specifically, the Commission discussed KPC's argument that it is a small company with few employees, limited resources, has reduced throughput and small operations, as well as its statement that it sought the waiver to reduce the costs associated with complying with the Standards of Conduct.<sup>28</sup> Moreover, in the April 2014 Order, the Commission explicitly stated that it had considered "all of KPC's circumstances" and concluded that KPC did "not meet the criteria for a partial waiver of the Standards of Conduct based on its size."<sup>29</sup> Therefore, the Commission's consideration reflected reasoned decision-making as it considered the evidence in the record when coming to a conclusion.

12. Despite the fact that KPC cited to two other partial waiver cases in its Request for Waiver, KPC now takes issue on rehearing with the Commission's statement that KPC characterizes itself as being comparable to those two other applicants. In citing those two cases, KPC was directing the Commission's attention to the quantity of its pipeline capacity as compared to that of the two other pipelines. It now suggests that the

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(75 miles); (2) Discovery Gas Transmission LLC (105 miles); (3) Nornew Energy Supply, Inc. (26 miles); (4) ONEOK, Inc. (100 miles); and (5) Trans-Union Interstate Pipeline, L.P. (41 miles)). In *Bear Creek Storage Company*, 108 FERC ¶ 61,011, at P 2 (2004), the Commission granted partial waivers to: (1) KB Pipeline Company and Northwest Natural Gas Company (19 miles); (2) Missouri Interstate Gas, LLC (6 miles); and (3) Tuscarora Gas Transmission Company (227 miles). Likewise, in *American Transmission Company, LLC*, 109 FERC ¶ 61,082 (2004), the Commission granted partial waivers to: (1) Jupiter Energy Corporation (10.2 miles of 10 ¾ inch pipeline, 3.2 miles of 8 and 5/7 inch pipeline); (2) Venice Gathering System, L.L.C. (253 miles); (3) WestGas Interstate, Inc. (12 miles); (4) *Rendezvous Pipeline Company, L.L.C.*, 120 FERC ¶ 61,131 (2007) (20.8 miles); (5) *USG Pipeline Company, L.L.C.*, 139 FERC ¶ 61,202 (2012) (15 miles); and (6) *TWP Pipeline LLC*, 147 FERC ¶ 61,016 (2014) (8 miles).

<sup>28</sup> April 2014 Order, 147 FERC ¶ 61,016 at PP 7-9.

<sup>29</sup> *Id.* P 14.

Commission should ignore any other circumstances present in those same two cases. While the Commission in the April 2014 Order acknowledged the quantity of capacity, the Commission also appropriately looked at the percentage of unsubscribed capacity<sup>30</sup> as an indication of the level of interest in transportation on the pipeline, as that is one of the criteria the Commission has established in considering small pipeline waiver requests.<sup>31</sup> Even though the Commission relied on the total amount of capacity (159,257 MMBtu/d) and subscribed capacity (111,120 MMBtu/d) that KPC described included in its Request for Waiver,<sup>32</sup> KPC claims in its Request for Rehearing that “the subscription levels cited in the [April 2014 Order] relate to capacity subscriptions on only a portion of the KPC system. The true percentage of total system capacity that is under contract is far less than the 69 percent cited in the April 2014 Order.”<sup>33</sup> We disagree. It is neither arbitrary nor capricious for the Commission to have relied upon the information that KPC brought to the Commission’s attention in its Request for Waiver. In effect, KPC is suggesting that, because some segments of the pipeline system may be idle, the Commission should take a piecemeal approach when considering the level of interest in transportation on the pipeline. KPC does not proffer any precedent to support this concept. We reject KPC’s argument that the Commission erred by considering the other two waivers as entirely unpersuasive. The Commission used those two waivers as illustrative examples of how KPC was not eligible for a partial waiver of the Standards of Conduct based on the small pipeline criteria. As noted above, the Commission considered the totality of the circumstances in denying KPC’s request for waiver. KPC has not offered any additional information in its Request for Rehearing to demonstrate good cause exists to grant it a partial waiver from the Standards of Conduct.

13. Notwithstanding KPC’s arguments to the contrary, the Commission considers a number of factors in determining whether to grant a pipeline a partial waiver of the Standards of Conduct and whether there is a risk of unduly discriminatory or unduly preferential behavior. As we stated in the April 2014 Order, the denial of KPC’s Request for Waiver was based on its failure to show good cause for its waiver request to be granted. Moreover, we reject KPC’s argument that the Commission has the burden of justifying its denial of KPC’s Request for Waiver. The burden of demonstrating that a waiver is warranted rested with KPC and KPC failed to do so. As to KPC’s argument that it should be granted a waiver, notwithstanding that it does not qualify for a waiver as a small entity; even if we accepted that waivers could be granted for other reasons, this

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<sup>30</sup> *Id.* P 4.

<sup>31</sup> *See supra* n.26.

<sup>32</sup> April 2014 Order, 147 FERC ¶ 61,016 at P 12; Request for Waiver at 9.

<sup>33</sup> Request for Rehearing at 9.

would only be pertinent if KPC had presented another compelling reason for a waiver to be granted, which KPC has not done here.

14. The sole reason KPC offers for it being given a waiver (that does not relate to it being a small pipeline) is that it finds the requirement to comply with the Commission's regulations burdensome. Under KPC's current business model, it is not required to comply with the Commission's Standards of Conduct regulations. We are not persuaded by KPC's assertions regarding burden, because any costs associated with compliance can be avoided merely by continuing its present business model.

15. While KPC argues otherwise, the fact that its system has well over 1,000 miles of pipeline facilities is an important (but not sole) factor for the Commission to consider when deciding whether KPC's request for a waiver as a small pipeline should be granted. This factor is not refuted by the fact that some of the pipes have a small diameter or that some of its system is currently idle. The fact that KPC structured its arrangements with its affiliates to place a number of its employees elsewhere in the organizational chart does not hide the fact that in reality its pipeline is of extensive scope and touches on multiple markets. Moreover, KPC's purpose in seeking the waiver is to allow it to enter certain transactions with its affiliates that would otherwise trigger the obligation to comply with the Standards of Conduct.

16. Finally, contrary to KPC's assertions, the fact that KPC's Request for Waiver is not protested does not compel the Commission to grant KPC's otherwise inadequately supported waiver request. For all these reasons, we will deny rehearing and reaffirm the finding denying KPC's Request for Waiver.

The Commission orders:

KPC's Request for Rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.