112 FERC ¶ 61,292
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates — Docket No. PL05-10-000

NOTICE OF INQUIRY

(September 15, 2005)

1. This order institutes a notice of inquiry to evaluate possible changes in the criteria set forth in *Arkla Gathering Service Co.*[1] employed by the Commission in evaluating whether and under what circumstances the Commission may invoke its "in connection with" jurisdiction to guard against abusive practices by natural gas companies and their gathering affiliates.

2. The *Arkla* test involves a determination that, as a result of the concerted action of a pipeline and its gathering affiliate, the Commission's effective regulation of the pipeline is circumvented. In a recent decision,[2] the United States Court of Appeals for the District of Columbia found that the Commission had misapplied the criteria set forth in *Arkla*. Under *Arkla*, the Commission's ability to reassert jurisdiction is limited to abuses directly related to the affiliate's unique relationship with an interstate pipeline, such as tying gathering service to the pipeline's jurisdictional transmission service or cross-subsidization between the affiliate's gathering rates and the pipeline's transmission rates. The court stated that *Arkla* permits a reassertion of jurisdiction in circumstances "limited to" abuses "directly related to the affiliate's unique relationship with an interstate pipeline," such as "tying gathering service to the pipeline's jurisdictional transmission service," or "cross-subsidization between the affiliate's gathering rates and the pipeline's transmission rates."[3] The court found that, in the case before it, the gathering affiliate's

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[1] *Arkla Gathering Service Co.*, 67 FERC ¶ 61,257 at 61,871 (1994), *order on reh'g*, 69 FERC ¶ 61,280 (1994), *reh'g denied*, 70 FERC ¶ 61,079 (1995), *reconsideration denied*, 71 FERC ¶ 61,297 (1995) (collectively, *Arkla*), *aff'd Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (*Conoco*).

[2] *Williams Gas Processing Co., L.P. v. FERC*, 373 F.3d 1335 (2004) (*Williams Gas Processing).*

[3] *Williams Gas Processing*, at 1342.

affiliation with the pipeline was "utterly irrelevant to its ability to charge high rates, or to impose onerous conditions for gathering service."[4] Instead, the affiliate "could do these things for one reason only – because it was a recently deregulated monopolist in the North Padre gathering market."[5] Accordingly, the court held that the Commission had not met its own test under *Arkla* for reassertion of jurisdiction and vacated and remanded the Commission's orders.

3. The Commission is interested in reevaluating both its legal authority to reassert jurisdiction and the policy considerations in deciding whether to do so. To assist this reevaluation of the *Arkla* test, the Commission is seeking comment on the following questions:

1. Is there an inherent anti-competitive issue when pipelines spin-down gathering facilities to affiliates or are concerns about the behavior of affiliated gatherers unique to certain specific pipeline/affiliate relationships, such as those articulated by Shell in its request for rehearing in the *Shell v. Transco* proceeding in Docket No. RP02-99-010?

2. Once a pipeline has spun-down its gathering services into an affiliated company, is it common for the affiliated gatherer to seek higher rates for its gathering services than the rates charged by the pipeline for those services prior to the spin-down?

    a. How do the rates of non-affiliated gatherers compare to the rates of affiliated gatherers?

    b. Have the rates charged by affiliated gatherers had an impact on well shut-ins?

3. What factors are relevant in determining whether a gathering affiliate is separate from its pipeline affiliate and independent from its pipeline affiliate in performing its gathering functions?

4. Must a gathering affiliate be physically separate and separately staffed in order to be independent of its pipeline affiliate?

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[4] *Id.* at 1342.

[5] *Id.*

5. Because the basis of initially disclaiming NGA section 4 and 5 "in connection with" rate and service jurisdiction is solely a change in ownership of the gathering facilities, is it necessary for the Commission to require a showing of collusion or abusive conduct in order to reassert jurisdiction, if it is found that the transfer of the facilities is a sham and/or there is no real, de facto separate corporate ownership?

6. What kind of conduct should trigger the Commission's reassertion of jurisdiction over the gathering services of a pipeline affiliate?

7. Should the Commission be especially concerned about the actions of gathering affiliates when they control access to an essential facility in order to gain access to the interstate pipeline grid?

8. Should a showing of "concerted action" by the gathering affiliate and the pipeline be required, or should it be sufficient for the gathering affiliate alone to have engaged in anticompetitive or otherwise objectionable behavior to trigger the Commission's reassertion of jurisdiction?

9. What kind of activities would constitute "concerted action" between the gathering affiliate and its affiliated pipeline for purposes of circumventing the Commission's effective regulation of the pipeline?

10. What incentives do states have to ensure that providers of gathering services do not engage in anticompetitive behavior?

11. Is there a gap between state regulation of gathering services and the Commission's regulation of natural gas companies, and, if so, what is the nature of that gap?

12. Should the Commission view the conduct of offshore affiliated gatherers differently from onshore affiliated gatherers due to the lack of state regulation offshore?

13. What criteria should the Commission employ in reasserting NGA section 4 and 5 "in connection with" jurisdiction over gathering rates and services following a spin-down of gathering facilities by a pipeline to an affiliate?

Procedure for Comments

4. The Commission invites interested persons to submit comments, and other information on the matters, issues and specific questions identified in this notice. Comments are due 60 days from the date of publication in the *Federal Register*. Comments must refer to Docket No. PL05-10-000, and must include the commentor's name, the organization they represent, if applicable, and their address.

5. To facilitate the Commission's review of the comments, the Commission requests that commentors provide an executive summary of their position. In addition, the Commission requests that commentors identify each specific question posed by the Notice of Inquiry that their comments address and to use appropriate headings. Comments should be double-spaced.

6. Comments may be filed on paper or electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. The Commission accepts most standard word processing formats and commentors may attach additional files with supporting information in certain other file formats. Commentors filing electronically do not need to make a paper filing. Commentors that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, D.C. 20426.

7. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commentors are not required to serve copies of their comments on other commentors.

Document Availability

8. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

9. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

10. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact the Commission's Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@ferc.gov) or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

By direction of the Commission. Commissioner Brownell concurring with a separate statement attached.

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Inquiry on Criteria for Reassertion Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates

Docket No. PL05-10-000

(Issued September 15, 2005)

BROWNELL, Commissioner, concurring:

Today we issue a Notice of Inquiry (NOI) to evaluate possible changes in the criteria for invoking the Commission's "in connection with" jurisdiction. I appreciate the need to guard against affiliate abuse. However, I think it is important to put the questions proffered in the NOI in context.

In *Panhandle*, the Supreme Court found that sections 4, 5 and 7 of the NGA do not concern gathering and only extend to the interstate transportation of gas by their express terms.[1] In *Conoco*, the court expressly stated that where an activity or entity falls within the section 1(b) gathering exemption of the NGA, the other provisions of the NGA, including the "in connection with" language in sections 4 and 5 neither expand our jurisdiction nor override the gathering exemption.[2] Therefore, the fundamental question for me is whether any new test has a direct nexus to our effective regulation of the interstate pipeline, not the gatherer. I am hard pressed to find that necessary linkage even if a spun-down entity seeks a higher rate for its services or is an essential access point to the interstate grid. In either situation, the Commission will continue to employ its section 4 and 5 NGA authority to ensure that the pipeline's rates remain just and reasonable.

Since Order 636, the Commission has approved a number of proposals to spin-down (as well as spin-off) gathering facilities because such transfers eliminated unnecessary costs from interstate rates and the stand-alone gatherer could more efficiently utilize the facilities involved. There have been very few complaints.

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[1] *Panhandle III*, 337 U.S. at 508-09, 69 S.Ct. at 1257-58.
[2] *Conoco Inc. v. FERC*, 90 F.3rd 536 at 552 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1142 (1997).

I urge commenters to consider whether there is a need for a new test and, if so, how any new test is consistent with the limits of our current statutory authority.

Nora Mead Brownell
Commissioner