111 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company Docket No. CP04-60-001

ORDER DENYING REHEARING

(Issued April 19, 2005)

1. On February 23, 2005, Tennessee Gas Pipeline Company (Tennessee) filed a request for rehearing[1] of the January 24, 2005 Order in this proceeding authorizing the construction and operation of Tennessee's 5.3-mile, 8-inch diameter Tewksbury-Andover Lateral in Massachusetts.[2] The January 24 Order held that a pipeline may not construct facilities pursuant to blanket construction authority codified in Part 157, subpart F, of the Commission's regulations[3] if it proposes to price service over the proposed facilities on an incremental basis, as did Tennessee. Instead, pipelines proposing to charge

[1] On February 17, 2005, Professor Thomas E. Phalen, Jr., on behalf of landowners Armindo and Sara Dias, filed several documents purporting to demonstrate that Tennessee's project does not address local environmental concerns and does not meet the U.S. Department of Transportation's (U.S. DOT) pipeline safety standards. The filing was not styled as a rehearing request and we do not deem it to be one. We note, however, that on March 7, 2005, Tennessee filed a response documenting that Professor Phalen's appeal of the Tewksbury Conservation Commission's issuance of a local permit was dismissed by the Massachusetts Department of Environmental Protection on June 4, 2004, and that by letter of September 21, 2004, to Professor Phalen, the U.S. DOT affirmed that Tennessee's proposed construction and design of the project meets the federal pipeline safety regulations.

[2] *Tennessee Gas Pipeline Company*, 110 FERC ¶ 61,047 (2005).

[3] 18 C.F.R. Part 157, subpart F (2005).

incremental rates for service over facilities otherwise eligible for Part 157 blanket construction authorization must seek authorization in a case-specific proceeding under section 7 of the Natural Gas Act (NGA). Tennessee requests rehearing of that decision.

2. The Commission is denying Tennessee's request for rehearing, as discussed below. This action is in the public interest since this case specific proceeding is not the appropriate forum in which to address proposals to change the Commission's policy with respect to pricing facilities authorized under the blanket construction regulations.

Background and the January 24, 2005 Order

3. Tennessee proposed in this proceeding to construct the Tewksbury-Andover Lateral under the prior notice provisions in Part 157, subpart F of the Commission's blanket certificate regulations since the project met the requirements for eligible facilities under section 157.202 of the Commission's regulations and the facilities' projected cost was within the cost limits set forth in section 157.208 (d) of the regulations. Tennessee indicated in its prior notice filing that it intended to provide service over the new lateral under its existing Rate Schedule FT-IL, a lateral line rate schedule which provides for incremental recourse rates to be calculated for service over each of Tennessee's separate laterals that qualify under the rate schedule.[4]

4. Commission staff filed a protest, which was not withdrawn, asserting that incremental rate proposals such as Tennessee's were not contemplated by the blanket construction certificate regulations. Because the staff protest was not withdrawn, pursuant to section 157.204(f), the Commission treated Tennessee's proposal as though it were a case-specific certificate application filed under Part 157, subpart A. In support of this position, Commission staff observed that under the Commission's Pricing Policy,[5] projects that qualify for construction under the Part 157 blanket procedures are entitled to a presumption of rolled-in rate treatment because the rate impact of qualifying projects on

[4] Tennessee's Rate Schedule FT-IL was approved by the Commission in Docket Nos. RP02-17-000 and CP00-65-005 in connection with Tennessee's Stagecoach Lateral Project. The rate schedule was established for service over the Stagecoach Lateral and over "any future incrementally-priced laterals approved by the Commission and constructed by Tennessee." *See Tennessee Gas Pipeline Co.*, 97 FERC ¶ 61,133 at p. 61,609 (2001).

[5] *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 (1995).

existing customers would be *de minimis*.[6] Therefore, Commission staff maintained, the Commission does not subject such projects to a case-specific analysis of system-wide benefits as is required for projects proposed for construction under the provisions of Part 157, subpart A.[7]

5. Tennessee filed an answer to the protests, arguing that the blanket certificate regulations do not specify what rate treatment is required for facilities constructed under blanket authority. Tennessee emphasized that the presumption for rolled-in rate treatment for blanket facilities contained in the Commission's Pricing Policy is not the same as a requirement for that treatment. Further, Tennessee alleged that in two earlier proceedings service over lateral line facilities constructed under blanket authority were priced incrementally and that the rates were established in separate NGA section 4 filings such that no section 7 reviews of the proposed rates occurred.[8]

6. In response to Tennessee's arguments, the Commission in the January 24, 2004 Order stated:

> [T]he general principle is that *initial* rates for service over new facilities are set in section 7 proceedings. For facilities constructed under blanket authorization, the pipeline charges its existing system rates as initial rates. While there may be support for enabling pipelines to construct facilities under blanket authorization

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[6] *Citing Destin Pipeline Co.*, 83 FERC ¶ 61,308 (1998) (explaining Commission's policy on rolled-in pricing of facilities constructed under a blanket certificate).

[7] On March 24, 2004, under NGA section 4, Tennessee filed in Docket No. RP04-221-000 tariff sheets to establish incremental rates for the proposed Tewksbury-Andover Lateral. The Director of the Division of Tariffs and Market Development – East rejected Tennessee's tariff filing as premature because, under section 154.207 of the Commission's regulations, tariff changes should be filed not less than 30 days or more than 60 days before the effective date of the tariff sheets, which Tennessee had proposed as April 25, 2004. However, the in-service date for the lateral was not scheduled until the fourth quarter of 2004.

[8] *Citing Texas Eastern Transmission, L.P.*, 101 FERC ¶ 61,181 (2002) (*Texas Eastern*) and *Maritimes & Northeast Pipeline, L.L.C.*, 91 FERC ¶ 62,052 (2000) (*Maritimes*). In the January 24, 2005 Order, the Commission noted another instance where a pipeline with a lateral-line rate schedule proposed to incrementally price service over a lateral being constructed under its blanket construction certificate. *See Algonquin Gas Transmission Co*., 95 FERC ¶ 61,138 (2001) (*Algonquin*).

> and implement rates for service over those facilities in a separate proceeding, absent a broader examination of potential implications, the Commission finds it preferable to review all proposals to price new facilities on an incremental basis in case-specific proceedings. This approach will allow the Commission to analyze the proposal under the Certificate Policy Statement and determine whether the project should be priced on an incremental or rolled-in basis.[9]

Accordingly, the Commission authorized construction of the lateral and approved Tennessee's proposed incremental recourse rates as initial rates under NGA section 7(c).

Tennessee's Request for Rehearing

7. Although Tennessee offers many of the same arguments in its rehearing request as it did in its answer to the staff's protest to its application, the main thrust of its contentions on rehearing is that the Commission did not sufficiently explain its decision to require case-specific review when incremental rates are proposed for facilities otherwise eligible for authorization under a prior notice blanket certificate. Because of this alleged failure, Tennessee asserts that the Commission decision was arbitrary and capricious.

8. For example, Tennessee maintains, the Commission did not and could not demonstrate that Tennessee's filing was inconsistent with the Commission's blanket certificate regulations since the proposed facilities clearly fit within the definition of "eligible facility" set forth in section 157.202, and its filing complied with all of the prior notice requirements of section 157.208(b)(2). According to Tennessee, these are the only requirements or limitations in the subpart F regulations. In particular, Tennessee points out that there is no provision relating to the type of rates required to be charged for service over facilities constructed under blanket authority.

9. Tennessee asserts that if the Commission relied on the Pricing Policy's presumption for rolled-in pricing of blanket facilities to support its decision to prohibit Tennessee from proposing incremental rates in the context of its prior notice filing, then the Commission's decision is incorrect.[10] Tennessee reiterates that a presumption is rebuttable and is not a requirement. Further, Tennessee contends that the presumption in the Pricing Policy was included because it was assumed that blanket projects would have a *de minimis* effect on systemwide shippers' rates. Tennessee urges that allowing

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[9] *Tennessee*, 110 FERC at P 24.

[10] Tennessee notes that Commission staff cited the Policy Statement in its protest.

incremental pricing for blanket construction is consistent with the Pricing Policy's goal of providing upfront rate certainty to existing shippers and assuring them that rolled-in pricing would only be permitted where projects would have little or no rate impact on existing shippers because, where incremental rates are proposed, there will be no effect on existing shippers.

10. Tennessee posits that the Commission's statement in the January 24 Order that "absent a broader examination of potential implications, the Commission finds it preferable to review all proposals to price new facilities on an incremental basis in case-specific proceedings," implies that the Commission would need to conduct an examination of the potential harm that could result if incremental rates were established for blanket facilities. According to Tennessee, the Commission failed to articulate any such harm because there is none for which the blanket regulations would fail to provide protection. For example, Tennessee urges that in acting upon the applicant's NGA section 4 filing to propose and place the incremental rates into effect, the Commission would have an adequate opportunity to review the proposed pricing and remedy any problems. Since blanket projects already have a presumption in favor of rolled-in rates, Tennessee asserts that the rate review would be unlikely to reveal that existing customers would be materially affected by the pipeline's proposal to charge incremental rates.[11] In light of the opportunity to review incremental rates for blanket projects in an NGA section 4 proceeding, Tennessee states that the Commission did not sufficiently explain why proposals to price new facilities on an incremental basis must be reviewed on a case-specific basis.

11. Citing *Maritimes*, *Texas Eastern*, and *Algonquin*, Tennessee claims that the Commission also failed to adequately explain why it allowed other pipelines to price blanket facilities on an incremental basis, but denied Tennessee that opportunity. Tennessee avers that the approach taken in *Maritimes*[12] is directly applicable to the

[11] Tennessee explains that pipelines that propose projects subject to the automatic blanket authority regulations, which do not require a filing with the Commission before construction commences, also have to make the NGA section 4 filing to place their rates into effect for the project. Thus, the Commission will have an opportunity to review incremental rates for those projects.

[12] The order in *Maritimes* (91 FERC ¶ 62,052 (2000)), issued under delegated authority, approved an initial rate under NGA section 7 for a lateral being constructed under automatic blanket authority, but stated that in the future, Maritimes could establish incremental rates for blanket facilities under its lateral line rate schedule by making an NGA section 4 filing.

circumstances in this proceeding and that the Commission failed to meaningfully distinguish the two cases. For example, Tennessee states, in both proceedings the pipelines had stand-alone rate schedules in effect for service on incrementally priced laterals, proposed to construct the incrementally-priced facilities under blanket authority, and filed to place the incremental rates into effect under NGA section 4, as was directed in *Maritimes*. Thus, Tennessee asserts that the Commission arbitrarily disregarded its precedent in that proceeding as well as that followed in *Texas Eastern* and *Algonquin*[13] when deciding in the January 24 Order that Tennessee could not propose incremental rates for blanket facilities.

12. Tennessee contends that the only reasons the Commission gave for not following its own precedent are unavailing. First, Tennessee argues, the fact that the order in *Maritimes* was approved by delegated authority does not render the order "non-binding," since the Director of the Division of Tariffs and Rates-East has the authority under section 375.301 of the Commission's regulations to issue binding orders. In Tennessee's view, there is no reason that delegated orders should not be considered precedent applicable to future proceedings. Second, Tennessee avers, the fact that the Commission failed to specifically discuss policy considerations in its previous orders should not have required Tennessee to disregard those orders when it proposed incremental rates for the Tewksbury-Andover Lateral Project. Tennessee urges that it should have received the same treatment as other pipeline companies that filed for approval of similar projects under similar vehicles. According to Tennessee, the Commission's disregard of its precedent demonstrates its failure to exercise reasoned decision-making.

13. Finally, Tennessee maintains that subjecting all proposals to construct facilities otherwise eligible for prior notice blanket authorizations to case-specific review because the pipeline proposes to incrementally price the proposed facilities would unnecessarily slow down the Commission's regulatory approval process and create bottlenecks of pending applications. According to Tennessee, that result would defeat the purpose of the Commission's blanket certificate procedures to streamline the process for certain

[13] In *Texas Eastern* (101 FERC ¶ 61,181 (2002)), the Commission accepted by letter order tariff sheets filed pursuant to NGA section 4 to establish "initial incremental recourse rates" for service on a lateral being constructed under automatic blanket authority to be effective on the in-service date of the new facilities. In *Algonquin* (95 FERC ¶ 61,138 (2001)), in a case-specific proceeding necessitated by protests to a prior notice filing, Algonquin was authorized to construct facilities under its blanket certificate and charge rates under its lateral line rate schedule without discussion of the procedure for implementing that incremental initial rate, which was later placed into effect in an NGA section 4 proceeding.

routine facilities, will have a chilling effect on the construction of lateral line facilities, and result in a disincentive for pipeline's to price such laterals on an incremental basis, consistent with other Commission policies.[14]

Discussion

14. The Commission's statement in the January 24 Order that it prefers to review on a case-specific basis proposals to incrementally price new facilities "absent a broader examination of the implications," was not intended to suggest that the Commission believes that harm to existing shippers would necessarily result when incremental rates are proposed for blanket facilities. Rather, the statement reflects the Commission's judgment that this case-specific proceeding is not the appropriate vehicle in which to explore whether it should change its policy or its regulations regarding how service over facilities constructed under blanket authorization may be priced. As the Commission noted, there arguably is support for the change Tennessee advocates given the tension between the fact that blanket construction was intended to be priced on a rolled-in basis and the Commission's current pricing policies which under most circumstances favor incremental pricing.

15. Tennessee urges that review of proposals to price blanket facilities on an incremental basis could occur when a pipeline makes its NGA section 4 filing to place the new rate into effect. The Commission perceives a number of difficulties with that approach. To start, approval of incremental rates for blanket construction in a section 4 proceeding may blur the lines between the Commission's authority under section 7, under which it approves initial rates, and its authority under section 4, under which it reviews changes to existing rates. The Commission believes that, if a pipeline proposes to charge a rate other than its existing Part 284 systemwide rate for service on facilities it proposes to construct under the blanket construction regulations, the proposed rate is an initial rate that the Commission must approve pursuant to NGA section 7 in the certificate proceeding authorizing construction of the facilities. Absent section 7 approval to charge incremental rates, there would arguably be no authorized rate for the service. The Commission continues to believe that any revisions to the blanket regulations to permit incremental pricing should provide a mechanism under section 7 for obtaining the Commission's approval of the incremental rate.

16. To the extent the Commission's January 24 Order did not explicitly respond to the issues Tennessee raised in its protest and reiterated in its rehearing request, we address

[14] Tennessee's rehearing request at 11 citing Commissioner Brownell's dissent to the January 24 order.

those issues now. Tennessee correctly observes that the blanket regulations in Part 157, subpart F, of the Commission's regulations do not contain a specific provision requiring blanket facilities to be priced on a rolled-in basis. However, these regulations also contain no provision authorizing a pipeline to revise the rate provisions of its tariff. We think these facts support the Commission's view that the blanket program as conceived and implemented does not accommodate the setting of incremental rates for blanket facilities. In other words, a specific provision was unnecessary because it was evident in the Commission's order promulgating the blanket regulations that rate issues would not be reviewed in the context of blanket proceedings.[15]

17. For example, the Commission stated in the 1982 rulemaking that the blanket procedures would authorize two types of construction activities: those that "either have relatively little impact on ratepayers, or little effect on pipeline operations . . . which are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity;" and those that "comprise . . . certain activities in which various parties might have a concern . . ."[16] Blanket authorization would not be available for "those activities which may have a major potential rate impact on ratepayers, or which propose such important considerations that close scrutiny and case-specific deliberation by the Commission is warranted."[17] In this regard, we note that historically case-specific deliberation has always been required to review new rates. For rates related to new facilities, that review takes place in a section 7 certificate proceeding.

18. Further, in explaining why section 157.204(a) requires an applicant for a blanket certificate to be an interstate pipeline that has previously received a certificate under

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[15] *Interstate Pipeline Certificates for Routine Transactions*, Order No. 234, 47 F.R. 24254 (June 4, 1982); 47 F.R. 30724 (July 15, 1982), *Reg. Preambles 1982-1985* ¶ 30,368.

[16] *Reg. Preambles 1982-1985* at ¶ 30,200. The Commission was referring to those projects which would qualify for automatic blanket authority and those requiring a prior notice filing, respectively.

[17] *Id.* In the rulemaking the Commission determined that per-project cost limitations should be retained because those limitations "provide some basis for judging whether a proposed activity is sufficiently routine and will have a sufficiently small impact on ratepayers, so that it should be approved under the streamlined procedures . . ." *Id*. at ¶ 30,206.

section 7 of the NGA and "had rates accepted by the Commission," the Commission observed that the whole blanket program certificate is

> predicated upon **previous** findings and filings in which jurisdictional entities would have been involved, such as **specific** rate determinations made in **separate rate** proceedings . . . The blanket certificate program is not designed to make such **initial findings** . . . but presumes that the certificate holder will have established some previous jurisdictional and informational base with the Commission concerning such matters as rates, system supplies and certificated customers. Only natural gas companies which have been issued a certificate under section 7 of the Natural Gas Act (other than a limited-jurisdiction certificate) and had rates accepted by the Commission will have established this informational base**.**[18]

19. Although the Commission was responding to non-jurisdictional pipelines who wished to avail themselves of the blanket certificate process without having any systemwide rates on file with the Commission, the above quote illustrates that no new rate determinations were expected to occur in the context of a blanket proceeding because the rates that would be charged for service over blanket facilities would already have been approved in a previous rate proceeding, *i.e.*, systemwide rates.

20. In addition to the indications in the rulemaking, two other considerations indicate the Commission's intention that blanket facilities would be priced on a rolled-in basis. First, at the time the rules were promulgated, and until relatively recently, the Commission had a preference for rolled-in rates and incremental rates were the exception. Although that preference no longer obtains, the Commission has affirmed in the Pricing Policy, and later in its Certificate Policy Statement,[19] that blanket construction is still exempt from the case-specific rate review required in non-blanket certificate proceedings because it still is anticipated that blanket facilities will be priced on a rolled-in basis. Second, with only the three exceptions cited by Tennessee, no issue regarding the appropriate pricing of blanket facilities has arisen in prior notice proceedings.

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[18] *Id*. at ¶ 30,201 (emphasis added).

[19] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at note 3 (1999), *order clarifying Statement of Policy*, 90 FERC ¶ 61,128, and *order further clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000) (*Certificate Policy Statement*).

21. Tennessee argues that the Commission's finding that proposed facilities cannot be approved under the blanket certificate regulations if the pipeline proposes to charge incremental rates for service on the facilities is incompatible with its own precedent in *Maritimes*, *Texas Eastern*, and *Algonquin* approving similar project applications. However, those cases, in particular the order in *Maritimes*, do not accurately convey the Commission's existing policy on this issue, as discussed above.

22. In *Maritimes*, the order was, of course, binding on the parties to that proceeding, but its precedential value beyond that proceeding is limited because it was a delegation order and the Commission did not have the opportunity to review on rehearing the procedural process outlined in that order.[20] Further, as we noted, there was no discussion of our policy on the pricing of blanket facilities in *Texas Eastern* where initial incremental rates for blanket facilities were established in a section 4 proceeding, not the usual forum for approving initial rates. Similarly, there was no discussion of how such a rate should be established in *Algonquin*, wherein the Commission disposed of a protest to Algonquin's prior notice filing and found that Algonquin could construct the subject facilities under blanket authority and charge a rate pursuant to its existing lateral line rate schedule. The simple fact is that the Commission did not focus on the issue of incremental pricing for blanket facilities in those proceedings and, therefore, did not substantively consider the issue.

23. Further, as noted, Tennessee urges that the rate view necessary to set incremental rates for blanket construction should occur under section 4 rather than in a case-specific review under section 7 because processing bottlenecks may occur. However, assuming initial rates could be set in a section 4 proceeding, case-specific analysis would be required in the section 4 proceeding. Thus, the feared bottleneck would be shifted from section 7 proceedings to proceedings under section 4, where the Commission might be required to accept and suspend the new rates if there are questions regarding the derivation of the proposed rate. Prior to the resolution of such questions, a pipeline may have no valid rate to charge for service it is obligated to provide.

24. Finally, we do not conclude that our decision in this proceeding will have a chilling effect on the construction of laterals or the provision of service over them pursuant to lateral line rate schedules because many laterals do not qualify for blanket consideration and will be reviewed in a case-specific proceeding wherein incremental rates will be set. The issue raised in this proceeding appears to have arisen in only a small subset of proceedings involving lateral line construction. Therefore, the

[20] Delegation orders may be reviewed by the Commission on rehearing pursuant to Rule 385.1902 of the Commission's regulations. 18 C.F.R. §385.1902 (2005).

Commission is declining at this time to initiate a separate proceeding to explore modifications to its blanket regulations.

Conclusion

25. For all of the reasons discussed above, we will deny Tennessee's request for rehearing of the January 24 Order.

The Commission orders:

Tennessee's request for rehearing of the January 24 Order in this proceeding is denied.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company Docket No. CP04-60-001

(Issued April 19, 2005)

BROWNELL, Commissioner, dissenting:

For the reasons set forth in *Tennessee Gas Pipeline Company*, 110 FERC ¶ 61,047 (2205), I believe a pipeline may propose an incremental recourse rate for service over facilities constructed pursuant to our blanket construction certificate program set forth in Part 157, subpart F of our regulations. Consequently, I would grant rehearing.

For these reasons, I respectfully dissent.

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Nora Mead Brownell
Commissioner