FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT

January 15, 2009 **Commissioner Marc Spitzer**

Docket Nos.: IN09-7-000, IN09-8-000, IN09-11-000 and IN09-12-000

Item No.: G-2

Statement of Commissioner Marc Spitzer on Enforcement Actions

"In 2005, Congress vested the Commission with substantial new enforcement and penalty authority.[1] Since that time, the Commission has repeatedly and unanimously implemented this authority in a "firm but fair" manner.[2] We also have emphasized the need for clear orders, rules, regulations and policies as an important means to ensure a meaningful enforcement program. In these settlements, however, the majority fails to achieve these important objectives.

I fully support the Commission's policy to encourage settlements of regulatory disputes.[3] I have strongly supported the Commission's enforcement program and our Enforcement Staff. Vigorous enforcement of willful violations of law is critical to fair, open, and transparent competitive markets. However, clarity of our regulations and policies is essential to compliance by market participants and a necessary predicate to "firm but fair" enforcement. In this case, the Commission has been less than clear and over a period of time sent what could best be described as a "mixed message" with regard to multiple-affiliate bidding practices. Civil penalties are not warranted here. As such, these settlements are not just and reasonable.[4]

These settlements are not the first time the issue of multiple-affiliate bidding in a pipeline's open season has come before the Commission. The Commission repeatedly has held that a pipeline has discretion to choose the method for allocating its capacity and has declined to impose specific rules and limitations on the methods chosen. Moreover, in Order No. 636, the Commission declined the call to establish specific parameters for determining the best bid. Rather, the Commission ruled that a pipeline's tariff must include an objective and non-discriminatory economic standard for determining the best bids. [5] Although there is no assertion here that the settling parties violated Cheyenne Plains Gas Pipeline Company's tariff, these principles are important to understand the context of Commission deliberations regarding multiple-affiliate bidding.

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1 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

2 *Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 27 (2008); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 51 (2008). *See also e.g.*, Chairman and Commissioners' comments at the May 15, 2008 Open Meeting at 59-73.

3 *E.g.*, *Northwest Utilities Serv. Co.*, 117 FERC ¶ 61,337 at P 20 n.22 (2006); *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 at 62,008 (2002).

4 *See*, *e.g.*, *Kern River Gas Transm. Co.*, 126 FERC ¶ 61,034 P 162-66 (2009) ("The Commission concludes that it cannot find that the overall settlement as a package provides a just and reasonable result, . . . Therefore, the Settlement is rejected").

5 *E.g.*, *Tennessee Gas Pipeline Co.*, 119 FERC ¶ 61,126 (2007); *Northern Natural Gas Co.*, 110 FERC ¶ 61,361 (2005). *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 636, FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 at 30,557 (1992), *order on reh'g*, Order No. 636-B, 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*, No. 95-1186 (1996), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

In *Pacific Gas Transmission Co.*,[6] shippers complained that the Commission should prohibit the submission of multiple bids by affiliated entities because allowing multiple-affiliate bidding "provides affiliated bidders with much more flexibility than other bidders" and it "permits the affiliated bidders to ensure that they will be awarded as much capacity as they want."[7] With the issue squarely before it, including accusations challenging the appropriateness of multiple-affiliate bidding with regard to other bidders, the Commission refused to require PGT to implement new open season procedures and expressly approved multiple-affiliate bidding. Indeed, the Commission arguably provided guidance on how multiple-affiliate bidding should be implemented: "as long as each affiliate (which is a separate entity under law) submits one bid."[8] Given the Commission's approval of multiple-affiliate bidding in *PGT*, it is not unreasonable for the industry to have concluded, even in the face of allegations in that case that such practices were a device to obtain an advantage over other bidders, that multiple-affiliate bidding was permissible as long as each affiliate was a separate corporate entity and each submitted one bid.

The issue again arose in *Trailblazer Pipeline Co.*[9] In *Trailblazer*, the Commission declined to prohibit multiple-affiliate bidding. Some parties argued that multiple-affiliate bidding was "gaming," and recommended an aggregate affiliate bid approach under which all affiliated companies would be considered as a single bidding entity.[10] The Commission ordered a technical conference on the issue of multiple-affiliate bidding. Trailblazer argued that no reasonable and effective solution to these concerns has emerged.[11] In fact, Trailblazer contended that it could not be placed in the position of rejecting a valid bid simply because a bid was also submitted in the same open season by an affiliate. Indeed, Trailblazer remarked that it might not be able to determine *post hoc* the affiliate status of bidding entities.

Notably, although the **Commission** did not prohibit multiple-affiliate bidding in *Trailblazer*, a Commission staff person persuaded Trailblazer to post a statement on the pipeline's electronic bulletin board regarding future allocations of capacity on the Trailblazer pipeline.[12] Commission policies are articulated through its orders rather than statements by individual staff personnel. [13] The fact that the Commission elected not to take action on complaints regarding multiple-affiliate bidding again in *Trailblazer*, but instead a staff person sought a posting addressing the activity, only contributes to the conclusion that, over the years, the Commission has sent mixed messages and has been unclear as to the propriety of multiple-affiliate bidding. The Commission provided no further guidance to the industry regarding the nature of remedial action, if any, relating to this type of bidding behavior. Given the Commission's actions in *Trailblazer*, including the fact that the Commission directly faced accusations that the practice was improper gaming, I do not think it unreasonable for the industry to have concluded that multiple-affiliate bidding was not improper unless a pipeline's tariff prohibited such practice.

Further, in its recent blanket certificate rulemaking, the Commission endorsed a party's clarification that "[a]s long as potential shippers received the same notice and ability to acquire capacity created by a . . . [new] expansion as they do on any existing capacity that becomes available, any risk of undue discrimination should be avoided." *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, FERC Stats. & Regs. ¶ 32,606 at n.68 (2006).

[6] 56 FERC ¶ 61,192 (1991) (*PGT*).

[7] *Id.* at 61,720.

[8] *Id.* at 61,721.

[9] 101 FERC ¶ 61,405 (2002), *order on technical conference and denying reh'g*, 103 FERC ¶ 61,225 (2003), *reh'g denied*, 108 FERC ¶ 61,049 (2004) (*Trailblazer*).

[10] 108 FERC at P 40.

[11] Initial Comments by Trailblazer Pipeline Company on Technical Conference at 5-6, Trailblazer Pipeline Co., Docket No. RP03-162 (Mar. 7, 2003).

[12] Trailblazer's open season post, reads, in relevant part:
The Market Oversight and Investigations (OMOI) staff of the FERC is monitoring open seasons for capacity releases on Trailblazer. Based on information related to recent open seasons, OMOI staff believes that bidders maybe able through the use of affiliated bidders, to game auctions of released capacity in which several bids have an equal Winning Bid Value, so that capacity is awarded on a pro rata basis. . . OMOI staff is monitoring situations in which a number of affiliated entities each make bids at the maximum rate for the same released capacity and release term…. To determine whether any remedial action relating to this open season is appropriate, OMOI staff may seek information on a non-public basis from entities that make such bids.

[13] *See MidAmerican Energy Holdings Co.*, 118 FERC ¶ 61,003 at P 19, n.45 (2007).

Transcontinental Gas Pipe Line Corp.[14] further obscures the Commission's policies regarding affiliate bidding. Again in response to shipper allegations that multiple-affiliate bidding gamed allocation of scarce capacity, the Commission recognized that tariff modification is the proper response to concerns that multiple bids by one corporation or by members of the same corporate family could be used to improperly influence the results of the bidding process. There, the Commission required Transco to modify its tariff to preclude a bidder from simultaneously submitting multiple bids for the same capacity. However, the Commission denied a request to require that a bidder certify at the time of bidding that no affiliate or other entity is acting on its behalf has withdrawn a higher bid.[15]

Against this background, I would have preferred that we follow our recent action in *Horizon Asset Management, Inc.*[16] There the Commission unanimously acknowledged that a lack of clarity of the law justified a decision not to impose sanctions. Nevertheless, having clarified the impropriety of the conduct at issue, we cautioned those parties and the industry at large that subsequent violations would result in sanctions. In that case, we first clarified our rules and then provided the industry with the necessary information to comply.[17] There is a potential dichotomy between unlawful conduct and the imposition of penalties. The analysis in determining unlawful conduct is different than the analysis for imposing penalties.

I respect the majority's view that 2005 legislation imposed new remedies for unlawful conduct and in fact created a new theory of liability. However, Commission deliberations regarding multiple-affiliate bidding have neither been repealed nor reversed and cannot be ignored any more than a tolled bell unrung. Nothing in the Energy Policy Act of 2005 or Order No. 670 expressly or implicitly changed that history. The mixed messages sent to the regulated community by the Commission raise subjective uncertainty in reasonable minds on the propriety of those practices. It is critical to the integrity of the Commission's enforcement efforts, and the public we serve, that our policies be interpreted as complementary rather than in conflict. Thus, it is the burden of the regulator to harmonize its prior precedent and actions rather than to conclude that one body of law trumps another.

A reasonable mind could have concluded multiple-affiliate bidding was not unlawful. Based on the totality of the circumstances, I believe that the Commission should have used these proceedings to first provide guidance regarding multiple-affiliate bidding practices rather than to impose civil penalties on the settling parties. I am concerned these orders may undermine the regulated community's reasonable reliance on Commission precedent or acquiescence.[18] The Commission's forbearance of imposition of penalties would further the interests of justice as well as compliance.

For these reasons, I respectfully dissent from this order."

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[14] 65 FERC ¶ 61,023 at 61,321-322 (1993).

[15] The majority's holding is not helped by Order No. 2005. *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at P 99 (2005). There is no reason to believe that a shipper would consider an order addressing open seasons on a future Alaska natural gas transportation project to have general applicability. Indeed, Order No. 2005, by its very terms relates to the "conduct of open seasons for Alaska Natural gas transportation projects (including procedures for the allocation of capacity)." Consequently, it is reasonable for a regulated entity to read the Commission's decision to examine multiple-affiliate bids for Alaska natural gas pipeline capacity as only applicable to open seasons for the Alaskan natural gas transportation project. Further, the Commission has arguably treated matters related to the unique nature of an Alaskan natural gas transportation project differently than other natural gas pipeline matters.

[16] 125 FERC ¶ 61,209 (2008).

[17] *Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citation omitted) ("Agency discretion is often at its 'zenith' when the challenged action relates to the fashioning of remedies.").

[18] Going forward, the regulated community should view its actions or attempts at regulated actions through the lens of 18 C.F.R. § 1c.1, Consequently, they should avail themselves of the Commission's guidance tools, including, but not limited to, declaratory orders, no-action letter requests, General Counsel Opinion letters, accounting interpretations, the Enforcement Hotline, the Help Desk, and pre-filing meetings.