

123 FERC ¶ 61,168
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Energy Transfer Partners, L.P.

Docket No. IN06-3-003

Energy Transfer Company

ETC Marketing Ltd.

Houston Pipeline Company

Oasis Pipeline, L.P.

Oasis Pipeline Company Texas, L.P.

ETC Texas Pipeline Ltd., Oasis Division

ORDER ESTABLISHING HEARING

(Issued May 15, 2008)

1. This order establishes a hearing to determine whether Energy Transfer Partners, L.P.; Energy Transfer Company (ETC); ETC Marketing Ltd. (ETC Marketing), and Houston Pipeline Company, (collectively, ETP) violated 18 C.F.R. § 284.403(a), which was the code of conduct applicable to persons holding blanket marketing certificates at the time the relevant gas trading activities occurred.¹ The order also establishes a hearing

¹ Section 284.403(a) of the Commission's regulations was promulgated in Order No. 644, *Amendments to Blanket Sales Certificates*, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,153 (2003), *reh'g denied*, *In the Matter of Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004). In Order No. 673, *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, FERC Stats. & Regs., Regulations Preambles 2006-2007 ¶ 31,207 (2006), the Commission rescinded sections of its regulations pertaining to codes
(continued...)

to determine whether Oasis Pipeline, L.P., Oasis Pipeline Company Texas, L.P., and ETC Texas Pipeline LTD., Oasis Division (collectively Oasis Pipeline) violated certain Commission regulations governing service provided pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Background

2. On July 26, 2007, the Commission issued an Order to Show Cause² directing ETP to show cause why the Commission should not find that ETP manipulated markets at the Houston Ship Channel (HSC) and Waha, Texas, on specific dates between December 2003 and December 2005, and why the Commission should not revoke ETP's blanket certificates to sell gas subject to the Commission's jurisdiction. The Show Cause Order further directed ETP to show why ETP should not pay Natural Gas Act (NGA) civil penalties in the amount of \$82,000,000 and disgorge \$69,866,966 in unjust profits, plus interest, resulting from market manipulation.

3. The Show Cause order also directed Oasis Pipeline to show cause why the Commission should not find that Oasis Pipeline: (1) unduly discriminated against nonaffiliated shippers and unduly preferred affiliated shippers in violation of section 284.9(b) of the Commission's regulations;³ (2) charged rates in excess of the Commission-approved fair and equitable rate in violation of section 284.122(b) of the Commission's regulations;⁴ (3) failed to file an amended operating statement in violation of section 284.123(e) of the Commission's regulations;⁵ and (4) should pay civil penalties in the amount of \$15,500,000 and disgorge \$267,122 in unjust profits, plus interest.

4. On October 9, 2007, ETP filed its answer in opposition to the Show Cause Order. ETP argued that the Commission should find that ETP had adequately shown cause why it should not be found to have committed any of the violations alleged in the Show Cause Order, and, accordingly, issue an order summarily dismissing the charges against ETP.

of conduct with respect to certain sales of natural gas because, pursuant to the Energy Policy Act of 2005, the Commission implemented new anti-manipulation regulations in Order No. 670, *Prohibition of Energy Market Manipulation*, FERC Stats. & Regs., Regulations Preambles 2006-2007 ¶ 31,202 (2006).

² *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Show Cause Order).

³ 18 C.F.R. § 284.9(b) (2007).

⁴ 18 C.F.R. § 284.122(b) (2007).

⁵ 18 C.F.R. § 284.123(e) (2007).

With respect to the NGA violations, ETP argued, among other things, that: (1) the physical monthly sales were legitimate, profitable transactions; (2) the methodology used to prove manipulation is scientifically unsound; and (3) the analysis of the trading activity is circular and riddled with errors and does not contain meaningful analysis of real-world physical trades and fundamental market conditions. With respect to the NGPA violations, ETP asserted, among other things, that: (1) Oasis Pipeline did not discriminate in favor of its market affiliate in the provision of interstate interruptible transportation pursuant to NGPA section 311; (2) the alleged overcharges occurred with respect to intrastate transportation not interstate transportation; and (3) the capacity lease and commercial operations agreement did not affect operations on the Oasis Pipeline system and thus did not require an amendment to the filed statement of operating conditions.

5. On December 20, 2007, the Commission issued an order denying ETP's expedited request for rehearing and stay of the Show Cause Order, and addressed certain aspects of the Commission's civil penalty procedures.⁶ The order, among other things, directed the Commission's Enforcement Litigation Staff (Enforcement Litigation Staff) to file a brief that: (1) identifies specific issues, if any, it recommends the Commission set for a trial-type evidentiary hearing before an administrative law judge (ALJ); (2) identifies specific issues, if any, it recommends the Commission resolve by order on the merits without a trial-type evidentiary hearing before an ALJ; and (3) contains a response to ETP's pending application for a subpoena.⁷ The order also gave ETP an opportunity to file a response to Enforcement Staff's brief.

6. On February 14, 2008, Enforcement Litigation Staff filed its brief recommending next steps and opposing ETP's motion for summary disposition. Enforcement Litigation Staff asserts that ETP's request for summary disposition has no merit and should be denied. Enforcement Litigation Staff argues that the Commission should set disputed

⁶ *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007). In its request for rehearing, ETP alleged that the Commission erred by finding that: (1) the Commission can require ETP to litigate the NGPA charges in an agency adjudication before the Commission assesses any penalty and before ETP can seek *de novo* review in a federal district court; and (2) the Commission can require ETP to litigate the NGA charges in a Commission adjudication without an opportunity to have its potential civil penalty reviewed *de novo* by a federal district court.

⁷ ETP's October 9, 2007 application for issuance of a subpoena and its February 21, 2008 renewed application for issuance of a subpoena will be addressed in a separate order.

material market manipulation issues for a trial-type evidentiary hearing because the Show Cause Order contains evidence of a strong case against ETP.

7. Enforcement Litigation Staff asserts in its brief that voice recordings and trade data demonstrate that ETP manipulated wholesale natural gas markets in Texas during the period of December 2003 through December 2005 by: (1) orchestrating its financial and physical portfolio to profit from lower prices as HSC; (2) selling fixed-price gas for prompt month delivery at HSC for less than a competitive price; (3) reporting these artificially lower prices to Platts *Inside FERC*, which included them in its monthly HSC index (IFERC HSC index); and (4) benefiting from lower prices reported in the IFERC HSC index.

8. Enforcement Litigation Staff argues that the errors in the Show Cause Order ETP identifies as undermining Enforcement Litigation Staff's *prima facie* case are inconsequential or non-existent because correction of these errors, which were initially made by ETP, strengthens the case that ETP manipulated prices at HSC. Moreover, Enforcement Litigation Staff refers to recently obtained information that allegedly demonstrates ETP similarly manipulated prices at HSC in November 2005, a delivery month that was not among the nine delivery months for which ETP manipulated prices at HSC as described in the Show Cause Order. Enforcement Litigation Staff asserts that ETP realized an estimated \$7,296,265 in unjust profits from its price manipulation at HSC for November 2005 delivery. Enforcement Litigation Staff submits that this brings the total amount of ETP's estimated unjust profits from its manipulations at HSC from \$67,638,416 to \$79,934,681 plus interest. In addition, Enforcement Litigation Staff asserts that because the corrected information shows that ETP committed 25 violations on October 25 and 28, 2005, to manipulate November 2005 prices at HSC, it recommends that the Commission increase ETP's civil penalty liability by \$25,000,000 from \$82,000,000 to \$107,000,000. Finally, Enforcement Litigation Staff submits that the Commission should direct the ALJ to submit an initial decision on the alleged NGA violations within six months of the Commission's order.

9. With respect to the allegations against Oasis Pipeline, Enforcement Litigation Staff asserts that the Commission should issue a penalty assessment order and direct other remedies against Oasis Pipeline for violations of the NGPA and Commission regulations. Enforcement Litigation Staff recommends that the Commission rule on the information already developed in this proceeding that Oasis Pipeline unduly discriminated in violation of the NGPA and violated sections 284.9(b) (non-discriminatory access), 284.122(b) (maximum rate) and 284.123(e) (statement of operating conditions) of the Commission's regulations. Enforcement Litigation Staff further submits that the Commission should: (1) issue a penalty assessment order against Oasis Pipeline in the amount of \$15,500,000 for its undue discriminations and other

violations of Commission requirements; (2) direct Oasis Pipeline to disgorge \$265,836 in unjust profits plus interest; and (3) condition Oasis Pipeline's continued provision of NGPA section 311 service.⁸

10. On March 31, 2008, ETP filed its reply to Enforcement Litigation Staff's February 14, 2008 brief. With respect to the allegations of market manipulation, ETP asserts that the Commission should summarily rule in ETP's favor because Enforcement Litigation Staff has failed to offer any meaningful response, or identify any genuine factual issues, regarding the essential element of artificial price. Moreover, ETP claims that Enforcement Litigation Staff has not identified any material issue of disputed fact regarding ETP's actual trading activity that would require a trial. In addition, ETP denies Enforcement Litigation Staff's new allegations that it artificially depressed prices at the HSC for November 2005 and asserts that Enforcement Litigation Staff has not presented any evidence necessary for its case.

11. ETP asserts that the claims that Oasis Pipeline violated the Commission's NGPA section 311 regulations lack merit. ETP argues that Enforcement Litigation Staff's arguments are premised on the incorrect assumption that transporters like Oasis Pipeline reserve specific space for interruptible service. ETP asserts that no shipper on Oasis Pipeline was guaranteed that it could flow interruptible gas; nor did any shipper pay a demand charge for interruptible service. ETP submits that Oasis Pipeline did not deny or discourage the use of interstate interruptible service. ETP argues that Oasis Pipeline had every incentive to keep its system full and the full recordings and actual transportation data belie Enforcement Litigation Staff's claim. ETP asserts that without addressing the law or evidence presented in its answer, Enforcement Litigation Staff continues to assert that Oasis Pipeline overcharges interstate interruptible shippers and failed to amend its Statement of Operating Conditions to reflect an internal capacity lease arrangement. ETP submits that these allegations against Oasis Pipeline are unsupported. Accordingly, ETP asserts that the case against Oasis Pipeline should be dismissed; no civil penalties should be assessed; there are no unjust profits to be disgorged; and the non-monetary operating conditions should not be imposed.

⁸ Enforcement Litigation Staff recommends that the Commission order that Oasis Pipeline's continued authority to provide transportation pursuant to NGPA section 311 be conditioned on Oasis Pipeline's: (1) enhancement of its electronic bulletin board to permit potential interruptible shippers to see at 3:00 p.m. next-day crosshaul capacity available on the pipeline; (2) termination of its dual contract program to end the practice of offering firm contract holders undue preferences in the access of interruptible crosshaul capacity; and (3) maintaining voice recordings of all business conversations of its pipeline schedulers and dispatchers. Enforcement Litigation Staff recommends that the conditions should last for at least two years.

Discussion

12. Based upon its review of the extensive pleadings filed in response to the Show Cause Order by both Enforcement Litigation Staff and ETP, the Commission finds that there are genuine issues of fact material to the decision of this proceeding which require a hearing before an ALJ. Accordingly, ETP's motion for summary disposition is denied.

13. With respect to allegations against ETP contained in the Show Cause Order, as supplemented in Enforcement Litigation Staff's February 14, 2008 brief,⁹ the ALJ should determine whether ETP violated section 284.403(a) of the Commission's regulations that was in effect at the time. Section 284.403(a) stated:

Any person making natural gas sales for resale in interstate commerce pursuant to § 284.402 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.¹⁰

The ALJ should also determine whether ETP unjustly profited from its activities and, if so, the level of unjust profits.

14. With respect to the allegations against Oasis Pipeline, the ALJ should determine whether Oasis Pipeline: (1) unduly discriminated against nonaffiliated shippers and unduly preferred affiliated shippers in violation of section 284.9(b) of the Commission's regulations; (2) charged rates in excess of the Commission-approved fair and equitable rate in violation of section 284.122(b) of the Commission's regulations, and, if so the amount of unjust profits due to the excessive rate; and (3) failed to file an amended operating statement in violation of section 284.123(e) of the Commission's regulations.

15. The Commission reserves to itself the issues of: (1) whether civil penalties should be imposed for the alleged violations of ETP and Oasis; (2) whether ETP's blanket marketing certificate should be revoked; (3) the method by which ETP and Oasis should disgorge any unjust profits; and (4) whether any conditions should be placed on Oasis Pipeline's continued authority to provide interruptible transportation pursuant to NGPA section 311. The Commission will make these determinations based on the record developed at the hearing established by this order.

⁹ See *supra* P 8 and 10.

¹⁰ 18 C.F.R. § 284.403(a) (2005).

16. The Commission finds that the Chief ALJ should determine whether the allegations of NGA violations against ETP and the allegations of NGPA violations against Oasis Pipeline are best addressed in one hearing or in separate hearings. The Chief ALJ has the discretion to determine whether the procedural schedule for the hearing or hearings should follow the Summary of Procedural Time Standards for Hearing Cases,¹¹ or some other time standards.

17. Finally, in response to ETP's request that the Commission expressly authorize the ALJ to exclude evidence pursuant to federal court precedent under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (*Daubert*),¹² the Commission finds that the ALJ must rule on the admissibility of evidence pursuant to Rule 509 of the Commission's Rules of Practice and Procedure.¹³ The Commission's rule for the admissibility of evidence differs from, and is broader than, Rule 702 of the Federal Rules of Evidence, which encompasses the principles of *Daubert*.¹⁴ Rule 509 reflects the administrative nature of the Commission's trial-type proceedings and the presence of a fact finder who can afford appropriate weight to the relevant evidence that is submitted.¹⁵

¹¹ <http://www.ferc.gov/legal/admin-lit/time-sum.asp>.

¹² *Daubert* provides that federal courts may reject technical or economic evidence prior to trial where the evidence fails to meet the requirements of accepted scientific inquiry. Rule 702 of the Federal Rules of Evidence was amended in response to *Daubert* and cases applying the *Daubert* principles.

¹³ 18 C.F.R. § 385.509 (2007).

¹⁴ See *Entergy Services, Inc. and EWO Marketing LP*, 109 FERC ¶ 61,108 at P 8 (2004) (the Commission's rules on admissibility are intentionally broad); *Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, Order No. 225, FERC Stats. & Regs., Regulations Preambles ¶ 30,358 at 30,178 (1983).

¹⁵ See 15 U.S.C. § 717n (2006) ("All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and *in the conduct thereof the technical rules of evidence need not be applied*") (emphasis added); *Pacific Gas & Elec. Co.*, 12 FERC ¶ 61,226 at 61,554 (1980) ("As a general rule, evidence is to be received liberally in administrative proceedings, without regard to the technical concepts of the common law which were developed for jury trials"); *Southern California Edison Co.*, 51 FERC ¶ 63,002 at 65,005 (1990) (the Federal Rules of Evidence are "not binding in proceedings before regulatory agencies such as the FERC"); see also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

The Commission orders:

(A) Pursuant to the authority of the Natural Gas Act, particularly under sections 14 and 15, and the Commission's rules and regulations, and pursuant to sections 311 and 501 of the Natural Gas Policy Act of 1978, a public hearing is to be held in Docket No. IN06-3-003 concerning the allegations contained in the July 26, 2007 Show Cause Order as supplemented by Enforcement Litigation Staff's February 14, 2008 Brief, as discussed above.

(B) The Chief ALJ is directed to determine, as expeditiously as possible, whether the allegations of NGA violations against ETP and the allegations of NGPA violations against Oasis Pipeline should be addressed in one hearing or in separate hearings.

(C) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, must convene a prehearing conference in this proceeding to be held within 10 days after the Chief ALJ's determination pursuant to Ordering Paragraph (B), in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The prehearing conference is for the purpose of clarification of the positions of the participants and establishment by the Presiding Judge of any procedural dates necessary for the hearing. The Presiding Administrative Law Judge is authorized to conduct further proceedings in accordance with this order and the rules of practice and procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.