

133 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Arizona Public Service Company and
Sequent Energy Management, L.P.

Docket No. PR10-45-001

ORDER DENYING LATE INTERVENTIONS AND DISMISSING REQUESTS FOR
REHEARING

(Issued October 21, 2010)

1. On June 25, 2010, Arizona Public Service Company (APS) and Sequent Energy Management, L.P. (Sequent) (collectively, Petitioners) submitted a joint petition seeking clarification that a certain transaction would not be a prohibited buy/sell transaction under Commission policy because the transaction involved a Hinshaw facility, as opposed to an interstate pipeline. Alternatively, Petitioners requested a limited waiver should the Commission determine that the transaction was a prohibited buy/sell transaction. On July 23, 2010, the Commission denied Petitioners' request for clarification finding that the prohibition against buy/sell transactions applies to interstate open-access transportation services provided by Hinshaw pipelines and intrastate pipelines (also referred to as, section 311 pipelines). However, the Commission found that good cause existed to grant Petitioners' request for a limited waiver of the Commission's buy/sell prohibition in order to allow the transaction to proceed.¹

2. Following the July 2010 Order, fifteen motions to intervene out-of-time were filed. Five requests for rehearing of the July 2010 Order were also filed and the requests were filed by entities seeking late intervention. Of the five rehearing requests, four ask that the Commission reverse its ruling prohibiting buy/sell transactions on section 311 and Hinshaw pipelines and one asks that the Commission consider requiring section 311 and Hinshaw pipelines to offer capacity release. In addition, of the four rehearing requests seeking reversal, two requests state that issues regarding the secondary market

¹ *Arizona Public Service Co.*, 132 FERC ¶ 61,064 (2010) (July 2010 Order).

on section 311 and Hinshaw pipelines should instead be addressed in a notice of inquiry (NOI) proceeding to examine the available options and their implications.

3. For the reasons discussed below, the Commission denies the motions for late intervention and dismisses the requests for rehearing. However, contemporaneously with this order, the Commission is issuing a Notice of Inquiry to consider the significant policy issues raised in the rehearing requests regarding the secondary market for capacity on section 311 and Hinshaw pipelines.

I. Background

4. The Commission's regulations governing interstate transportation services by intrastate pipelines under section 311 of the Natural Gas Policy Act of 1978 (NGPA) are set forth in subpart C of the Commission's Part 284 open-access regulations.² Those regulations require that intrastate pipelines performing interstate service under NGPA section 311 must do so on an open-access basis.³ Section 284.224 provides for the issuance of blanket certificates to Hinshaw pipelines⁴ to provide open-access transportation service "to the same extent that, and in the same manner" as intrastate pipelines are authorized to perform such service by Subpart C of the Commission's Part 284 open-access regulations.

5. Consistent with the NGPA's goal of encouraging section 311 and Hinshaw pipelines to provide interstate service, the Commission has not imposed on those pipelines all of the Part 284 requirements imposed on interstate pipelines. For example, the Commission exempted section 311 and Hinshaw pipelines from the requirements of

² 18 C.F.R. § 284.121-126 (2010).

³ 18 C.F.R. §§ 284.7(b), 284.9(b) and 284.122 (2010).

⁴ Section 1(c) of the Natural Gas Act (NGA) exempts from the Commission's NGA jurisdiction those pipelines which transport gas in interstate commerce if (1) they receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state and (3) the pipeline is regulated by a state Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include section 1(c). *See ANR Pipeline Co. v. Federal Energy Regulatory Comm'n*, 71 F.3d 897, 898 (1995) (briefly summarizing the history of the Hinshaw exemption).

Order No. 636,⁵ including capacity release, electronic bulletin boards (now internet websites) and flexible receipt and delivery points.

6. Traditionally, a prohibited buy/sell transaction is a commercial arrangement whereby a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (e.g., an end-user), ships that gas through its interstate pipeline capacity, and then resells an equivalent quantity of gas to the downstream entity at the delivery point. Prior to Order No. 636, the Commission permitted interstate pipelines regulated under the NGA to obtain certificates for capacity brokering programs that would allow customers to assign their capacity to other customers and to engage in certain “buy/sell” programs. In Order No. 636, however, the Commission decided that it could not monitor those certificated capacity brokering programs adequately to ensure against undue discrimination in the allocation of capacity.⁶ The Commission explained that “there are simply too many potential assignors of capacity and too many different programs for the Commission to oversee.”⁷

7. As a result, and in an effort to provide greater assurance that transfers of interstate pipeline capacity from one shipper to another were transparent and not unduly discriminatory, the Commission adopted a nationally uniform capacity release program requiring capacity releases to be posted on the interstate pipeline’s website and subject to bidding on a non-discriminatory basis. In addition, in concurrent orders, the Commission terminated the capacity brokering program⁸ and stated it would not authorize any more buy/sell transactions.⁹ The Commission believed that to permit buy/sell transactions to

⁵ See *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998) (Order No. 636).

⁶ Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,416.

⁷ *Id.*

⁸ *Algonquin Gas Transmission Co., et al.*, 59 FERC ¶ 61,032 (1992).

⁹ *El Paso Natural Gas Co., et al.*, 59 FERC ¶ 61,031 (1992).

utilize interstate pipeline capacity after the capacity release mechanism went into effect would frustrate the new, nationally uniform program.¹⁰

Petitioners' Request for Clarification

8. On June 25, 2010, Petitioners sought clarification that a certain proposed transaction involving a Hinshaw storage facility was not a prohibited buy/sell transaction as contemplated by Commission policy.¹¹ Alternatively, Petitioners requested a limited waiver should the Commission determine that the transaction was a prohibited buy/sell transaction.

9. Petitioners stated that APS had not been able to obtain access to strategically-located natural gas storage for its operations. As a result, Petitioners proposed to enter into an agreement for an initial 12-month period whereby APS would have the right to deliver gas to Sequent and Sequent would take title to the gas and inject it into storage at Chevron Keystone Gas Storage, LLC (Keystone Storage), a Hinshaw pipeline with a limited blanket certificate to provide certain storage and hub services in interstate commerce. APS would have the right to require Sequent to redeliver gas to APS and title would pass back to APS at the Keystone Storage delivery point. APS would pay Sequent a fixed monthly fee and volumetric charges that correlate to Sequent's costs to inject and withdraw gas at Keystone Storage.

10. Petitioners believed that the contemplated transaction would not violate Commission policy. Petitioners contended that, in Order No. 636, the Commission prohibited buy/sell arrangements to prevent the circumvention of the Commission's capacity release regulations and because Keystone Storage was a Hinshaw facility not subject to the capacity release restrictions of Order No. 636, there was no concern that the structure of the proposed transaction would circumvent any capacity release regulations. Petitioners requested expedited action on their request because APS's need for the service provided under the proposed transaction was most critical during the summer months.

11. Public notice of Petitioners' filing was issued in Docket No. PR10-45-000 on June 30, 2010. Interventions and protests were due July 7, 2010. One party intervened and no protests or adverse comments were filed.

¹⁰ *Id.* at 61,080.

¹¹ According to their petition, APS is Arizona's largest electric utility company and Sequent purchases and sells natural gas and provides other energy-related services to customers throughout the United States.

July 2010 Order

12. The July 2010 Order stated that the Petitioners had raised an issue which the Commission had not previously addressed – whether the prohibition on buy/sell transactions applies to interstate open-access transportation services provided by section 311 and Hinshaw pipelines.¹² Finding that the prohibition did apply, the Commission explained that, while Order No. 636 adopted the prohibition on buy/sell transactions in conjunction with the creation of the capacity release program for interstate pipelines, the prohibition on buy/sell transactions, together with the shipper-must-have-title rule, play a more fundamental role than just preventing the circumvention of the capacity release program.¹³ These rules help enforce the central requirement of the Commission’s Part 284 regulations that all open-access pipelines, including section 311 and Hinshaw pipelines, “must provide such service without undue discrimination, or preference.”¹⁴ They do this by ensuring that capacity is allocated among shippers in a transparent manner based on the procedures and not unduly discriminatory priorities in the pipeline’s Commission-approved tariff, either for the direct sale of capacity by the pipeline or for capacity release by firm shippers.¹⁵

13. The Commission acknowledged that it does not require section 311 and Hinshaw pipelines to include capacity release provisions in their tariffs, nor have any such pipelines done so. However, it did not follow from this fact that the prohibition on buy/sell transactions was unnecessary. Rather, the Commission stated that the absence of a capacity release program for section 311 and Hinshaw pipelines means that their tariffs contain no provisions to ensure that capacity reassignments by shippers are transparent and non-discriminatory. In these circumstances, a blanket authorization of buy/sell transactions would allow holders of capacity on such pipelines to privately contract to allow another party to make use of their capacity without informing the pipeline or publicly disclosing the transaction. This, the Commission stated, would create the same potential for discrimination and inability of the Commission to monitor capacity

¹² July 2010 Order, 132 FERC ¶ 61,064 at P 12.

¹³ July 2010 Order, 132 FERC ¶ 61,064 at P 16.

¹⁴ *Id.* (citing sections 284.7(b)(1) and 284.9(b) of the Commission’s regulations, which are applicable to section 311 and Hinshaw pipelines providing service under Subpart C of the Part 284 regulations).

¹⁵ July 2010 Order, 132 FERC ¶ 61,064 at P 16.

reassignment which led to the adoption of the capacity release program as the sole method for capacity reassignment on interstate pipelines.¹⁶

14. Recognizing, however, that capacity reassignments could promote more efficient use of firm pipeline capacity, and given the absence of any generic capacity reassignment programs on section 311 and Hinshaw pipelines, the Commission agreed to consider, on a case-by-case basis, requests for waiver of the buy/sell prohibition, where it can be shown that a particular buy/sell transaction provides significant benefits to the market.¹⁷ Along those same lines, the Commission found that, in this case, good cause existed to grant Petitioners a limited waiver of the Commission's buy/sell prohibition for the initial 12-month period of the agreement in order to allow the proposed agreement to proceed.¹⁸

II. Late Interventions and Requests for Rehearing

15. Subsequent to the July 2010 Order, fifteen motions to intervene out-of-time were filed.¹⁹ The entities generally argue that good cause exists to grant their requests because it was not apparent from the Petitioners' initial filing that the July 2010 Order would address more than the specific transaction proposed by the Petitioners. They contend that the Commission's July 2010 Order, unexpectedly, went beyond the scope of the narrow issue presented in the joint petition. They claim that no party will be prejudiced or burdened by their late intervention and that this late intervention will not unduly delay the proceeding.

16. Also filed were five requests for rehearing of the July 2010 Order and each of those requests were filed by entities seeking late intervention. The entities seeking

¹⁶ *Id.* P 17.

¹⁷ *Id.* P 19.

¹⁸ *Id.* P 21.

¹⁹ Encana Marketing (USA) Inc., Morgan Stanley Capital Group Inc. (Morgan Stanley), American Gas Association, Sempra Energy Trading LLC, ConocoPhillips Company, Iberdrola Renewables, Inc., Shell Energy North America (U.S.) L.P., Barclays Capital Energy Inc., J.P. Morgan Ventures Energy Corporation, Chevron U.S.A. Inc., BG Energy Merchants, LLC (BG Energy), Tenaska Marketing Ventures, Citigroup Energy Inc., Texas Pipeline Association (TPA), and Natural Gas Supply Association, Electric Power Supply Association, and Independent Petroleum Association of America (collectively, the Associations).

rehearing are: (1) TPA; (2) BG Energy; (3) Morgan Stanley; (4) the Associations; and (5) the Marketer Group.²⁰

17. BG Energy requests that the Commission grant rehearing and institute a notice and comment proceeding to consider requiring a uniform capacity release program for section 311 and Hinshaw pipelines that requires capacity to be posted and subject to bidding on a non-discriminatory basis. It contends that a firm shipper on a section 311 or Hinshaw pipeline that wants to release or acquire interstate capacity encounters cumbersome, lengthy, and non-transparent procedures.

18. The Marketer Group, Morgan Stanley, TPA and the Associations request that the Commission grant rehearing and reverse its ruling expanding the buy/sell prohibition to section 311 and Hinshaw pipelines.²¹ They contend that the application of the buy/sell prohibition to section 311 and Hinshaw pipelines cannot be reconciled with Commission precedent. They argue that Commission precedent, including Order No. 636 and certain companion orders, makes clear that the buy/sell prohibition is a corollary to the Commission-mandated capacity release programs on interstate pipelines and is required solely to prevent circumvention of the capacity release program on those pipelines.

19. The Marketer Group, Morgan Stanley, TPA and the Associations also argue that the Commission erred by expanding the buy/sell prohibition to section 311 and Hinshaw pipelines on the basis of discrimination concerns without a record establishing the existence of discrimination. If the Commission seeks transparency, Morgan Stanley argues that a necessary precursor is a capacity release mechanism. In fact, Morgan Stanley argues that the efficiency gains cited by the July 2010 Order cannot be fully realized absent a capacity release mechanism on section 311 and Hinshaw facilities. The Associations suggest that if the Commission wishes to address any issues with regard to the secondary market of capacity on section 311 and Hinshaw pipelines, it should initiate a notice of inquiry proceeding to examine any available option and their implications.

²⁰ The Marketer Group includes Barclays Capital Energy Inc., Chevron U.S.A. Inc., Citigroup Energy Inc., ConocoPhillips Company, Encana Marketing (USA) Inc., Iberdrola Renewables, Inc., J.P. Morgan Ventures Energy Corporation, Tenaska Marketing Ventures, Sempra Energy Trading LLC and Shell Energy North America (U.S.) L.P.

²¹ TPA, in addition to the foregoing, requests that the Commission clarify that the shipper-must-have-title rule also does not apply to section 311 and Hinshaw pipelines. Section 311 and Hinshaw pipelines generally include in their statements of operating conditions a requirement that shippers possess title to the gas being stored or transported.

20. Finally, the Marketer Group, Morgan Stanley, TPA and the Associations argue that the July 2010 Order fails to establish a record addressing the potential effect, results, and impacts on shippers. Among the issues they argue the July 2010 Order did not consider are: (1) the potential market uncertainty that may result from the expansion of the buy/sell prohibition; (2) the impact on the efficient use of pipeline capacity; (3) the burden and impracticability of entities having to seek a waiver for buy/sell transactions; and (4) the extent of the Commission's jurisdiction to impose the buy/sell prohibition on section 311 and Hinshaw pipelines given Congress' decision to provide the Commission with only limited jurisdiction over section 311 and Hinshaw pipelines. The Marketer Group states that, if the Commission believes that it may be in the public interest to apply the buy/sell prohibition to section 311 and Hinshaw pipelines, the Commission should grant rehearing of the July 2010 Order and issue a NOI in which a record can be compiled to examine the necessity for and the implications associated with the issue.

III. Discussion

21. For the reasons discussed below, the Commission denies the motions for late intervention and, accordingly, dismisses the requests for rehearing of the July 2010 Order. However, contemporaneously with this order, the Commission is issuing a NOI to consider the significant policy issues raised in the pleadings regarding the secondary market on section 311 and Hinshaw pipelines.²²

22. In ruling on a motion to intervene out-of-time, the Commission applies the criteria set forth in Rule 214(d)²³ of the Commission's regulations and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether the movant's interest is not adequately represented by other parties to the proceeding, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. The Commission, therefore, is more liberal in granting late intervention at the early stages of a proceeding, but is more restrictive as the proceeding nears its end.²⁴ Accordingly, a petitioner for late intervention bears a higher burden to show good cause for late intervention after issuance of a final order in a proceeding,²⁵ and generally

²² [CITATION FOR NOI ISSUED CONTEMPORANEOUSLY].

²³ 18 C.F.R. § 385.214(d) (2010).

²⁴ See, e.g., *Transok, L.L.C.*, 89 FERC ¶ 61,055, at 61,186 (1999).

²⁵ See *Williston Basin Interstate Pipeline Co.*, 31 FERC ¶ 61,045, at 61,076 (1985).

Commission policy is to deny late intervention at the rehearing stage, even when the petitioner claims that the decision establishes a broad policy of general application.²⁶

23. We find that the entities requesting late intervention have not met the higher burden of justifying late intervention. In this proceeding, the Commission has already issued an order granting the Petitioners their requested relief, waiving the buy/sell prohibition so that they may implement their proposed transaction. Neither Petitioner has requested rehearing of the Commission's order. Thus, the Commission has finally resolved the specific issue raised by the Petitioners of whether they may engage in their proposed buy/sell transaction. Unlike the cases cited by several of the entities as support for granting their requests for late intervention, there are no outstanding or unresolved issues in this case.²⁷

24. In their requests for rehearing, the entities requesting late intervention do not contest the relief granted to the Petitioners, but seek only to raise general policy issues concerning whether the prohibition on buy/sell transactions should apply to service on section 311 and Hinshaw pipelines and whether the Commission should permit other methods of reassigning firm capacity on those pipelines. Such policy issues are more appropriately addressed in a rulemaking proceeding, rather than the instant proceeding which the Petitioners initiated solely for the purpose of determining whether their particular transaction should be allowed. We recognize that these policy issues are significant, and accordingly contemporaneously with this order we are issuing a Notice of Inquiry in which all affected industry participants will have an opportunity to file comments. As discussed in the Notice of Inquiry, the Commission is also granting a blanket waiver to allow buy/sell transactions involving section 311 and Hinshaw pipelines to continue to take place, while the Commission is considering these policy issues. Moreover, the Commission will not institute any enforcement actions with respect to prior buy/sell transactions involving section 311 and Hinshaw pipelines in recognition of the preexisting uncertainty of whether the buy/sell prohibition applied to those pipelines.

25. In light of our denial of the requests for late intervention, we will also dismiss the requests for rehearing filed by TPA, BG Energy, Morgan Stanley, the Associations, and the Marketer Group. Under section 19(b) of the Natural Gas Act and section 385.713(b)

²⁶ *Williston Basin Interstate Pipeline Co.*, 112 FERC ¶ 61,038, at P 12 (2005) (citing *Williston Basin Interstate Pipeline Co.*, 81 FERC ¶ 61,033, at 61,178 (1997)).

²⁷ For example, in *FPL Energy Marcus Hook, L.P v. PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,169, at P 7 (2007), the Commission granted motions for late intervention because the court's remand of the earlier Commission decision raised new issues, which, in turn, the Commission requested parties to brief.

of the Commission's regulations, only a party to a proceeding is entitled to request rehearing of a Commission decision.²⁸ Because TPA, BG Energy, Morgan Stanley, the Associations, and the Marketer Group are not parties here, they have no standing to seek rehearing of our July 2010 Order.

The Commission orders:

(A) The motions for late intervention are denied as discussed in the body of this order.

(B) The requests for rehearing are dismissed as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ See 18 C.F.R. § 385.713(b) (2010). See, e.g., *Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000).