128 FERC ¶ 61,269
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Energy Transfer Partners L.P.
Energy Transfer Company
ETC Marketing, Ltd.
Houston Pipeline Company

Docket No. IN06-3-003

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued September 21, 2009)

1. This order approves as fair and reasonable and in the public interest an uncontested settlement between Enforcement Litigation Staff and Energy Transfer Partners L.P., Energy Transfer Company, ETC Marketing Ltd., and Houston Pipe Line Company LP[1] (collectively ETP) resolving all claims asserted against ETP in Docket No. IN06-3-003 arising from its alleged manipulation of natural gas prices described in the Commission's July 26, 2007 Order to Show Cause[2] or thereafter asserted by Enforcement Litigation Staff in this proceeding.[3]

Background

2. ETP is a publicly traded limited partnership that owns and operates a diversified portfolio of energy assets. Enforcement Litigation Staff initiated a non-public investigation of ETP in late September 2005. The Commission issued an order of non-

[1] Houston Pipe Line Company LP was previously known as Houston Pipeline Company.

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

[3] All matters in Docket No. IN06-3-004 concerning claims that ETP's affiliate, Oasis Pipeline, L.P., violated various Commission regulations concerning transportation pursuant to section 311 of the Natural Gas Policy Act of 1978 were resolved by a prior settlement approved by the Commission in *Oasis Pipeline, L.P.*, 126 FERC ¶ 61,188 (2009), and are not covered by the instant settlement.

public investigation on October 26, 2005, which order was amended and expanded on November 16, 2006.

3. On July 26, 2007, the Commission issued its Show Cause Order that directed ETP to respond to allegations that it manipulated certain Texas natural gas markets in violation of the Commission's then in effect anti-manipulation rule, 18 C.F.R. § 284.403(a) (2005), promulgated under the authority of the Natural Gas Act (NGA). The Commission directed ETP to show: (1) why its conduct did not manipulate prices for fixed price natural gas for prompt month delivery at the Houston Ship Channel for nine enumerated delivery months in violation of the anti-manipulation rule; and (2) why its conduct did not manipulate prices for fixed price natural gas for next day delivery at Waha, Texas, on two days in December 2005, also in violation of the anti-manipulation rules. The Show Cause Order made no findings or conclusions on the merits regarding ETP's alleged conduct. The Commission reserved its ultimate decision until consideration of all the facts and circumstances.[4]

4. On October 9, 2007, ETP filed a response to the Show Cause Order in which it denied that it had manipulated prices for fixed price natural gas or violated any of the Commission's regulations. On December 20, 2007, the Commission issued an order on rehearing concluding, among other things, that ETP was entitled to have any assessment of civil penalties under the NGA reviewed by a federal court of appeals pursuant to NGA section 19(b),[5] but that ETP was not entitled to *de novo* review by a federal district court.[6]

5. On February 14, 2008, Enforcement Litigation Staff filed a brief as required by the Rehearing Order. This brief asserted an additional month of alleged manipulation at the Houston Ship Channel. On March 31, 2008, ETP filed its Reply to Enforcement Litigation Staff's brief. On May 15, 2008, the Commission issued an order instituting a trial-type evidentiary hearing on the allegations enumerated in the Show Cause Order and Enforcement Litigation Staff's February 14, 2008 brief.[7] On August 11, 2008, ETP filed a petition for review of the Commission's May 15, 2008 Hearing Order in the

[4] *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, at P 87 (2007).

[5] 15 U.S.C. § 717r (2006).

[6] *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, at P 53-66 (2007) (Rehearing Order).

[7] *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168 (2008) (Hearing Order).

United States Court of Appeals for the Fifth Circuit, which subsequently determined that the May 15, 2008 Hearing Order was not ripe for review.[8]

6. Prehearing matters commenced before Presiding Administrative Law Judge Bobbie J. McCartney. Enforcement Litigation Staff filed direct prepared testimony on September 26, 2008, and November 17, 2008, and its prepared rebuttal testimony on May 19, 2009. Enforcement Litigation Staff's direct prepared testimony expanded the number of months of alleged manipulation from the ten enumerated in the Show Cause Order and the February 14, 2008 brief to a total of seventeen delivery months. ETP filed answering testimony on March 31, 2009.

7. On May 18, 2009, ETP filed a motion for summary disposition which, among other things, explained that the anti-manipulation rule in section 284.403(a) of the Commission's regulations was not in effect at the time of the alleged conduct for one of the allegation months added by Enforcement Litigation Staff in its prepared direct testimony (specifically, the December 2003 delivery month). On June 2, 2009, Enforcement Litigation Staff filed an opposition to ETP's motion for summary disposition which alleged a pattern of manipulation for December 2003, but stated that Enforcement Litigation Staff did not seek unjust profits for that delivery month. The Presiding Administrative Law Judge denied ETP's motion for summary disposition on June 25, 2009.

8. ETP and Enforcement Litigation Staff filed their respective prehearing briefs and witness lists on June 29, 2009. The hearing in this matter was scheduled to commence on July 15, 2009. On July 10, 2009, ETP and Enforcement Litigation Staff filed a joint motion to delay the proceedings to explore settlement. The same day, by Order of the Chief Judge, this schedule was suspended for thirty days to allow ETP and Enforcement Litigation Staff to explore settlement. On August 12, 2009, at the joint request of the Settling Parties, the Chief Judge extended the suspension of the proceedings until August 26, 2009.

9. On August 26, 2009, ETP and Enforcement Litigation Staff filed a joint motion to certify their joint offer of settlement and to waive the comment period. ETP and Enforcement Litigation Staff also filed a non-public joint offer of settlement, including a joint explanatory statement and stipulation and consent agreement. Pursuant to the terms of the settlement, the material contained in the settlement will become public after the

[8] *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir.), *reh'g denied*, No. 08-60730 (5th Cir. July 1, 2009).

Commission's approval. On August 31, 2009, Judge McCartney certified the settlement to the Commission as uncontested.[9]

Details of the Settlement

10. The settlement requires that the Commission dismiss all current claims against ETP with prejudice, terminate all investigations in the Docket No. IN06-3-003 proceeding and forever bars the Commission from bringing against ETP any and all claims arising out of or related to matters referenced in the Show Cause Order or asserted by Enforcement Litigation Staff in the Docket No. IN06-3-003 proceeding. In consideration of the foregoing, ETP has agreed to a settlement value of $30 million. ETP neither admits nor denies the claims in this proceeding.

11. No later than five business days after the settlement effective date, ETP shall pay to the United States Treasury by wire transfer a sum of $5 million in civil monetary penalties. In addition, no later than five business days after the settlement effective date, ETP shall establish a designated fund in the amount of $25 million for the purpose of disgorging alleged unjust profits based on or arising from, in whole or in part, ETP's alleged conduct. Eligible third parties that agree to accept their allocated portion of the fund, including any parties that have brought lawsuits against ETP, shall forever waive and release ETP from all claims based on or rising from, in whole or part, ETP's alleged conduct. The Chief Administrative Law Judge shall designate an administrative law judge as the Fund Administrator. The Fund Administrator shall determine the portion of fund to allocate to those third parties who elect to become participants in the fund.

12. Pursuant to the settlement, the Commission will have the opportunity to review the allocation of funds and provide modifications to the Fund Administrator. The allocation becomes final when the Commission agrees with the fund allocation report or takes no action within a time frame specified in the settlement. If at the close of the allocation process set forth in the Stipulation and Consent Agreement, there is any amount of money remaining in the fund, that amount shall be paid to the United States Treasury. Concurrently with this order the Commission is issuing a notice of the settlement describing the procedures third parties must follow to opt-in to the allocation of the $25 million fund. The settlement does not affect entities or lawsuits brought by entities who do not elect to become participants in the fund. Pursuant to the settlement, ETP agrees to comply with section 1c.1 of the Commission's regulations, "Prohibition of Energy Market Manipulation," 18 C.F.R. § 1c.1 (2009), as that regulation may be in force and amended from time to time. ETP agrees to requirements related to its corporate compliance program to ensure that its gas trading protocols and prohibited trading practices, as determined by ETP, comply with section 1c.1 of the Commission's

[9] *Energy Transfer Partners, L.P. et al.*, 128 FERC ¶ 63,014 (2009).

regulations. ETP also agrees to have its compliance program audited by an independent auditor for two years to ensure compliance with the settlement.

13. The settlement has been executed by ETP and Enforcement Litigation Staff and will become effective on the date upon which a Commission order approving the settlement in its entirety without modification becomes final and is no longer subject to appeal under the NGA.

Discussion

14. We find the settlement is fair and reasonable and in the public interest, and we therefore approve it. First, we note that the proceeding in Docket No. IN06-3-003 was the first, and likely only, case brought against an entity for an alleged violation of the Commission's gas market behavior rule contained in section 284.403(a) of the Commission's regulations. Section 284.403(a), and the analogous market behavior rules for the electric markets, were promulgated by the Commission in the wake of the energy crisis in the western states in 2000 and 2001 to prevent manipulative and anti-competitive conduct in energy markets. These gas and electric market behavior rules have been rescinded since the Commission was given broader anti-market manipulation authority in the Energy Policy Act of 2005 (EPAct 2005), which is embodied in sections 1c.1 and 1c.2 of the Commission's regulations. Thus, any Commission or court decisions related to section 284.403(a) would likely have limited precedential effect.

15. Second, in this settlement ETP has agreed to establish a $25 million fund to compensate parties who may have been affected by ETP's alleged conduct. This aspect of the settlement provides an opportunity for compensation to the parties who have been directly affected by the alleged manipulation. While civil penalties serve a deterrent function, disgorgement monies are an important tool to ensure that persons harmed by the alleged misconduct are made whole to the extent possible and that the public interest is served.

16. Third, in recognition that ongoing oversight helps prevent potentially manipulative conduct from occurring, the settlement imposes a detailed compliance program on ETP including independent audits of such program. Specifically, ETP is required to confirm that its compliance program, as it currently exists or as it may be modified to conform to this settlement, includes the following procedures for its officers and employees involved in commodity trading and risk management: (i) written compliance standards, which shall include gas trading protocols and prohibited trading practices, designed to ensure compliance with section 1c.1 of the Commission's regulation; (ii) mandatory compliance training for employees directly involved with commodity trading, including training designed to ensure compliance with section 1c.1 of the Commission's regulations; (iii) annual review of the compliance program, as it pertains to commodity trading and risk management, by the ETP officers and directors responsible for this program; (iv) ongoing monitoring of ETP's compliance program by its chief compliance officer;

(v) confidential reporting systems; (vi) disciplinary mechanisms to ensure enforcement of these standards; and (vii) procedures for conducting internal investigations of trading activities. An independent auditor shall conduct an audit of ETP's compliance program to ensure compliance with the terms of the settlement. The independent audits shall take place annually for a period of two years after the settlement effective date. The independent auditor shall provide copies of its audit reports to Enforcement Litigation Staff at the same time as it provides its report to ETP.

17. Finally, the settlement does not seek to vacate the Commission's prior orders in this proceeding; those orders will continue to stand as Commission precedent on certain jurisdictional and procedural issues.

18. The Commission finds that all of these features of the settlement taken together make the Enforcement Litigation Staff's settlement with ETP fair and reasonable and in the public interest.

The Commission orders:

(A) The settlement in Docket No. IN06-3-003 is approved as fair and reasonable and in the public interest.

(B) The proceeding in Docket No. IN06-3-003 is terminated.

(C) All materials contained within the settlement are made public.

(D) Within 5 business days of this order the Chief Administrative Law Judge shall appoint an Administrative Law Judge as Fund Administrator pursuant to the settlement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.