

122 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

In re Entergy New Orleans, Inc.

Docket No. IN08-4-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued March 11, 2008)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Entergy New Orleans, Inc. (ENOI). This Order is in the public interest because it resolves the preliminary, nonpublic investigation of ENOI's self-reported violations of the Commission's shipper-must-have-title requirement. ENOI has agreed to pay a civil penalty of \$400,000.

Background

2. ENOI, a subsidiary of Entergy Corporation, is the local electric and natural gas distribution company in New Orleans, Louisiana. ENOI is a shipper with firm No Notice Service transportation capacity on Gulf South Pipeline Company, LP (Gulf South). ENOI has entered into a series of similar natural gas supply contracts since January 1999. Under each contract, the supplier held title to the gas while the gas was transported on ENOI's No Notice Service capacity on Gulf South, and transferred title to the gas to ENOI at the delivery point on Gulf South. Thus, ENOI failed to hold title to gas shipped on its No Notice Service capacity on Gulf South.

3. On May 1, 2007, ENOI self-reported to Enforcement that ENOI had violated the shipper-must-have-title requirement since January 1999. Enforcement investigated and confirmed ENOI's violations. ENOI stated that the violations occurred because ENOI preferred to take title to the gas at the delivery point on Gulf South rather than the receipt point, in order to have the timing of the billing for the gas supply match the timing of the delivery of the gas, for purposes of ENOI's monthly purchased gas adjustment filings with its local regulator.

Violations

4. In order to promote pipeline open-access and to prevent undue discrimination in the primary and secondary markets for capacity, the Commission adopted a number of specific capacity release policies. Among them is the shipper-must-have-title requirement, under which a shipper must hold title to the gas being transported on the shipper's pipeline capacity.

5. The shipper-must-have-title requirement arose in pipeline-specific proceedings involving the implementation of open-access transportation under Order No. 436, wherein the Commission required that "all shippers shall have title to the gas at the time the gas is delivered to the transporter and while it is being transported by the transporter."¹ The shipper-must-have-title requirement was designed to prevent the unauthorized brokering of capacity.

6. The shipper-must-have-title requirement was retained when the Commission required pipelines to adopt capacity release programs in Order No. 636, and the Commission has stated on many occasions that the title requirement is intended to provide transparency to jurisdictional transactions and to prevent the withholding or brokering of interstate capacity.² Indeed, in Order No. 637 the Commission rejected producers' calls to eliminate the shipper-must-have-title requirement, explaining that the "capacity release rules were designed with this requirement as their foundation."³ Without the shipper-must-have-title requirement, the identities of the users of the pipeline's transportation and the conditions under which they moved gas would not be known, undermining the Commission's objectives of pipeline open-access and non-discrimination.⁴

7. As part of the implementation of Order No. 636, pipelines revised their tariffs to include shipper-must-have-title provisions in the General Terms and Conditions. These provisions require shippers to warrant good title to the gas shipped on their capacity.

¹ *Consolidated Gas Transmission Corp.*, 38 FERC ¶ 61,150, at 61,408 (1987) (citing *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,260, at 61,683-85 (1986)); accord *Williston Basin Interstate Pipeline Co.*, 44 FERC ¶ 61,129, at 61,368 (1988).

² See, e.g., *Rendezvous Gas Services, LLC*, 113 FERC ¶ 61,169, at P 40 (2005) (stating that "[t]o use capacity on an interstate pipeline a shipper must have a capacity contract with the pipeline, and have title to the gas when transportation is scheduled"); *Enron Energy Services, Inc.*, 84 FERC ¶ 61,222, at 62,063 (1998), *reh'g denied*, 85 FERC ¶ 61,221 (1998).

³ Order No. 637, at 31,300.

⁴ *Id.*

Further, in proceedings subsequent to Order No. 636, the Commission has emphasized that “[a]lthough the language of the tariff provisions may only indicate the shipper must have title to gas at the time it delivers the gas to the pipeline for transportation, longstanding Commission policy also requires that the shipper must continue to hold title to the gas throughout the entire course of the transportation of the gas.”⁵

8. By failing to hold title to the gas transported on Gulf South under its No Notice Service contract, ENOI violated the shipper-must-have-title requirement and Gulf South’s tariff. ENOI transported approximately 50 Bcf of gas in violation of the shipper-must-have-title requirement. The gas transported on ENOI’s No Notice Service was for ENOI’s retail load. ENOI did not profit unjustly from its violations, and it appears that no demonstrable financial harm to third parties was caused by ENOI’s violations.

9. Upon learning of ENOI’s violations of the shipper-must-have-title requirement, ENOI moved quickly to self-report the violations and take corrective action. ENOI revised the supply contract with its current supplier so that, effective August 1, 2007, the supplier now transfers title to ENOI at the receipt point on Gulf South rather than the delivery point. ENOI also instituted employee training in shipper-must-have-title and other capacity release matters.

Stipulation and Consent Agreement

10. Enforcement and ENOI have entered into the attached Agreement to resolve Enforcement’s investigation of ENOI’s violations. The Agreement requires ENOI to pay a \$400,000 civil penalty to the United States Treasury within ten days of this Order accepting and approving the Agreement.

Determination of the Appropriate Remedy

11. Pursuant to section 22(a) of the Natural Gas Act (NGA), the Commission may impose a civil penalty up to \$1 million per day per violation for as long as the violation continues.⁶ In approving the Agreement and the \$400,000 penalty, we considered the factors set forth in section 22(c) of the NGA, 15 U.S.C. § 717t-1(c), and in our Policy Statement on Enforcement.⁷ Among all the factors considered, five are of particular

⁵ *Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

⁶ 15 U.S.C. § 717t-1(a), *added by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B) (2005). Section 22(a) provides that the Commission can assess a penalty “of not more than \$1,000,000 per day per violation for as long as the violation continues.”

⁷ *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

significance: (1) that the Commission's shipper-must-have-title requirement is a long-standing, well-known, and critical element of the Commission's capacity release program; (2) that the violations occurred on transportation used to serve only ENOI's retail customers; (3) that ENOI's violations caused no demonstrable harm to the market or to market participants; (4) that ENOI took prompt actions to remedy the violations; and (5) that ENOI self-reported the violations.

12. We conclude that the civil penalty specified in the Agreement is fair and equitable and in the public interest.

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

B. Violations

5. A central element of the Commission's capacity release program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage facility and while it is being transported or held in storage.

6. Interstate pipeline tariffs feature provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of pipeline tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

7. Section 15 of the General Terms and Conditions of Gulf South's tariff states in relevant part:

As to gas which Gulf South transports or stores and delivers for Customer, Customer warrants that it will at the time of delivery to Gulf South have good title to all gas so delivered free and clear of all liens, encumbrances and claims whatsoever. . . .

8. By failing to hold title to the gas transported on Gulf South, ENOI violated the shipper-must-have-title requirement and Gulf South's tariff. ENOI engaged in thousands of individual transactions involving the transportation of approximately 50 Bcf of gas in violation of the shipper-must-have-title requirement between January 1999 and August 1, 2007. While the duration is long and the quantity of gas large, all of the gas was delivered to ENOI and was used to serve ENOI's retail customers in New Orleans.

9. ENOI's violations caused no demonstrable financial harm to the market and generated no unjust profits for ENOI. Entergy's senior management was not directly involved in causing the violations.

C. ENOI's self-corrective remedial action

10. After discovering the violations, ENOI took immediate action to correct its violation of the shipper-must-have-title requirement by amending its current supply contract to change the point at which title transferred, from the delivery point on Gulf South to the receipt point on Gulf South. The amended supply contract became effective August 1, 2007. In addition, ENOI immediately instituted employee training in the shipper-must-have-title requirement issues and other capacity release regulations and requirements.

III. SANCTION

11. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation into the violations self-reported by ENOI, Enforcement and ENOI agree that ENOI shall pay a civil penalty of \$400,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined in paragraph 12 below.

IV. TERMS

12. The Effective Date of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matter specifically addressed herein as to ENOI and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to ENOI. This Agreement does not constitute an admission or acknowledgement by ENOI of liability to any third party.

13. Commission approval of this Agreement without material modification shall release ENOI and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to ENOI and forever bar the Commission from holding any of them liable for any and all administrative or civil claims arising out of, related to, or connected with the shipper-must-have-title violations addressed in this Agreement.

14. Failure to make a timely civil penalty payment as agreed to herein, or to comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Natural Gas Act (NGA), and may subject ENOI to additional action under the enforcement and penalty provisions of the NGA.

15. If ENOI does not make the civil penalty payment above by the date agreed to by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(2)(iii) from the date that payment is due, in addition to the penalty specified above.

16. The Agreement binds ENOI and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on ENOI, or any affiliated entity, its agents, officers, directors, or employees, other than the obligation identified in Section III of this Agreement.

17. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of

Enforcement or ENOI has been made to induce the signatories or any other party to enter into the Agreement.

18. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor ENOI shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and ENOI.

19. In connection with the payment of the civil penalty provided for herein, ENOI agrees that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 22(a) of the NGA, 15 U.S.C. § 717t-1(a). ENOI waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

20. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

21. The undersigned representative of ENOI affirms that he or she has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his or her knowledge, information and belief, and that he or she understands that the Agreement is entered into by Enforcement in express reliance on those representations.

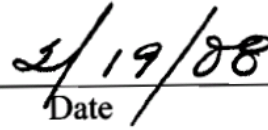
22. The Agreement may be signed in counterparts.

23. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:



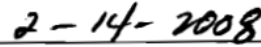
Susan J. Court
Director
Office of Enforcement
Federal Energy Regulatory Commission



Date



Roderick K. West
President and CEO
Entergy New Orleans, Inc.



Date