20030520-3049 Issued by FERC OSEC 05/20/2003 in Docket#: CP01-153-004

103 FERC ¶ 61, 204

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Tuscarora Gas Transmission Company Docket No. CP01-153-004

ORDER VACATING CERTIFICATE AUTHORIZATION, IN PART

(Issued May 20, 2003)

1. On April 12, 2001, Tuscarora Gas Transmission Company (Tuscarora) filed an application seeking authorization to construct and operate compression and pipeline facilities to provide up to 95,912 Dth per day of firm transportation capacity on its system for local distribution companies (LDCs) and electric generators in the states of Nevada and California (2002 Expansion Project). In a series of orders, the Commission issued a certificate to construct and operate the proposed facilities.[1]

2. On February 25, 2002, Tuscarora filed an application to amend its certificate, requesting authorization to phase its proposed expansion project. In an order issued on April 11, 2002, the Commission amended Tuscarora's certificate authorization to permit it to bifurcate the 2002 Expansion Project into two phases.[2] Specifically, the Commission authorized Tuscarora to construct the facilities to serve Duke Energy North America, L.L.C.'s (Duke) Washoe Energy Facility as Phase II of the project.[3]

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[1]Tuscarora Gas Transmission Co., 96 FERC ¶ 61,356 (2001), order issuing certificate, 98 FERC ¶ 61,071 (2002), order on reh'g and amending certificate, 99 FERC ¶ 61,044 (2002) (Tuscarora).

[2]Tuscarora, 99 FERC ¶ 61,044 (2002).

[3]Duke plans to construct a 540 megawatt generating facility in Nevada (Washoe
(continued...)

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3. On March 28, 2003, Tuscarora filed a motion to vacate Phase II of its certificate authorization. Tuscarora states that Duke has informed it that, due to prevailing market conditions, Duke "will not immediately construct" the Washoe Energy Facility. Therefore, it requests that the Commission vacate its certificate authorization for Phase II of its 2002 Expansion Project. Public Service Resources Corporation (Public Service)[4] filed an answer to Tuscarora's motion. It requests that the Commission impose certain conditions on a grant of that motion.

4. The Commission dismisses Public Service's answer in so far as it constitutes a collateral attack on prior Commission orders. As discussed below, we also find that because Duke no longer plans to construct its proposed gas-fired electric generation facility at this time, the Phase II facilities are no longer needed. Therefore, it is in the public interest to grant Tuscarora's motion.

Answer to Motion to Vacate

5. Public Service filed an answer to Tuscarora's motion, opposing Tuscarora's request to vacate its certificate authorization for Phase II of its proposed facilities. Public Service requests that the Commission condition any grant of Tuscarora's motion to require "that any future reapplication by Tuscarora to construct and operate Phase II facilities, or their equivalent, will not be authorized unless Tuscarora can demonstrate that the adverse impact of Phase I construction on the Paiute Pipeline Company (Paiute) system and [Public Service] has been rectified."[5] In the alternative, it asks that the Commission require that Tuscarora show cause why its certificate authorization for its Phase I facilities should not be so conditioned.

6. Public Service is the sole beneficiary of a trust holding title to the Harold G. Laub liquefied natural gas (LNG) facility located in Lovelock, Nevada and an associated 61-mile, 20-inch diameter high pressure pipeline running from the LNG Plant to Wadsworth, Nevada. The LNG plant and pipeline interconnect with Paiute's system. Public Service leases the LNG storage facilities to Southwest Gas Corporation

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[3](...continued)
Energy Facility).

[4]Public Service intervened in this docket as PSEG Resources, Inc. It has subsequently changed its name.

[5]See Public Service answer, at 2.

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(Southwest), an affiliate of Paiute, and the LNG storage facilities are operated by Paiute.[6]

7. Sierra Pacific Power Company (Sierra Pacific), Tuscarora's affiliate, had contracted with Paiute for 35,078 Dth/d of storage service at the LNG Plant and associated firm transportation service. The service was a winter peaking service and was limited to the months of November through March. Sierra Pacific's contract with Paiute for the storage service expired on February 23, 2003. Sierra Pacific did not renew its contract for the LNG storage service.

8. Under a 1996 Firm Gas Purchase Agreement, Sierra Pacific assigned 25,700 Dth/d of the 35,078 Dth/d of LNG storage and associated transportation capacity, to Southwest (leaving 9,378 Dth/d of capacity available to Sierra Pacific). Sierra Pacific subscribed to 11,412 Dth/d of Tuscarora's Phase I expansion capacity and Southwest subscribed for 24,500 Dth/d. Tuscarora's total Phase I capacity was 55,912 Dth/d.[7]

9. In the certificate proceeding, Public Service argued that it was not possible for the Commission to evaluate whether the proposed expansion would have adverse impacts on other pipelines serving the area and whether the project would create excess regional pipeline capacity. It pointed out that Paiute had an existing contract for LNG storage gas service with Sierra Pacific that would expire on February 23, 2003. It stated that to the extent Sierra Pacific failed to renew that contract, Paiute would have unsubscribed capacity. As such, Paiute and Public Service, as the beneficial owners of a portion of the assets comprising the Paiute system, would be adversely affected.[8]

10. In response, Tuscarora pointed out that the west coast was experiencing a severe energy shortage and that the proposed facilities would be constructed to serve new incremental load to that area. Tuscarora also provided statements from Paiute, Sierra Pacific, and Southwest that attested to the fact that the expansion volumes on its projects

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[6]Shippers seeking to contract for the LNG Storage Service do so under the Terms and Conditions of Paiute's tariff.

[7]Morgan Stanley Capital Group, Inc. subscribed to the remaining 20,000 Dth/d of capacity. Tuscarora has completed construction of the facilities and commenced service in December, 2002.

[8]Tuscarora, 96 FERC at 62,346.

would be used to meet incremental load.[9] It also pointed out that Paiute supported the proposed project. The Commission approved Tuscarora's proposed project finding that the competing pipeline, Paiute, supported the project and that the expansion volumes were for incremental load and were not intended to displace existing volumes.[10]

11. When Tuscarora filed to amend its application into two phases, Public Service argued that the Commission never analyzed or approved Phase I on a stand-alone basis. It again pointed out that Sierra Pacific had right of first refusal (ROFR) with respect to existing pipeline capacity on Paiute. Public Service reargued its position that the Commission could not make a proper determination on the amended application without knowing whether Sierra Pacific would, in fact, exercise its ROFR. Public Service asserted that if Sierra Pacific did not exercise its ROFR rights, it would shift capacity from Paiute to Tuscarora, thus, stranding capacity on Paiute which, it argued, is contrary to the Commission's Policy Statement.[11]

12. Here, Public Service argues that Tuscarora's motion to vacate Phase II of its proposed project raises questions which strike at the integrity of the Commission's process. It contends that a central issue in the Commission's approval of Tuscarora's expansion project was whether the project was necessary to serve incremental load, or if it would displace existing service on Paiute. Public Service states that Tuscarora represented to the Commission that the expansion was necessary to meet incremental load growth and, therefore, would not displace existing volumes. Public Service asserts that the Commission accepted Tuscarora's position and dismissed Public Service's contention that the Commission should investigate whether Tuscarora had made efforts to minimize any adverse impacts on existing pipelines.

13. Public Service now states that within only a short period of time, it has become clear that Public Service was right all along. It points out that Sierra Pacific has not renewed its contract for LNG storage service on Paiute. Further, the volumes subscribed by Sierra Pacific and Southwest on Tuscarora's expansion project are essentially offset by the newly unsubscribed capacity on Paiute. Therefore, it concludes that, as a direct consequence of Tuscarora's Phase I expansion project, the LNG storage service and

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[9] Id.

[10] Id.

[11] Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999); order clarifying statement of policy, 90 FERC ¶ 61,128 (2000); order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000)(Policy Statement).

associated transportation service is currently unsubscribed. As such Paiute, and the facilities owned by Public Service, have been adversely affected by Tuscarora's expansion project. Public Service contends that the Commission should have evaluated this potential adverse impact in the certificate proceeding.

14. Public Service states that because Phase I of the project was authorized and constructed based on less than forthright representations by the applicant, it would be proper and appropriate for the Commission to condition a grant of Tuscarora's motion to vacate. It requests that the Commission warn Tuscarora that any future request to construct and operate the Phase II facilities, or their equivalent, will not be authorized unless Tuscarora can demonstrate that the adverse impact of the Phase I facilities on Paiute and Public Service have been rectified. It claims that this type of condition would be a step in the right direction toward rectifying the omission of an economic balancing test in the original certificate proceeding.

15. In the alternative, Public Service requests that the Commission institute a show cause proceeding against Tuscarora. It states that in that proceeding, the Commission should require that Tuscarora explain the circumstances and timing of Sierra Pacific's decision to terminate its LNG Storage and associated firm transportation on Paiute and to move those volumes onto Tuscarora. Public Service also asserts that Tuscarora should explain its and Sierra Pacific's dealings with Southwest and how they affected Southwest's actions.

Answers to Public Service's Answer

16. Sierra Pacific filed a motion for leave to file a response and a response to Public Service's answer. Tuscarora filed a motion for leave to file an answer and an answer to Public Service's answer. We will deny the motions and reject the response and answer as impermissible answers to an answer.[12]

Commission Response

17. The Commission addressed Public Service's concern regarding the impact of Tuscarora's project on its interest in the Preliminary Determination order issued on September 28, 2001.[13] Public Service did not request rehearing of that order. Public

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[12] 18 C.F.R. § 385.213(a)(2) (2002).

[13] Tuscarora, 96 FERC at 62,346.

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Service's concern was also raised and addressed in the amendment proceeding.[14] Again, Public Service did not request rehearing of that order. Accordingly, we will dismiss Public Service's answer as an impermissible collateral attack on those orders.

18. Even if Public Service's answer was not dismissible on procedural grounds, it would not support the relief Public Service requests. In Order No. 636, the Commission determined that it was vital to give all gas purchasers, including LDCs, the ability to make market-driven choices about the cost of delivering gas.[15] Under the Policy Statement, the Commission considers the impact of new construction projects on existing pipelines. However, as the Policy Statement explains, the fact that an existing pipeline's interest will be considered in a certificate proceeding for a new project does not mean that the Commission will protect existing pipelines from the risk of loss of market share to a new entrant. [16]

19. The Commission has frequently stated that it will not second guess the business decisions of end users or challenge the business and economic decisions of an end user.[17]

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[14]Tuscarora, 99 FERC at 61,179.

[15]Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (April 16, 1992), III FERC Stats. & Regs. Preambles ¶ 30,939, at 30,393 (April 8, 1992), order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), III FERC Stats. & Regs. ¶ 30,950 (August 3, 1992), order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992), Notice of Denial of Rehearing (January 8, 1993), 62 FERC ¶ 61,007 (1993), aff'd in part and vacated and remanded in part, United Dist. Companies v. FERC, 88 F.3d 1105 (D.C. Cir. July 16, 1996), order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[16]Policy Statement, 88 FERC at 61,748.

[17]See Guardian Pipeline, L.L.C., 91 FERC ¶ 61,285, at 61,977 (2000), order on reh'g and issuing certificate, 94 FERC ¶ 61,269 (2001), order denying motion for stay and request seeking voluntary remand, 96 FERC 61,204 (2001), order granting abandonment and amending certificate, 97 FERC ¶ 61,007 (2001), order vacating in part and issuing certificate, 99 FERC ¶ 61,201 (2002); Southern Natural Gas Co., 76 FERC ¶ 61,122, at 61,645 (1996), order issuing certificate and denying reh'g, 79 FERC 61,280 (1997), order amending certificate and denying stay and reh'g, 85 FERC ¶ 61,134 (1998), order denying stay, 86 FERC ¶ 61,081 (1999), order denying reh'g, 86 FERC ¶ 61,129

(continued...)

Here, Sierra Pacific and Southwest contracted with Tuscarora for a firm transportation service that is available all year long and terminated a seasonal peaking service that was only available November through March. While the exact motives behind the business decisions are unknown, we note that it is not unusual for customers to seek out alternative means of accessing supplies when their contracts with their existing suppliers terminate.[18]
Moreover, there has been no showing of improper or anticompetitive conduct related to the LDCs decision to satisfy their incremental load growth needs with a new year round service instead of the existing seasonal storage service.[19]

20. Further, the NGA directs the Commission to approve a project when it is or will be required by the present or future public convenience and necessity.[20] In its Annual Energy Outlook 2003, the Energy Information Administration forecasts continued growth in gas consumption in the region of the proposed facilities.[21] In such a growth environment, it is reasonable to expect that Paiute can market its unsubscribed capacity in the future. Further, the Commission will make a decision on any future application by Tuscarora to construct and operate facilities based on the merits of that application. Public Service, and all other interested parties can raise any relevant issues they have concerning such an application at that time.

21. The Commission finds that because Duke no longer plans to construct its proposed gas-fired generation facility at this time, the Phase II facilities are no longer needed. Therefore, granting Tuscarora's motion to vacate the certificate authorization to construct and operate the facilities to provide service to that facility is in the public interest.

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[17](...continued)
(1999), aff'g sub nom., Midcoast Interstate Transmission Inc., v. FERC, 198 F.3d 960 (D.C. Cir. 1999).

[18]Id.

[19]"The Commission need not protect pipeline competitors from the effects of competition, but it does have an obligation to ensure fair competition." Policy Statement, 88 FERC at 61,748.

[20]See, e.g., ANR v. FERC, 205 F.3d 403 at 406 (D.C. Cir. 2000).

[21]See http://www.eia.doe.gov/oiaf/aeo/supplement/suptab_105.htm

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The Commission orders:

(A) Tuscarora's motion to vacate, in part, the authorization granted to construct and operate the Phase II facilities to serve Duke's Washoe Energy Facility is granted.

(B) Public Service's answer is dismissed.

(C) The motions to file a response and answer are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.