

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
104 FERC ¶ 61,302

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

Tuscarora Gas Transmission Company

Docket No. CP01-153-005

ORDER DENYING REHEARING

(Issued September 17, 2003)

1. On May 20, 2003, the Commission issued an Order in this proceeding granting Tuscarora Gas Transmission Company's (Tuscarora) motion to vacate its certificate authorization to construct pipeline facilities to provide service for Duke Energy North America, LLC's (Duke) proposed Washoe Energy Facility.¹ In response to Tuscarora's motion, Public Service Resources Corporation (Public Service)² filed an answer requesting, among other things, that conditions be placed on Tuscarora's request to vacate its certificate authorization. In the May 20 Order, the Commission dismissed Public Service's answer insofar as it constituted a collateral attack on prior Commission orders. Public Service requests rehearing of that order. As discussed below, we will deny Public Service's rehearing request.

Background

2. 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 Pipeline Company's (Paiute) interstate system. Public Service leases the LNG storage facilities to Southwest Gas Corporation (Southwest), an affiliate of Paiute. The LNG storage facilities are operated by Paiute as part of its interstate system. Shippers

¹ Tuscarora Gas Transmission Co., 103 FERC ¶ 61,204 (2003)(Tuscarora).

² Public Service intervened in this docket as PSEG Resources, Inc. It has subsequently changed its name.

seeking to contract for the LNG storage service must do so under the Terms and Conditions of Paiute's tariff.

3. Sierra Pacific Power Company (Sierra Pacific), Tuscarora's affiliate, had contracted with Paiute for 35,078 Dth/d of LNG storage service and associated firm transportation service.³ The service is a winter peaking service and is limited to the months of November through March. Sierra Pacific's contract with Paiute for the LNG storage service expired on February 28, 2003. Sierra Pacific did not renew the contract.

4. On April 12, 2001, Tuscarora filed an application seeking authorization to construct and operate pipeline facilities to increase capacity for local distribution companies (LDCs) and electric generators in the states of Nevada and California. Sierra Pacific and Southwest subscribed to a total of 35,912 Dth/d of Tuscarora's expansion project. Specifically, Sierra Pacific subscribed to 11,412 Dth/d of Tuscarora's expansion capacity and Southwest subscribed for 24,500 Dth/d.⁴

5. Public Service filed a motion to intervene out-of-time and comments on Tuscarora's application. Public Service pointed out that the in-service date of Tuscarora's proposed expansion, November 1, 2002, was just prior to the expiration date, February 28, 2003, of Sierra Pacific's contract for LNG storage service on Paiute. Public Service asserted that to the extent Sierra Pacific fails to renew the LNG storage contract on Paiute because of the new capacity on Tuscarora expansion project, Public Service, as the beneficial owner of a portion of the assets comprising the Paiute system, may be adversely affected.

³ We note that, based on representations made by Public Service in its answer to Tuscarora's motion to vacate, the background section of the May 20 Order stated that under a 1996 Firm Gas Purchase Agreement (1996 Agreement), Sierra Pacific assigned 25,700 Dth/d of the 35,078 Dth/d of LNG storage and associated transportation capacity, to Southwest. In an answer filed on May 5, 2002, Southwest clarified that the 1996 Agreement gave it the right to purchase firm gas supplies from Sierra Pacific at an interconnect on Paiute's system and is unrelated to the contract Sierra Pacific has with Paiute for the LNG storage service. For the purpose of clarifying the record, we will accept Southwest's May 5 filing into the record.

⁴ Tuscarora proposed to construct the facilities to serve four shippers. In addition to Sierra Pacific and Southwest, the proposed facilities would provide 20,000 Dth per day of capacity for Morgan Stanley Capital Group, Inc. (Morgan Stanley) and 40,000 Dth per day of capacity for Duke. Tuscarora commenced service on the newly constructed facilities on December 1, 2002.

6. In response to Public Service's comments, Tuscarora asserted that, at that time, the west coast was experiencing a severe energy shortage and the Commission had in place incentives and procedures to promote the construction of capacity quickly in Tuscarora's proposed service area. Tuscarora also provided statements from Paiute, Sierra Pacific, and Southwest that attest to the fact that the expansion volumes on Tuscarora would be used to meet incremental load.

7. In a preliminary determination order issued on September 28, 2001, after considering Public Service's comments and Tuscarora's response, the Commission determined that the expansion would provide operational benefits for shippers on both Paiute and Tuscarora through Tuscarora's proposed interconnect with Paiute.⁵ The Commission also concluded that the proposed interconnect would allow common shippers of both systems to manage their loads and would provide increased reliability in the event of outages on either system. Further, the Commission concluded that by providing fuel for electric generating facilities, Tuscarora's expansion would enhance the western electric grid. It also pointed out that Paiute fully supported Tuscarora's application and Southwest and Sierra Pacific had stated that the Tuscarora expansion volumes were incremental load and were not intended to displace existing volumes.⁶ The Commission concluded that Tuscarora's proposal was consistent with the Policy Statement.⁷ Public Service did not request rehearing of the September 28 Order.

8. On January 30, 2002, the Commission issued a final Order that addressed the environmental issues and issued a certificate to Tuscarora to construct its proposed project.⁸ Public Service also did not file for rehearing of the January 30 Order.

9. One of Tuscarora's other proposed shippers, Duke, intended to use its contracted capacity for a proposed a 540 megawatt generating facility (Washoe Energy Facility). On February 25, 2002, Tuscarora filed an application to amend its certificate. While Tuscarora was ready to commence construction on part of its facilities, because of various unresolved issues concerning the construction of Duke's

⁵ Tuscarora, 96 FERC ¶ 61,356 (2001).

⁶ Tuscarora, 96 FERC at 62,346.

⁷ 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).

⁸ Tuscarora, 98 FERC ¶ 61,071 (2002).

Wahoe Energy Facility, Tuscarora wanted to delay construction of the proposed facilities needed to serve the Wahoe Energy Facility. Therefore, Tuscarora requested authorization to construct its facilities in two phases. Phase I would include the facilities needed to serve Sierra Pacific, Southwest, and Morgan Stanley. Phase II would include the facilities needed to serve Duke's Wahoe Energy Facility.

10. Public Service filed a motion to intervene out-of-time and comments on Tuscarora's request to amend its certificate. Public Service stated, among other things, that it was concerned that approval of the amended application would permit Tuscarora to construct only Phase I of its expansion, even though the Commission had never analyzed or approved the first phase on a stand-alone basis. It contended that, in light of the uncertainty about whether Tuscarora would proceed with Phase II of the expansion, the Commission should make a determination as to whether Phase I on a stand-alone basis would satisfy the Commission's criteria for pipeline certification. Public Service asserted that if the Phase II lateral facilities were not constructed, Tuscarora would have built mainline transmission facilities in excess of that under contract with Phase I expansion shippers. Thus, Public Service alleged that this would increase the potential for affiliates of Tuscarora to move existing transportation off Paiute's system onto Tuscarora, negatively affecting Public Service.

11. Public Service also reiterated its concern that Sierra Pacific had a contract for existing capacity on Paiute that was expiring on February 28, 2003. Public Service asserted that the Commission could not make a proper determination on the amended application without knowing whether Sierra Pacific did, in fact, terminate its existing contract by February 28, 2003. Public Service asserted that if Sierra Pacific did not renew its contract, it would shift capacity from Paiute to Tuscarora, thus stranding capacity on Paiute, which Public Service claimed was contrary to the Commission's Policy Statement.

12. In an Order issued on April 11, 2002, the Commission authorized Tuscarora to construct its expansion project in two phases.⁹ In response to Public Service's concern, the Commission found that the Phase I facilities were designed to provide only the 55,912 Dth per day of mainline capacity for the Phase I shippers. Phase II included a lateral line and a mainline compressor that would only be needed to serve the Washoe Energy Facility. All the capacity proposed for construction in Phase I was under final, firm contracts. Therefore, the Commission determined that there was no need to review each phase on a stand alone basis.

13. The April 11 Order did not specifically address Public Service's concern about the potential termination of the LNG storage contract. That argument was simply a

⁹ Tuscarora, 99 FERC ¶ 61,044 (2002).

reiteration of the identical issue addressed by the Commission in the previous order from which Public Service did not request rehearing. Public Service did not request rehearing of the April 11 Order.

14. On March 28, 2003, Tuscarora filed a motion requesting that the Commission vacate its certificate authorization to construct the Phase II facilities. Public Service filed an answer to Tuscarora's motion. It requested that the Commission impose certain conditions on its grant of that motion. Stating that Sierra Pacific indeed had not renewed its LNG storage service and related transportation contract with Paiute, Public Service claimed that Paiute and Public Service, in fact, had been adversely impacted by the expansion project and that the Commission had not evaluated this potential impact in the certificate proceeding.

15. Consequently, Public Service requested that the Commission condition its grant of Tuscarora's motion to vacate by warning Tuscarora that any future request to construct and operate the Phase II facilities, or their equivalent, would not be authorized unless Tuscarora could demonstrate that the adverse impact of the Phase I facilities on Paiute and Public Service had been rectified. In the alternative, it requested that the Commission institute a show cause proceeding against Tuscarora and require it to explain the circumstances and timing of Sierra Pacific's decision to terminate its LNG storage and associated firm transportation service on Paiute.

16. In the May 20 Order, the Commission granted Tuscarora's motion to vacate the authorization to construct the Phase II facilities. The Commission also dismissed Public Service's answer insofar as it constituted a collateral attack on prior Commission orders. However, it also addressed the arguments raised by Public Service in its filing and determined that Public Service's answer did not support the relief it requested

Rehearing Request

17. On rehearing, Public Service argues that its failure to seek rehearing of the September 28 and April 11 Orders does not bar it from raising issues regarding the integrity of the Commission's processes and whether the subject orders were based on misleading or incorrect information. It states that it did not know until December 23, 2002, that Sierra Pacific had terminated its LNG storage and associated seasonal transportation service on Paiute effective February 28, 2003. Therefore, it concludes that the May 20 Order is not the product of reasoned decision making, is arbitrary, capricious, and an abuse of the Commission's discretion.

18. Public Service contends that Southwest, Sierra Pacific, and Tuscarora knew well before the Commission issued the certificate that the capacity would be switched from Paiute to Tuscarora but did not reveal that fact to the Commission in time for it

to properly consider its weight and relevance in the final certificate order. It argues that it cannot be faulted or collaterally estopped for not raising facts that came to light after the rehearing period for the April 11 Order had passed.

19. Public Service asserts that the record now supports the finding that Southwest and Sierra Pacific planned for some time to move capacity subscriptions from Paiute to the Tuscarora Phase I expansion. It argues that the current revelation that they intended to switch existing volumes to Tuscarora and did not let the Commission know about their intentions calls for at least the relatively minor remedial action suggested by Public Service.

20. Public Service also contends that the Commission arbitrarily and capriciously ignored substantial record evidence that demonstrated that its prior orders were based on representations by the applicant and its supporters that proved to be incorrect. It argues that the May 20 Order gave no consideration to the allegations that the factual foundation of the prior Commission orders were at least suspect and warranted some remedial action.

Discussion

21. Public Service bases its argument on the mistaken premise that: (1) the Tuscarora expansion capacity subscribed to by Sierra Pacific and Southwest was not intended to serve new incremental demand; (2) Sierra Pacific and Southwest were disingenuous when they represented that they intended the Tuscarora capacity to serve new incremental demand; and (3) this requires some remedial remedy in the form of a post or pre-certificate condition on some future unpredictable filing.

22. The LNG storage service on Paiute's system was a seasonal service only offered for the months of November through March. The new firm transportation service on Tuscarora is available all year. Even if the Tuscarora expansion capacity did replace the LNG storage service on Paiute, it is clear that the new capacity on Tuscarora is incremental capacity during the months of April through October, capacity that was not available through the LNG storage arrangement with Paiute.

23. Further, even if Sierra Pacific did intend to replace the seasonal LNG storage service from Paiute with the incremental year-round firm transportation service, that intention would not have been material to the Commission's decision to certificate Tuscarora's expansion project. As the Commission pointed out in the May 20 Order, under the Policy Statement the fact that an impact on an existing pipeline 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.¹⁰ Regardless of Sierra Pacific's specific intent behind the termination of the LNG storage contract, absent a finding of anti-competitive behavior, competition is not by itself an adverse impact under the Policy Statement.

24. As discussed in the May 20 Order, it is not unusual for shippers on a pipeline to seek out alternative means of accessing supply when their contracts with their existing suppliers terminate. In the cases cited by the Commission in that order,¹¹ the LDCs had contracted for capacity on newly constructed pipelines to replace existing capacity on other pipelines when their contracts for that service terminated.

25. In the Guardian and Midcoast cases, the shippers specifically intended to replace firm transportation capacity on existing pipelines with firm transportation capacity on another pipeline. Here, even if as Public Service suggests, Sierra Pacific had intended from the outset not to renew its contract with Paiute, it was replacing seasonal LNG storage capacity with year-round pipeline capacity. As discussed above, the Tuscarora capacity does not just potentially replace the LNG storage capacity, it creates additional incremental capacity for Sierra Pacific and Southwest.¹²

26. Regarding Public Service's argument that it was somehow justified in not seeking rehearing of the Commission's September 28, January 30, and April 11

¹⁰ Tuscarora, 103 FERC at P 18, citing, Policy Statement 88 FERC at 61,748.

¹¹ 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)(Guardian); 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 (1999), aff'g sub nom., Midcoast Interstate Transmission Inc. v. FERC, 198 F.3d 960 (D.C. Cir. 1999)(Midcoast).

¹² In response to the Commission's discussion of the Guardian and Midcoast precedent, Public Service contends that Commission's ruling is a departure from existing procedure and policy and should be reversed on rehearing. The Guardian and MidCoast orders represent current Commission policy. Public Service does not cite to any authority to support its position that the termination of the Paiute LNG storage contract requires that the Commission impose conditions on a hypothetical future filing in an order that grants a motion to vacate part of a previously issued certificate authorization.

Orders in this proceeding, we note that while the orders indicate that the Tuscarora capacity was intended to be incremental to that on Paiute, there was never any indication that Sierra Pacific had affirmatively committed to extending their service on Paiute beyond the February 2003 expiration date. If it was Public Service's position that, absent the assurance of the extension of the Sierra Pacific contract with Paiute, the potential for adverse impact on Public Service would outweigh the potential benefits of the project, it was incumbent upon Public Service to put that argument squarely before the Commission, before the project was constructed, rather than now, when even Public Service acknowledges it is "too late" to address the harm it has allegedly suffered.

27. Public Service also states that the May 20 Order misstates and misapplies the Commission's Policy Statement. It also states that the purpose of the Policy Statement was to aid in a predetermination of whether a project ought to be certificated, not as a post hoc justification for why certification, construction, and operation has already occurred. It contends that the May 20 Order cannot correct the incorrect record by trying to recreate Policy Statement compliance almost two years after the fact.

28. Public Service's argument has no merit. The May 20 Order did not apply the Policy Statement to Tuscarora's expansion project that has already been constructed and is operational. The Commission applied the Policy Statement in the September 28 preliminary determination. The Commission did consider Public Service's concerns in that order, including the potential that the LNG storage contract would not be renewed. Any concerns Public Service may have had concerning the Commission's application of the Policy Statement should have been raised in a request for rehearing of the September 28 Order.

29. Public Service also questions the Commission's reliance on EIA forecasted growth to support its finding that Paiute should be able to remarket its newly unsubscribe capacity. Again, the May 20 Order did not make any additional findings concerning the merits of Tuscarora's expansion project. The Commission only cited to the EIA forecast information to demonstrate the potential for long term growth in demand in the area where the storage facilities are located.

Docket No. CP01-153-005

- 9 -

30. Accordingly, as discussed above, Public Service's request for rehearing of the May 20 Order is denied.

The Commission orders:

Public Service's request for rehearing of the May 20 Order is denied.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary