106 FERC ¶ 61,013

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Equitrans, L.P. and Carnegie Interstate Pipeline Company — Docket No. CP02-233-001

ORDER DENYING REHEARING

(Issued January 14, 2004)

1. On July 1, 2003, the Commission issued an order in this proceeding approving a proposed merger by Equitrans, L.P. (Equitrans) and Carnegie Interstate Pipeline Company (Carnegie). However, the July 1, 2003 Order, the Commission declined to approve a settlement offered by Equitrans and Carnegie in response to protests filed in the proceeding. The Commission found that the proffered settlement would postpone compliance with an earlier rate settlement's requirement that Equitrans file a Section 4 rate case in the summer of 2003. A party to the earlier settlement objected to the postponement of the filing of that rate case by Equitrans and, therefore, opposed the settlement.

2. Two parties filed requests for rehearing of the July 1, 2003 Order and one filed a motion for clarification and reconsideration, arguing that the Commission should have approved the settlement offered in this proceeding over the objections of the party to the earlier settlement. In this order, the Commission is denying the rehearing requests. The denial of rehearing is in the public interest because it assures administrative certainty to parties to settlements that such settlements generally cannot be modified by subsequent settlements without the consent of the parties to the original settlement.

Background

3. In this proceeding, Equitrans proposed to acquire Carnegie by merger. Because Equitrans anticipated filing a rate case under Section 4 of the Natural Gas Act (NGA) in the summer of 2003, pursuant to a requirement of an earlier rate settlement,[1] it proposed to charge the same rates Carnegie had charged for service over the Carnegie facilities until new rates for Equitrans' entire system were established in the 2003 rate case. Protesters raised the issue of whether existing Equitrans' shippers rates would increase if Equitrans seeks to roll the costs associated with the acquisition and operation of Carnegie's facilities into its systemwide rates in the next Section 4 rate case. The protesters requested that the Commission condition the merger authority so that Equitrans cannot increase its rates in the next rate case based on the merger with Carnegie.

4. In response to the protests, Equitrans and Carnegie offered a settlement that, among other things, would have relieved Equitrans of the obligation to file a Section 4 rate case in 2003, as required by the prior rate settlement, and would have provided that Equitrans' current rates would stay in effect until at least March 31, 2005. After that date Equitrans could file a Section 4 rate case if it chose to do so. Equitrans and Carnegie asserted that this approach would address the protesters' concerns by providing rate certainty for both Equitrans' and Carnegie's shippers for at least two years.

5. All the parties to the proceeding, except one, supported the proposed settlement either in its entirety or subject to certain requested modifications. The Independent Oil & Gas Association of West Virginia (IOGA) opposed the settlement on the grounds that it was a party to the previous rate settlement and that it had agreed to accept higher gathering rates on Equitrans' system in exchange for Equitrans' making the Section 4 rate filing for rates to be effective on August 1, 2003. IOGA argued that it would lose the benefit of its bargain if Equitrans and its other shippers are allowed to change the previous rate settlement in a new settlement without IOGA's consent.

6. Equitrans and Carnegie maintained that IOGA's interest in Equitrans' rates had become attenuated because IOGA itself is not a shipper on Equitrans' system and none of the producers represented by IOGA are currently firm shippers on Equitran's system,

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[1] See Equitrans L.P., 87 FERC ¶ 61,116 (1999) (approving settlement in which Equitrans is required in Article IX, §§ 5 and 7 of the Joint Stipulation and Agreement, as amended, to file a Section 4 rate case for rates to be effect on August 1, 2003.

although some might transport gas on an interruptible basis. In the alternative, Equitrans and Carnegie suggested that the Commission approve the settlement as uncontested for the parties that supported it and sever IOGA so that it could litigate new rates to apply to its members.

7. In the July 1, 2003 Order, the Commission explored whether it could approve the contested settlement under any of the approaches it set forth in Trailblazer Pipeline Company.[2] The Commission found that it could not approve the settlement under Approach No. 2, where approval of a contested settlement is based on a finding that the overall settlement package provides a just and reasonable result, because there was no record upon which the Commission could determine that IOGA would be in no worse position under the terms of the settlement than if the case is litigated.[3] The Commission also determined that it could not approve the settlement under Approach No. 3, where the Commission must establish whether the benefits of the settlement outbalance the nature of the objections, in light of the limited interest of the contesting party in the outcome of the case. Although the parties argued strenuously that IOGA's interest in Equitrans' rates had become attenuated since the previous settlement was approved, the Commission cited to the previous rate proceeding where it determined that, for the purposes of that settlement, "IOGA is a significant participant in this proceeding whose interests are not so insubstantial that they can be overlooked."[4]

[2] 85 FERC ¶ 61,345 (1998), order on reh'g, 87 FERC ¶ 61,110 (1999) Trailblazer). Approach No. 1 permits the Commission to approve the settlement after considering the contesting parties' concerns on the merits. The July 1, 2003 did not discuss this approach because IOGA was not raising specific issues related to new rates proposed by Equitrans, but rather was raising the issue of whether, as a matter of law or policy, a previous rate settlement should be abrogated by the Commission over IOGA's objections.

[3] The Commission explained that IOGA has alleged circumstances related to Equitrans' system and services that might result in a decrease in Equitrans' rates when considered in the context of a Section 4 rate case. Therefore, if the Commission were to approve the settlement and not require Equitrans to file a rate case in 2003, IOGA's members would lose the potential of a possible rate decrease for at least two years.

[4] Equitrans, 85 FERC ¶ 61,395 at 62,527 (1998).

8. With regard to Equitrans' and Carnegie's suggestion that the Commission sever IOGA from the settlement under Approach No. 4, the Commission found that IOGA's objection went to the very heart of the settlement; i.e., Equitrans wanted to postpone the filing of a Section 4 rate case, perhaps indefinitely, whereas IOGA wanted the rate case filed in 2003, as provided by the previous settlement. The Commission also noted that severing IOGA so that new rates could be litigated for its members would not result in savings of time and expense for IOGA and Equitrans.

9. Finally, the Commission expressed its concern that the new settlement would declare a previously approved settlement of no force and effect, despite the objections of a party to the earlier settlement. Although the Commission acknowledged that under special circumstances it could abrogate a previously approved settlement, it held that there were no such special circumstances in this case warranting that result. The Commission rejected Equitrans' and Carnegies' position that by not approving the settlement because of IOGA's objections, the Commission was undermining its own precedent which favors settlements of cases. The Commission explained that, to the contrary, its action in this proceeding would provide assurance to parties to a settlement that they will get the benefit of their bargain and that the settlement will not be nullified subsequently without their consent, absent compelling justification.

Requests for Rehearing and Commission Response

10. Keyspan Delivery Companies (KeySpan)[5] and PSEG Energy Resources & Trade LLC (PSEG), both firm shippers on Equitrans' system and supporters of the settlement in this proceeding, filed timely requests for rehearing. On August 7, 2003, Equitable Gas Company (Equitable Gas) filed a motion for clarification and reconsideration. Equitable Gas is Equitrans' largest shipper.

11. KeySpan argues that by declining to approve the settlement over IOGA's objections, the Commission has acted inconsistently with its well-established policy of encouraging negotiated settlements and that the Commission's stated reasons for why it

[5]The KeySpan Delivery Companies consist of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island; and Boston Gas, Colonial Gas Company, EnergyNorth Natural Gas, Inc., and Essex Gas Company, collectively d/b/a KeySpan Energy Delivery New England.

was not severing IOGA are unsupported.[6] KeySpan points to cases where it claims the Commission found that a party's interest in the pipeline's rates was not sufficient to preclude the Commission from approving the proposed settlement over that party's objections. KeySpan cites Texas Gas Transmission Corp.[7] where the Commission approved Texas Gas' proposed settlement as an uncontested one under the fair and equitable and public interest standard of Rule 602(f)(2)[8] (2002) and severed Indicated Shippers so they could litigate their concerns about a particular rate and establish a sufficient record for the Commission to make a merits determination on whether the proposed rate was just and reasonable. On rehearing, the Commission rejected Indicated Shippers' contention that they had an interest in the noncontesting parties' rates because those rates would govern the rates paid for released capacity in the secondary market. The Commission found that interest to be insufficient to justify rejection of the settlement.[9] KeySpan also asserts that in Northwest Pipeline Corp. (Northwest) the Commission rejected an interest in a producer's netback as a reason to reject a settlement as to the uncontesting parties.[10]

12. The Commission does not agree that its rejection of the proposed settlement in this proceeding is inconsistent with its policy favoring negotiated settlements or with Commission precedent. In Texas Gas the Commission found that the interests of the contesting party (Indicated Shippers) could be protected by severing it from the settlement and allowing it to litigate its own rates. In that case, Indicated Shippers' only claims of harm attributable to other shippers' rates were in the secondary market and those claims were held to be speculative. Since Indicated Shippers did not claim to own producing properties whose value would be affected by the other shippers' rates, the

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[6] PSEG supports Keyspans' arguments on this issue.

[7] 98 FERC ¶61,244, order on reh'g, 99 FERC ¶ 61,328 (2000) (Texas Gas).

[8] 18 CFR § 385.602 (f)(2) (2002).

[9] KeySpan also contends that a negotiated settlement is similar to negotiated rates; therefore, since IOGA would not have veto authority over rates negotiated by the parties supporting the settlement, it should not have veto authority over a rate settlement. The Commission rejects this contention because under this view, the Commission would have to approve all settlement rates in all cases.

[10] 81 FERC ¶61,242 (1997).

Commission did not address any issue concerning how such an interest should be treated in reviewing a contested settlement. Issues raised by IOGA in this case do not involve the secondary market and are considered on their own merits. We do not believe that severing IOGA from the settlement to litigate separately its interests is appropriate because, as we stated in the July 1 Order, IOGA's objection goes to the very heart of the prior settlement; i.e., IOGA wanted a rate case filed in order to have the opportunity to address the level of Equitrans' rates.

13. In addition, the Commission's analysis in this case is no different than it was in Northwest, although, the context and result of the analysis are. In Northwest, as here, the Commission declined to sever the nonconsenting party to litigate its interests separately. Instead, the Commission carefully considered the parties objections before finding, pursuant to Rule 385.602(h)(1)[11] of our rules governing contested settlements, that the settlement was supported by substantial evidence and should be approved. [12] Thus, in the July 1 Order, the Commission rejected the new settlement after careful consideration of the arguments of the nonconsenting party. Specifically, the Commission found that the proposed settlement should not be approved on its merits because it would abrogate an earlier rate settlement over the objections of a party to that earlier settlement. .

14. Approval of a settlement under the circumstances presented here would risk undermining confidence in the settlement process. The Commission believes that a party to a rate settlement generally should be able to rely upon the terms and conditions of that settlement until a new rate case can be conducted under NGA Section 4 or a Section 5 proceeding in response to a complaint. Parties to a settlement should not have to worry that other parties to the settlement may, at a later date, do an "end run" in a proceeding not involving the subject matter of the settlement, and change the settlement without all of the parties' consent.

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[11] 18 CFR § 385.602(h)(1) (2002).

[12] Northwest Pipeline Corp, Order Denying Rehearing, 83 FERC ¶ 61,001 (1997).

15. As explained in the July 1 Order, the Commission could not find under any of the Trailblazer standards that the proposed settlement should be approved.[13] The outcome here is also consistent with the substantive result in Trailblazer, which recognized that producers do have significant interest in a pipeline's rates, if their reserves are so located that the pipeline can be used as a path to market.[14]

16. Equitable Gas contends that requiring Equitrans to file its rate case in 2003 will result in skewed rate structures because most of Equitrans' customers' contracts will expire at the end of 2004 and it is not certain which contracts will be extended. This is an issue that should be raised in the Section 4 rate case which Equitrans is required to file.

Conclusion

17. For all of the above reasons the Commission is denying the requests for rehearing and/or consideration in this proceeding.

The Commission orders:

Rehearing and/or reconsideration of the July 2, 2003 Order in the above-captioned proceeding is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[13] The Commission notes that its decision to reject the settlement was not based on an underestimation of the support of Equitrans' shippers, as alleged by PSEG and Equitable. Although footnote 7 in the July 1 order contains an error stating that Equitable Gas supported IOGA's position, the Commission noted that "Carnegie and Equitrans emphasize that Equitrans' firm transportation and storage customers are responsible for 98 percent of Equitrans' revenues and IOGA's members are not part of this group." 104 FERC ¶ 61,008 at P 24.

[14] Trailblazer Pipeline Co., 85 FERC ¶ 61,345 at 62,347 (1998), order on reh'g, 87 FERC ¶ 61,110 at 61,442-3 (1999).