availability of appropriated funds from which payment for contract purposes can be made.

Dated: August 8, 1997.

Randolph L. Kesling,

Supervisory Contract Specialist, Acquisition and Assistance Division.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN97–3–000]

Arkansas Oklahoma Gas Corporation; Order Instituting Proceeding

Issued August 8, 1997.

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, and Donald F. Santa, Jr.

Arkansas Oklahoma Gas Corporation (AOG) is a local natural gas distribution company in the Fort Smith, Arkansas area. It provides interruptible transportation (IT) of natural gas in interstate commerce subject to a blanket certificate issued under section 284.224 of the Commission's regulations.[1] In a complaint to the Enforcement Task Force, a potential shipper stated that AOG's IT service agreements contain a ''sales provision'' requiring the shipper to sell gas to AOG when AOG determines that the gas is needed to protect AOG's sales to its local customers. The sales provision in AOG's IT agreements may violate sections 4 (a) and 4(b) of the Natural Gas Act (NGA),[2] section 311 (a)(2) of the Natural Gas Policy Act of 1978 (NGPA),[3] and sections 284.9(b)(1), 284.123(a) and 284.123(e) of the Commission's regulations relating to transportation under the blanket certificate.[4]

This order establishes a proceeding pursuant to NGA sections 4, 5 and 16 and NGPA sections 211 and 501.[5] We are requiring AOG to sow why it has not violated NGA sections 4(a) and 4(b), NGPA section 311(a)(2), or sections 284.9(b)(1), 284.123(a) and 284.123(e) of the Commission's regulations. We are also directing AOG to respond to data and document requests that relate to AOG's blanket certificate transportation.

[1] 18 C.F.R. § 284.224 (1996).

[2] 15 U.S.C. 717c (a), (b) (1994).

[3] 15 U.S.C.A. § 3371(a)(2) (1994).

[4] 18 C.F.R. §§ 284.9(b), 284.123(a), 284.123(e) (1996).

[5] 15 U.S.C. 717c, 717d, 717o, 3371, 3411 (1994).

I. Background

AOG makes direct sales to 60,000 residential and industrial customers in four Oklahoma and five Arkansas counties surrounding Fort Smith.[6] AOG obtains system supply from more than 450 local production input points scattered throughout its system.[7]

AOG received its Order No. 63[8] blanket certificate from the Commission on November 13, 1985.[9] In particular, this certificate permits AOG to transport gas in interstate commerce under the same conditions as apply to transportation by intrastate pipelines under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).[10] These conditions are set forth in Part 284, Subpart C of the Commission's regulations. Section 284.224(e)(1) of the regulations provides that, as relevant here, any transportation transaction under an Order No. 63 blanket certificate is subject to the Subpart C terms and conditions and reporting requirements.[11] In 1994, AOG transported 8,334,725 MMBtu pursuant to its Order No. 63 authority, as compared to 13,698,875 MMBtu that AOG distributed to retail customers.[12]

In discussions with the Task Force, AOG stated that its IT agreements under its blanket certificate contain the following ''sales provision'' or a similar provision:

> Shipper agrees to sell to Transporter gas from the wells listed in the Exhibit ''A'', on a best efforts basis, when, in Transporter's judgment, the purchase of such gas is necessary to protect the continuity of gas service to Transporter's gas purchasing customers. Such a right to purchase from Shipper shall be up to the volumes sufficient for Transporter to cease curtailment. Any volumes in excess of those required to enable Transporter to meet its customers [sic] needs which Shipper can deliver to Transporter and which Transporter can transport will thereupon be transported pursuant to other provisions of the gas transportation agreement. Transporter will first balance gas deliveries and redeliveries and if Transporter is unable to balance them it will purchase the gas at the greater of the W.A.COG [sic] as filed with the Arkansas Public Service Commission for AOG system purchases or the ''net back'' price plus Transporter's transportation attributable to Purchaser's contract. (Use average W.A.COG for preceding twelve months.) Transporter further has the right to purchase transportation gas not currently flowing. These pricing provisions can be changed by mutual consent between the parties. This pricing provision is also subject to other pricing provisions set forth in any gas purchase contracts between Shipper and Transporter. Transporter's right to purchase gas hereunder shall be in effect as to any well listed in Exhibit ''A'' so long as this agreement is in effect.

Pursuant to 18 C.F.R. § 284.123(e), AOG was required to file an operating statement concerning its transportation under the blanket certificate.[13] The statement must ''describe [ ] how the pipeline will engage in these transportation arrangements, including operating conditions, such as, quality standards and financial viability of the shipper.'' [14] On March 22, 1988, AOG filed an amended operating statement with the Commission that does not refer to the sales provision.

On June 23, 1997, AOG submitted a ''Statement of Position and Offer of Settlement'' (statement), pursuant to Rules 1b.18 and 1b.19 of the Commission's Rules Relating to Investigations.[15] AOG requests confidential treatment for the statement. The statement (apart from the offer of settlement) is a legal argument that does not contain proprietary or otherwise privileged information that would be protected from disclosure under the Freedom of Information Act. AOG has not provided any reason why its legal analysis should not be made public. Therefore, the Commission grants AOG's request for confidential treatment for the offer of settlement and otherwise denies its request for confidential treatment of the remainder of the statement. The Commission addresses

[6] *See* AOG's March 22, 1995 filing in Docket No. PR95–4–000, AOG's most recent rate case before the Commission.

[7] *Id.*

[8] FERC Stats. & Regs. (Regulations Preambles 1977–1981) ¶ 30,118 (1980).

[9] Arkansas Oklahoma Gas Corporation, 33 FERC ¶ 61,197 (1995).

[10] 15 U.S.C. § 3371(a)(2) (1994).

[11] When AOG received its Order No. 63 blanket certificate, the Commission regulated AOG as a ''natural gas company'' pursuant to the NGA. As such, AOG had received certificates under NGA section 7 for constructing and operating facilities within this Commission's jurisdiction. In 1989, the Commission held that the Uniform Regulatory Jurisdiction Act of 1988 transferred exclusive jurisdiction over AOG's transportation of gas to ultimate consumers from the Commission to the Arkansas Public Service Commission and the Oklahoma Corporation Commission. Arkansas Oklahoma Gas Corporation, 48 FERC ¶ 61,338 (1989). As a result, except for the blanket certificate, the Commission vacated all NGA section 7 certificates it had previously issued to AOG, effective October 6, 1988. Nonetheless, AOG remains subject to the Commission's jurisdiction to the extent necessary to enforce the terms and conditions of the blanket certificate. *Id.*

[12] AOG's May 9, 1995 filing in Docket No. PR95–4–000, Answer to Item (2), p. 2 of 2.

[13] This requirement applies to AOG's transportation by virtue of section 284.224(e)(1) of the Commission's regulations.

[14] 18 C.F.R. § 284.123(e).

[15] 18 C.F.R. § 1b.18, 19 (1996). These rules permit a person to submit a memorandum setting forth its position on matters relevant to an investigation.

below the substantive arguments contained in the statement.

II. Discussion

With respect to its transportation under its blanket certificate, AOG is subject to section 4 of the NGA. NGA section 4(a) requires that all rules and regulations affecting or pertaining to rates or charges for AOG's blanket certificate transportation be just and reasonable. The transportation service for which shippers pay AOG's rates includes a requirement that shippers sell gas to AOG, at AOG's discretion, to help it meet its own system supply requirements. AOG's sales provision appears to be an unreasonable rule or regulation relating to its rates for interstate IT service. Moreover, in determining its rates for transportation service, AOG does not appear to have addressed the value of the ''back-up'' supply service it requires of shippers. Therefore, to the extent AOG has required interstate shippers to agree to the sales provision, AOG appears to have imposed an unreasonable regulation relating to its rates for blanket certificate transportation, in violation of NGA section 4(a).

NGA section 4(b) prohibits AOG from any undue preference or discrimination with respect to its transportation under the Order No. 63 blanket certificate. The Commission has implemented this prohibition by subjecting AOG's blanket certificate transportation to section 284.9(b)(1) of the Commission's regulations. Under this provision, AOG must provide interruptible service ''without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volume of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.'' With respect to its interruptible transportation, AOG is ''held essentially to the same non-discriminatory access standards as an interstate pipeline providing NGA section 7 service.'' [16]

By tying its interstate transportation to the sales provision, AOG appears to have unduly discriminated against current and potential shippers, in violation of NGA section 4(b) and section 284.9(b)(1) of the Commission's regulations.[17] In addition, AOG appears to have violated section 4(b) and section 284.9(b)(1) by failing to disclose the sales provision in the operating statement AOG filed with the Commission.[18]

AOG's blanket certificate subjects AOG's interstate IT service to the terms and conditions under which intrastate pipelines provide transportation pursuant to NGPA section 311(a)(2). This transportation, which must be subject to fair and equitable rates and charges pursuant to section 284.123(a) of the Commission's regulations, carries the same nondiscriminatory conditions as transportation by interstate pipelines.[19] AOG's tying of its transportation to the sales provision appears to be an unjust and inequitable condition on its interstate transportation service, in violation of NGPA section 311(a)(2) and section 284.123(a) of the Commission's regulations.

Further, AOG's failure to include the sales provision in its operating statement appears to have violated section 284.123(e), which requires the statement to be filed. A requirement that a shipper agree to sell gas to AOG appears to be sufficiently central to ''how the pipeline will engage in [Order No. 63] transportation arrangements'' that AOG must disclose it in its operating statement.

In its statement, AOG asserts that the Commission does not have any authority over the sales provision. AOG argues that because the sales provision relates to AOG's gas purchases for the purpose of selling gas to its distribution customers, the provision is exempted from Commission jurisdiction pursuant to NGA section 1(b).

Contrary to AOG's argument, the Commission has jurisdiction over the sales provision because AOG conditions Order No. 63 transportation on this provision. AOG's blanket certificate permits the company to conduct transportation permitted by NGPA section 311.[20] Under NGPA section 311(c), the Commission may prescribe terms and conditions for such transportation.[21] The legislative history indicates that section 311 ''provides authority for the Commission to condition approval of the sale, transportation, or exchange under this section upon such specified terms and conditions as it deems appropriate.'' [22] The Commission has recognized its authority to condition section 311 transportation in numerous decisions.[23] Thus, the Commission has authority to determine whether the sales provision is an appropriate condition of AOG's transportation, and to require AOG to delete the condition upon a finding that it is not appropriate.

AOG also argues that the sales provision is ''directly tied to its LDC state-regulated service obligation.'' Statement at 9. The Commission would have jurisdiction over the sales provision as an encumbrance on transportation in interstate commerce, even if the state commission had expressly authorized it, because Order No. 63 preempts state law.[24] In addition, contrary to AOG's assertion, the portion of AOG's Arkansas Public Service Commission tariff that the company provided at Exhibit B to its statement makes no mention of the sales provision. In any event, if AOG believes that the sales provision contributes to its ability to perform its state authorized service obligations, it can remove the provision from its interruptible transportation contracts and execute separate, voluntary sales agreements that are not a prerequisite for receiving Order No. 63 service.

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[16] *Southwestern Public Service Co.* v. *Red River Pipeline,* 74 FERC ¶ 61,133 at 61,473 (1996) (*Southwestern*).

[17] *See* Order No. 436, FERC Stats. & Regs. [Regs. Preambles 1982–1985] ¶ 30,655 at 31,511 (1985) (''arrangements by pipelines that tie or ''bundle'' gathering, production, storage or other services not requested by shippers to self-implementing transportation service offered under this rule would constitute undue discrimination in violation of the non-discriminatory access condition * * * if the costs of such services are not properly allocable to a fully-allocated transportation rate.'')

[18] Id. at 31,505 (''[R]easonable operating conditions imposed routinely by pipelines or shippers do not *per se* violate the non-discriminatory access provision, *provided* that such conditions are stated 'up-front' in the pipeline's transportation tariffs on file with the Commission and are applied by the pipeline fairly to all similarly-situated shippers and shipments.'' [emphasis in original]). In lieu of tariffs, holders of Order No. 63 blanket certificates file operating statements setting forth the conditions under which they will provide interstate transportation. Order No. 436–A, FERC Stats. & Regs. ¶ 30,675 at 31,692–93. Thus, even if AOG's sales provision were reasonable, it appears that AOG is violating section 284.9(b)(1) because its operating statement does not disclose the provision.

[19] *Southwestern, supra* n. 16 and Transok, Inc., 54 FERC ¶ 61,229 at 61,673 (1991).

[20] Order No. 63, FERC Stats. & Regs. ¶ 30,118, at 30,825 (1980). The Commission established these conditions pursuant to NGA section 7(e), 15 U.S.C. § 717f(e), which granted the Commission authority to attach to the certificate ''such reasonable terms and conditions as the public convenience and necessity may require.''

[21] *See, e.g.,* Associated Gas Distributors v. FERC, 824 F.2d 981, 1016 (D.C. Cir. 1987) (''the authority of § 311(c) * * * allows [the Commission] to prescribe 'terms and conditions' '' for section 311 transportation).

[22] Conference Committee Report; Joint Explanatory Statement, H. Rept. 95–1752, at 106–109 (1978); S. Rept. 95–1126, at 106–109 (1978), reprinted at 5 Natural Gas Policy Act Information Service ¶ 311:210 at p. 4.

[23] *E.g.,* Missouri Gas Energy v. Williams Natural Gas Company, 79 FERC ¶ 61,204 (1997) (section 311 construction projects must comply with the environmental requirements of section 157.206(d) of the Commission's regulations); Pacific Gas and Electric Company, 69 FERC ¶ 61,140 at 61,505 (1994) (acceptance of an Order No. 63 blanket certificate authorizes the Commission to enforce terms and conditions of the certificate).

[24] *See, e.g.,* Order No. 63, at 30,827.

AOG also contends that its interruptible transportation service is a gathering service that has been regulated by the Commission as a matter of convenience. Statement at 15. This argument proves too much, for if AOG's facilities are exempt gathering facilities, it should not have a blanket certificate. Indeed, AOG specifies that it does not want the Commission to declare that AOG's facilities are ''gathering.'' Statement at 17 n.25.

AOG next argues that the Commission cannot require it to amend its operating statement by including the sales provision, and adds that it is not aware that the Commission has ever required an intrastate pipeline or an Order No. 63 transporter to amend its operating statement. Statement at 18–19. AOG quotes from *Transok, Inc.*[25] for the proposition that, while the Commission can reject or suspend proposed changes in tariff provisions that interstate pipelines file under NGA section 4, it cannot reject or suspend an Order No. 63 transporter's operating statement filed under NGPA section 311. Here, the Commission is not considering whether to reject or suspend AOG's operating statement. Instead, the Commission is exercising its authority to determine whether AOG's sales provision is lawful and whether it should be included in AOG's operating statement. That is consistent with our actions in *Transok*. There, the Commission determined, *inter alia*, that an intrastate pipeline that provides section 311 service must curtail firm shippers on a nondiscriminatory basis. In that proceeding, the Commission directed Transok to amend its operating statement to meet this requirement.[26]

AOG next cites *CNG Transmission Corporation*[27] for the proposition that the Commission can only recommend (not require) the terms and conditions under which an LDC transacts business on its system. In that order, the Commission declined to specify how an LDC should broker transportation capacity to end users receiving the LDC's non-jurisdictional distribution service. Here, the Commission is exercising its authority over the terms of AOG's jurisdictional transportation.

Finally, AOG suggests that because the Commission approved its rates three times since it filed its operating statement, the sales provision is insulated from further review. Statement at 19. But the Commission never addressed the sales provision when it approved AOG's rates, and there is no indication that the Commission was aware of it.

The Commission will require AOG to show why, by including the sales provision in its interstate IT agreements, and by not disclosing this provision in its operating statement, it has not violated and is not violating NGA sections 4(a) and 4(b), NGPA section 311(a)(2) and sections 284.9(b)(1), 284.123(a) and 284.123(e) of the Commission's regulations.

The Commission orders:

(A) Within 30 days of the issuance of this order, AOG shall:

(1) File an answer to the allegations of violations that conforms to the requirements of Rule 213 of the Commission's Rules, 18 C.F.R. § 385.213 (1996). In its answer, AOG shall admit or deny, specifically and in detail, each allegation set forth in Part II of this order, and shall set forth every defense relied on. If an allegation is only partially accurate, AOG shall specify that part of the allegation it admits and that part of the allegation it denies.

(2) Show why, by including the sales provision in its interstate IT agreements, it has not violated and is not violating NGA sections 4(a) and 4(b), NGPA section 311(a)(2) and section 284.9(b)(1) of the Commission's regulations.

(3) Show why, by not disclosing the sales provision in its operating statement, it has not violated and is not violating sections 284.9(b)(1) and 284.123(e) of the Commission's regulations.

(4) AOG shall separately state the facts and the arguments that it advances. AOG must support with exhibits, affidavits and/or prepared testimony any facts that it alleges. AOG's statement of material facts must include citation to supporting data. In addition to its answer, AOG must respond to the following requests for information and documents. All materials must be subscribed and verified as set forth in sections 385.2005 (a) and (b)(2) of the Commission's regulations, 18 C.F.R. §§ 385.2005 (a) and (b)(2) (1996).

(a) State the full legal name and business address of each entity with which AOG has executed a currently effective Order No. 63 transportation agreement. For each entity identified, provide a copy of the transportation agreement, as amended. For each transportation agreement provided, state the expiration date of the agreement if it is not clearly set forth in the copy of the agreement.

(b) State whether AOG has ever invoked the sales provision (or a similar provision) for any transportation agreement provided in response to (a).

(c) For each transportation agreement for which AOG has invoked the sales provision (or a similar provision), provide the following information and documents:

(i) The date on which AOG invoked the provision;

(ii) The period during which the shipper sold gas to AOG pursuant to the provision;

(iii) The quantity and sales price of the gas the shipper sold to AOG, and the amount of the transportation charges AOG refunded to the shipper; and

(iv) All documents relating to AOG's purchase of gas under the provision or notification to the shipper that sales would no longer be required under the provision.

(B) AOG's request for confidential treatment for its June 23, 1997 statement is granted with respect to the offer of settlement contained therein and denied with respect to the remainder of the statement.

(C) Notice of this proceeding will be published in the **Federal Register**. Interested parties will have 20 days from the date of publication of the notice to intervene.

By the Commission.

Linwood A. Watson, Jr.,

Acting Secretary.

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[25] 54 FERC ¶61,229 at 61,672 n.5 (1991).

[26] *Id.* at 61,676. In response, Transok filed an amended operating statement that deleted a provision that the Commission determined might discriminate against interstate shippers. 56 FERC ¶61,275 at 62,083 n.12 (1991).

[27] 55 FERC ¶61,189 at 61,627 (1991).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP97–663–000]

CNG Transmission Corporation; Notice of Request Under Blanket Authority

August 11, 1997.

Take notice that on July 23, 1997, CNG Transmission Corporation (CNG), 445 West Main Street, Clarksburg, West Virginia 26301, filed in Docket No. CP97–663–000 a request pursuant to Sections 157.205, 157.211 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211 and 157.216) for authorization to expand the facilities at the existing Jefferson Measuring and Regulation Station (Jefferson Station) near Jefferson, Frederick County, Maryland, under CNG's blanket certificate issued in Docket No. CP82–537–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.