DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM01–9–001]

Reporting of Natural Gas Sales to California Market

Issued October 11, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission is denying rehearing of the Commission's July 25, 2001 order, 66 FR 40245 (August 2, 2001), imposing certain reporting requirements on natural gas sellers and transporters serving the California market.

DATES: The reporting requirement covers activity for the six months from August 1, 2001, to January 31, 2002, and the first report is due October 1, 2001.

FOR FURTHER INFORMATION CONTACT: Jacob Silverman, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 208–2078.

SUPPLEMENTARY INFORMATION:

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

Order on Rehearing

Issued October 11, 2001.

On July 25, 2001, the Commission issued an order (July 25 order) imposing a reporting requirement on natural gas sellers and transporters serving the California market.[1] The specific information to be collected was set forth in a series of questions included as an appendix to the order. The Commission concluded that it has the authority to request the information in order for the Commission to understand why the disparity in the price of natural gas between the price in California and the remainder of the country had occurred, and was continuing. The information is to be submitted monthly for the six-month period covering August 1, 2001, through January 31, 2002, with the report due 30 days after the end of each month.[2] Requests for rehearing or clarification were filed by a number of parties.

The Commission denies rehearing. The reporting requirement is in the public interest, since the information is necessary for the Commission to better understand how the California natural gas market operates so the Commission can determine whether there is anything else the Commission can do to protect California consumers. Without the information the Commission can not determine whether it has authority to meaningfully address the problem of disparate prices in the California natural gas market. Further, the information is necessary for the Commission to advise Congress as to whether it should change the existing regulatory framework under which the Commission now operates. The Commission also denies the requests for clarification.

Background

On May 18, 2001, the Commission issued an order (the May 18 order) proposing to impose a reporting requirement on natural gas sellers and transporters serving the California market, and requested comments on the proposal.[3] The order discussed the Commission's concern about a sharp increase in the price of natural gas sold in the California market, which exceeded the increase in other markets, including those markets supplied by the same producing areas.[4] The May 18 order stated that the information should assist the Commission in carrying out its regulatory responsibilities in a number of ways. First, it would help the Commission determine what part of the problem, if any, is within the scope of its jurisdiction by enabling the Commission to determine what percentage of the volumes sold into the California market is domestically produced gas sold by marketers affiliated with pipelines[5] and LDCs in sales for resales, which are the only sales of natural gas now being made that the Commission has jurisdiction to regulate. The information would also give the Commission an accurate picture of the overall average gas costs being incurred by all purchasers of natural gas moving into the California market. The Commission also stated that the information would enable it to determine the extent to which the cost of interstate transportation, which is subject to the Commission's jurisdiction, affects the price of gas at the California border.

The specific information to be collected was set forth in a series of questions included as an appendix to the May 18 order. Twenty-nine responses were filed to the May 18 order. Some commenters who supported the proposal also sought to broaden the scope of information gathered. Other commenters raised a number of issues, such as the extent of the Commission's authority to collect the information, the period in which the information is to be collected, and the confidential treatment of certain information, particularly the data on individual transactions. In addition, some commenters urged clarification of a number of the questions.

The July 25 order concluded that under NGA sections 14[6] and 16 the Commission has the authority to request the information from entities that may not be natural gas companies subject to the Commission's NGA section 1 jurisdiction.[7] In addition to the reasons discussed in the May 18 order, the Commission pointed out that the information being sought would be relevant in determining the effect of legislative proposals addressing the California energy situation in the current session of Congress.[8]

Moreover, the Commission stated that it was also concerned about the operation of the California natural gas market because gas-fired electric generators in California help to establish the market clearing price for electric generation pursuant to the bidding system used by the California Independent System Operator. On June 19, 2001, the Commission issued an

[1] 96 FERC ¶ 61,119 (2001).

[2] On September 17, 2001, the Office of Management and Budget (OMB) approved the information collection, and assigned it OMB No: 1902–0187. The order stated that the Commission intended to seek an extension of the reporting requirement, upon approval by OMB, through September 30, 2002, to coincide with the end date of the Commission's mitigation plan regarding wholesale electricity prices in California and the West. See San Diego Gas & Electric Company, *et al.*, 95 FERC ¶ 61,418 (2001), *reh'g pending*.

[3] 95 FERC ¶ 61,262 (2001).

[4] The May 18 order stated that the Commission's legal authority to take actions that would affect those prices is limited by the existing statutory framework, specifically the Natural Gas Policy Act of 1978, and the Natural Gas Wellhead Decontrol Act of 1989. As a result, the only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, LDCs, or their affiliates.

[5] For the most part, interstate pipelines no longer sell natural gas.

[6] Section 14(a) provides:

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of [the NGA] or any rule, regulation, or order hereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress.

[7] Moreover, with respect to concerns over confidentiality, the order found that the specific information gas sellers are required to report concerning sales transactions is exempt from disclosure under the Freedom of Information Act (FOIA). In addition, in response to the comments received, certain of the proposed questions were modified.

[8] [See *e.g.* S. 764, and H.R. 1974 which would instruct the Commission to require natural gas sellers of bundled sales to the California market to disclose the commodity portion and the transportation portion of the sale price.

order establishing price mitigation for the California power markets.[9] Under that mitigation plan, generators' price bids during reserve emergencies must reflect the marginal cost of obtaining natural gas used for generation in the California ISO's single price auctions. The ISO's clearing price will act as a maximum price for spot sales outside the ISO's single price auctions, which are bilateral sales in California and the rest of the WSCC. That number is derived using an average of the mid-point of the monthly bid-week prices at certain reported California natural gas market price points. Thus, the price for electric power would be dependent, to some extent, on the price of natural gas at certain California market points.

Under these circumstances, not only was the Commission's NGA section 14 and 16 authority applicable, but the Commission found that Section 311 of the Federal Power Act (FPA)[10] also applies. That section authorizes the Commission, ''as a basis for recommending legislation,'' to request information ''regarding the generation * * * of electric energy, however produced * * * whether or not subject to the jurisdiction of the Commission * * *'' As a result the Commission has the authority to ''investigate nonjurisdictional sales of nonjurisdictional companies.''[11] The FPA section 311 authority includes authorization to secure information concerning ''the cost of generation.'' Since natural gas is used in many generating plants to produce the electricity, the cost of natural gas is obviously a crucial element in any investigation of the cost of generating electricity. Thus, in the current situation, FPA section 311 is another basis for the Commission's authority to issue the reporting requirement.

Requests for rehearing or clarification were filed by e prime, Inc, Tractebel Energy Marketing, Inc. (TEMI), and Enron North America and Enron Energy Services (Enron). The Public Utilities Commission of the State of California (CPUC), and Southern California Gas Company and San Diego Gas & Electric Company (collectively Sempra Utilities) filed requests for clarification.

Discussion

1. For the Purpose of the Reporting Requirement the Commission Has the Authority To Require Reports From Entities Not Subject to Its Jurisdiction

The requests for rehearing objected to the requirement that non-jurisdictional entities report information regarding non-jurisdictional transactions to the Commission. They contend that there is no basis to permit the Commission to collect data from entities that are not subject to the Commission's jurisdiction under the Natural Gas Act.

TEMI also argues that even if the Commission declines to grant rehearing, it should exclude from the reporting requirement those entities whose gas sale volumes could not have a material effect on gas prices in the California market. It asserts that the order should be limited to entities whose volumes exceed 1 billion cubic feet per month of physical volumes in the California market. E prime, Inc. contends that since the Commission cannot require the information it seeks from those not subject to its jurisdiction, information from the limited universe of persons concerning the limited number of sales transactions over which the Commission does have jurisdiction, will not aid the Commission in its search for a solution to the California problem, so the rulemaking should be rescinded in its entirety.

The July 25 order explained that NGA sections 14 and 16, and FPA section 311 provide the Commission's authority to require all entities selling gas in the California market, including non-jurisdictional entities, to file the report. The order explained that because of the disparity in the price between California and the rest of the country, the Commission needs the information to carry out its statutory responsibilities. Thus, contrary to e prime, which asserts that the Commission has not explained why it needs the information, the July 25 order has an extensive discussion on this very point.[12]

Without repeating the discussion in the July 25 order as to why the Commission needs the information, suffice it to say that without the information from non-jurisdictional parties, the Commission can not determine whether it has authority to meaningfully address the disparity in price of natural gas in the California market. Further, the information is necessary for the Commission to advise Congress as to whether it should change the existing regulatory framework under which the Commission now operates.

There is no merit in e prime's contention that NGA section 14 cannot be a basis for the Commission's order here because that section cannot expand the Commission's jurisdiction over persons or transactions excluded by Congress, citing *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498. In that case, the Commission sought to enjoin the company, a regulated entity, from transferring property from which gas was being produced. The Court held that such action was outside the Commission's jurisdiction because it involved the ''production and gathering'' of gas, an activity specifically excluded from the Commission's jurisdiction under NGA section 1(b). However, the Court noted that in support of its position, the Commission relied on a number of sections of the NGA, one of which was Section 14(b). The Court stated:

> Section 14 (b) * * * comes closest to supporting the Commissions' argument, *but that confers only power to obtain information* (emphasis added).[13]

That is exactly what is at issue here, the Commission's authority to obtain information relevant to carrying out its statutory responsibilities. Contrary to e prime's contention, the Commission's action is not a fishing expedition, but has been taken ''for the purpose of investigating a specific problem that is a matter of urgent concern both to it and the Congress.''[14]

Similarly, TEMI's argument that case law conflicts with the Commission's position is unconvincing.[15] The cases TEMI cites found that the Commission has authority to require natural gas companies to submit information both as to jurisdictional and non-jurisdictional matters. It does not follow from that, as TEMI argues, that the Commission has no authority to require non-jurisdictional entities to submit information. In fact, in *Superior Oil,* cited by TEMI, at issue was the Commission's order requiring natural gas companies to file information concerning their exploration and development related expenditures, as well as those of their affiliates, including affiliates not themselves natural gas companies. Petitioners contended the Commission had exceeded its statutory power to the extent the order applied to affiliates not natural gas companies. The Court

[9] *See* San Diego Gas & Electric Co. *et al.*, 95 FERC ¶ 61,418 (2001) (*San Diego*), establishing a price mitigation plan for Western States Coordinating Council (WSSC) area, including California.

[10] 16 U.S.C. § 825j. That section provides, in part, that ''the Commission is authorized and directed to conduct investigations regarding * * * electric energy, however produced, throughout the United States, * * * whether or not subject to the jurisdiction of the Commission. * * *''

[11] Continental Oil Co. v. FPC, 549 F.2d 31 at 34 (5th Cir. 1975).

[12] 96 FERC at 61,464–66.

[13] 337 U.S. at 505–06.

[14] 96 FERC at 61,464.

[15] TEMI cites Continental Oil v. FPC, 519 F.2d 31, 34 (5th Cir. 1975); Union Oil v. FPC, 542 F.2d 1036 (9th Cir. 1976), and Superior Oil Co. v FERC, 563 F2d 191 (5th Cir. 1977).

upheld the Commission because the information as to affiliates was necessary to ensure that the Commission could determine the true cost of production of interstate sales of the regulated gas. Moreover, the Court stated that ''[O]ther sections of the Act,'' such as section 14(a):

> while falling short of specifically empowering the FPC to gather from affiliates the information sought by Form 64, support the view that *the [Commission's] investigatory powers are broad and are not limited by the constraints which Congress* has placed on the regulatory and rate-setting jurisdiction of the [Commission](emphasis added).[16]

Here, the Commission relies upon NGA sections 14 and 16, and FPA section 311, for its authority to act here with respect to the specific problem being addressed.

With regard to the Commission's authority under FPA section 311, the July 25 order explained that in light of the Commission's electric mitigation order; *supra,* n 2., it is essential that the Commission understands the operation of the natural gas market in California because the price of natural gas is an element in determining the cost of generating electricity. To argue, as does TEMI, that the price of natural gas is like ''any subject matter that could possibly affect the cost of electricity generation'' [17] fails to recognize the crucial role natural gas plays in determining the price of electricity under the mitigators plan. Under the mitigation plan generators' price bids during reserve emergencies must reflect the marginal cost for each generator by using a proxy which is to be determined by ''averag[ing] the mid-point of the monthly bid-week prices * * * for three spot market prices reported for California.'' [18]

This clearly falls within the scope of FPA section 311 which authorizes ''investigations regarding the generation, transmission, distribution, and sale of electrical energy, however produced, throughout the United States * * * whether or not subject to the jurisdiction of the Commission. * * * ''That section also expressly authorizes the Commission to secure information concerning ''the cost of generation.'' Moreover, to understand the operation of natural gas market in California, the Commission must have information from all participants in that market. Thus, the Commission will not limit the reporting requirement to only the larger participants in that market, as TEMI has requested.

2. Other Issues Raised in the Rehearing Requests Are Without Merit

Enron takes a different position than the others seeking rehearing. It argues that:

> the situation does not present an adequate legal basis for the imposition of the burden of formal reporting requirements on all parties; rather, the burden should only be imposed on parties and at such times as is reasonably necessary to investigate specific matters. The formalized and generally applicable reporting requirements adopted go far beyond that scope.[19]

However, the experience in the past year supports the need for the information requested. The Commission is seeking information covering a limited time period. It is needed to address a specific problem in the California natural gas market to enable the Commission to determine whether it can take any meaningful action with respect to that problem, and, if not, whether Congress should consider changes in the regulatory framework.

Enron contends that based upon its experience in responding to similar data requests, the Commission underestimated the burden of the reporting requirement set forth in the July 25 order, and seems to imply that this is a basis for not complying. The Commission can only make an average projection of that burden. The fact that Enron believes the burden will exceed that estimate provides no grounds for rescinding the reporting requirement.

In addition, Enron argues that the reporting requirements were based on a business method that does not reflect how Enron manages its business. Specifically Enron asserts that the reporting requirement seeks daily pricing and volume information for gas transportation and purchase contracts ''associated with the sales contracts'' for gas physically delivered to California, and Enron does not have daily information about its sales, nor does it have purchase contracts that relate to specific sales contracts because its business is managed on an aggregated basis. It argues that to associate purchases to sales would be an ''arbitrary after the-fact-determination.'' Instead, Enron asks that the Commission should ''clarify that sellers of natural gas need to file information that they have that is responsive to the questions, but that they do not have to create data to respond to these questions when that data does not otherwise exist.'' [20]

Question 2 to natural gas sellers requires them to provide, on a daily basis, certain information for each contract under which they sold gas that was physically delivered at points on the California border or in California. Question 3 requires sellers to identify separately the transportation and gas commodity components for each of the sales contracts identified in Question 2. Question 4 requires sellers to provide certain information on a daily basis ''for each of your gas purchase contracts associated with the sales contracts you identified in response to Question 2.''

Enron reads Questions 3 and 4 as requiring gas sellers to match specific contracts under which it purchases transportation service and natural gas with particular gas sales contracts on a daily basis. Enron suggests that it cannot do this, primarily because its business is managed on an aggregated basis. It does not '''back-to-back' its sales with specific packages of gas or of transportation it purchases.'' [21] Therefore, it asserts, any association of purchase and transportation contracts with particular sales contracts would be purely arbitrary. Enron also states any association of transportation and sales contracts with its sales contracts on a daily basis is complicated by the fact that it does not have daily information about most of its sales, since they are done on a monthly billing cycle basis.

Questions 3 and 4 as adopted by the Commission do not require sellers to make arbitrary associations of the sellers' transportation and gas purchases with particular sales contracts. Rather, those questions can, and should, be answered in a manner consistent with the way the particular gas seller does business. For example, if a seller, such as Enron, operates its business on an aggregated basis without attributing purchases under any particular purchase contract to sales under any particular sales contract, then all the contracts under which it purchases gas each day during a particular month supply the gas sold under all its sales contracts during that month, whether in California or elsewhere. In effect, the purchases under each of the seller's gas purchase contracts must be considered to have been pro-rated among each of the seller's sales contracts, including both the California sales contracts identified in response to Question 2 and any other sales contracts that the seller might have. In such circumstances, the seller should report the information requested in Question 4 as to all its gas purchase contracts, since a pro-rated portion of the gas purchased under each gas purchase contract supplies the gas sold under each California sales

[16] 563 F.2d at 198.

[17] 95 FERC at 62,560–61.

[18] San Diego, 95 FERC at 62,560–61.

[19] Rehearing request at 2.

[20] Rehearing request at 5.

[21] Rehearing request at 4.

contract.[22] In response to Question 4(d) concerning the daily volumes purchased, the seller would report a pro rata share of the volumes purchased under that contract equal to the pro rata share that the seller's California sales represent of its overall sales.[23]

To the extent that Enron is contending that it should only be required to report aggregated information concerning its gas purchase contracts, the Commission finds that limiting the reported information in such a manner would be unacceptable. First, the individual contract-by-contract information is necessary to verify the aggregated data. Second, the information about the terms of each seller's gas purchase contracts is necessary for the Commission to understand how the California gas market works and thus what actions, if any, the Commission should take within its jurisdiction, or recommend that Congress take. For example, while spot prices of natural gas at the California border and, to a somewhat lesser extent, in producing basins have been very volatile, the Commission does not know to what extent sellers must pay spot prices for the gas they sell in California. The information required in response to Question 4 about the terms of the seller's gas purchase contracts and whether the price in those purchase contracts is fixed or indexed, will enable the Commission to determine this.

Question 3 to gas sellers requires them to identify separately the transportation component and the gas commodity component of the price in their sales contracts identified in response to Question 2. The July 25 order stated that if the sales contract only includes an overall price, then the seller shall report the transportation cost it incurred in moving the gas from the point where it purchased the gas to the point where it sold the gas, and how it determined that amount. If a seller operates its business on an aggregated basis, it still must maintain particular transportation contracts for the purpose of delivering gas to California. Therefore, to the extent its California sales contracts do not separately identify the transportation and gas commodity components of the sales price, then it should pro-rate the costs incurred under its transportation contracts used for delivering gas to California among the gas sales contracts identified in response to Question 2.

Finally, Enron asserts that the filing deadline should be extended from 30 to 45 days after the end of each month. It argues that the current filing deadline creates additional problems because it ''tends to be the busiest time for the personnel in gas accounting who will have to prepare the reports.'' [24]

We note that Enron was the only party seeking such an extension. Moreover, we fail to understand how the filing of the report thirty days after the month in which the activity occurred imposes too difficult a burden on gas accountants. The report due on October 1, 2001, is for the activity that occurred during August. The information for that activity would be processed, and compiled in September, and the filing would be made by October 1. Accordingly, we deny that request.

The Commission recognized, as e prime argues, that some of the information to be furnished might include highly confidential, sensitive marketing information. However, the order gave protection to such information, so that argument as a grounds for not furnishing the information is baseless.

3. Requests for Clarification

CPUC requests that all the information furnished to the Commission should be given to CPUC as well.[25] Although the CPUC has regulatory authority in California, we do not believe that that alone is a sufficient basis for granting its request. Certain of the information will not be entitled to confidential treatment, and will be available to all, including the CPUC. However, the July 25 order found that individual sales or purchase contracts, which include sensitive price data will be exempt from public disclosure. We will not make exceptions to this ruling because, by assurance of confidential treatment, parties will have no basis for not complying.

Moreover, the purpose in seeking the information is to enable the Commission to understand the operation of the market for gas sales into California, not to investigate the conduct of particular participants in that market. First, the information would help the Commission to determine what part of the problem, if any, is within the scope of its jurisdiction, and enable it to determine the extent to which the cost of interstate transportation, which is subject to the Commission's jurisdiction, affects the price of gas at the California border. In addition, the information being sought would be relevant in determining whether Congress should consider changes in the regulatory framework. None of these purposes would be aided by giving to the CPUC the confidential data concerning individual sales or purchase contracts.

Sempra requests that the Commission clarify that the ''sellers and transporters of natural gas serving the California market'' required to provide data include LDCs and utilities upstream of California that are interconnected with or served by interstate pipelines ultimately serving the California markets. Sempra argues that it is impossible for the Commission to gain a comprehensive understanding of the pricing disparity between California and the rest of the nation unless, at a minimum, it obtains data on capacity utilization by entities upstream of California.

The Commission denies the request. Not only is the request so broad and ambiguous that it is difficult to understand what it covers, but the Commission is satisfied that the questions in their present form will furnish the Commission with the necessary information.

The Commission orders:

(A) The requests for rehearing are denied.

(B) The requests for clarification are denied.

By the Commission.

David P. Boergers,

Secretary.

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[22] Question 4 requires the following information concerning gas purchase contracts:

a. The purchase contract's identification number;

b. The pipeline upstream of the point of delivery; and the pipeline downstream of the point of delivery;

c. The term of the purchase contract (beginning and ending dates);

d. The daily volumes (on a MMBtu basis) purchased;

e. The price paid;

f. Whether the price is fixed or indexed (identify the index),

g. Identify the entity from whom the responder purchased the gas; and,

h. Identify the point where responder took title to the gas.

[23] If a seller does make gas purchases to supply particular gas sales contracts, then the only purchase contracts it need report in response to Question 4 are those purchase contracts which supply the gas sales contracts it identified in response to Question 2. The Commission has requested daily information, because market conditions change on a daily basis, and there can be significant changes in at least the spot price of gas from day to day.

[24] Rehearing request at 5.

[25] Sempra Energy Trading Corp. (SET) moved to respond to the CPUC's request, and that good cause exists to accept the answer since it had no opportunity to respond to CPUC's initial request. SET objects to the CPUC's request, and points out that the CPUC is a litigant in many ongoing Commission proceedings, so it should not have access to the confidential data furnished.