

FERC Seeks Comment on Intrastate Pipeline Capacity Transfers

October 26, 2010

On October 21, the Federal Energy Regulatory Commission (FERC or Commission) denied rehearing of its ruling in *Arizona Public Service Co. (APS)*, 132 FERC ¶ 61,064 (2010), where it announced that the prohibition against buy/sell transactions applies equally to intrastate pipelines engaged in NGPA Section 311 transactions and to Hinshaw pipelines. At the same time, the Commission issued a Notice of Inquiry (NOI) in Docket No. RM11-1 seeking comments on whether and how holders of firm interstate capacity on intrastate pipelines and Hinshaw pipelines¹ can allow others to use their capacity, including whether buy/sell transactions should be permitted.

In Order No. 636 (issued in 1992), the Commission instituted its capacity release program, which was designed to permit holders of firm capacity on interstate pipelines to reallocate any unneeded capacity to the person who values it the most. FERC's capacity release program requires reassignment of capacity to be transparent, and prohibits private long-term transfers of capacity between shippers. Coincident with Order No. 636, the Commission issued orders eliminating capacity brokering and announcing that it would no longer allow any more buy/sell transactions. Traditionally, a buy/sell transaction is an arrangement whereby a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (e.g., an end user), ships that gas through its interstate pipeline capacity, and then resells an equivalent quantity of gas to the downstream entity at the delivery point. Intrastate pipelines, including those engaged in NGPA Section 311 transactions,² and Hinshaw pipelines³ operating under Part 284 certificates (18 C.F.R. § 284.224) which allow them to engage in interstate transactions to the same extent as an intrastate pipeline under NGPA Section 311, were not subject to the capacity release rules and were generally understood to be permitted to engage in buy/sell transactions.

The Commission's July 2010 initial order in the *APS* proceeding determined that the prohibition against buy/sell transactions applied to intrastate pipelines and Hinshaw pipelines to the extent that they were

¹ The NOI relates to firm capacity held on intrastate natural gas pipelines providing interstate transportation and storage services under Section 311 of the Natural Gas Policy Act of 1978 (NGPA) and Hinshaw pipelines providing such services pursuant to blanket certificates issued under section 284.224 of the Commission's regulations.

² NGPA Section 311 permits the Commission to allow intrastate natural gas pipelines to transport natural gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines.

³ Section 1(c) of the Natural Gas Act (NGA) exempts from the Commission's NGA jurisdiction those pipelines that transport gas in interstate commerce if (1) the pipeline receives natural gas within the boundary of a state, (2) all gas is consumed within that state, and (3) the pipeline is subject to regulation by state commission. This exemption is referred to as the Hinshaw exemption.

engaged in interstate transportation authorized under NGPA Section 311 or Part 284 certificates. In denying rehearing of its order, the Commission explained that waivers had been granted to the parties in the *APS* order and that the broader issue was more appropriately addressed through a Notice of Inquiry.

Accordingly, in Docket No. RM11-1-000, 133 FERC ¶ 61,065 (2010), the Commission issued a NOI to consider whether and how holders of firm interstate capacity on Section 311 and Hinshaw pipelines should be permitted to allow others to make use of their firm interstate capacity, including to what extent buy/sell transactions should be permitted, and whether Section 311 pipelines and Hinshaw pipelines should be required to offer capacity release programs.

Because the Commission has not addressed the issue of whether the prohibition against buy/sell transactions applies to interstate service provided by Section 311 and Hinshaw pipelines, the Commission announced that it will not institute any enforcement actions with respect to buy/sell transactions involving such pipelines. In addition, the Commission issued a blanket waiver of the prohibition on buy/sell transactions to allow existing and new buy/sell transactions involving Section 311 and Hinshaw pipelines to continue until the Commission issues a further order in the proceeding.

Comments are due to FERC 60 days from the date of publication in the *Federal Register* (forthcoming).

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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