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FERC Rescinds Pipeline Contracts and Reaffirms Capacity Posting Policy

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On October 15, 2020, the Federal Energy Regulatory Commission (“Commission”) issued an order finding that Northern Border Pipeline Company awarded pipeline capacity through pre-arranged deals that were unduly preferential toward an affiliated natural gas producer, and unduly discriminatory against similarly situated shippers. The Commission rescinded the pre-arranged deals and capacity awards and directed Northern Border to hold a new open season.

Background

One of the Commission’s priorities in regulating the natural gas transportation market is that pipeline capacity be made available on a transparent, open-access basis to ensure that the capacity is allocated to the party that values it the most. The Commission allows pipelines to sell capacity through pre-arranged deals with shippers, provided that the pipeline first publicly post the capacity as available. If the pipeline enters into a pre-arranged deal, it must then post the terms of the pre-arranged deal and provide all shippers an opportunity to bid on the capacity in an open season. If a shipper submits a bid with a greater net present value (“NPV”) than that of the pre-arranged deal, the pre-arranged shipper may match that bid and obtain the capacity. If the pre-arranged shipper declines to match, the pipeline must award the capacity to the highest bidder.

In February 2020, Northern Border held an open season for six packages of long-term capacity that it intended to sell to an affiliate through pre-arranged deals, with service agreements to commence on June 1, 2020, or later. Northern Border had previously posted the capacity as operationally or seasonally available, but had not posted the capacity as available for long-term subscription. Northern Border’s pre-arranged deal open season imposed restrictions limiting the rate, term, and volumes that parties could include in their bids, and indicated that given the restrictions the pre-arranged deals provided the highest possible NPV for the capacity. At the conclusion of the open season, Northern Border awarded all of the capacity to the pre-arranged shipper.

Two groups of shippers subsequently filed complaints with the Commission, asserting that Northern Border had not posted the subject capacity as generally available prior to making the pre-arranged deals, and that the bid restrictions in the open season made it impossible for any shipper to offer bids with higher NPVs than the pre-arranged shipper’s bid. Northern Border responded that the open season was consistent with its tariff, which did not require it to post capacity that would not be available within 95 days. Northern Border also contended that the open season bid restrictions were consistent with Commission policy permitting pipelines to specify bidding parameters in open seasons.

Commission Findings

The Commission granted the complaints, finding that Northern Border had conferred an undue preference upon its affiliate and unduly discriminated against similarly situated shippers, in violation of Section 5 of the Natural Gas Act, the Commission’s regulations, and the Commission’s Standards of Conduct. The Commission found that Northern Border failed to post the capacity before entering into the pre-arranged deals, such that shippers did not have equal access to information about the capacity. The Commission noted that even though Northern Border’s tariff did not expressly require it to post capacity that would not be available within 95 days, Commission policy requires capacity to be posted before it is sold through pre-arranged deals in the absence of specific terms to the contrary in the pipeline’s tariff. The Commission also found that Northern Border’s restrictions on rate, term, and volumes that parties could include in their bids guaranteed that the capacity would ultimately be awarded to Northern Border’s affiliate and denied other potentially interested parties a meaningful opportunity to bid on the capacity. The Commission found that these restrictions undermined its fundamental open access and nondiscrimination principles and provided no assurance that the pre-arranged deals allocated the capacity to the party that values it the highest.

The Commission rescinded the contracts, ordered Northern Border to hold a new open season for the capacity, and directed Northern Border to make tariff revisions requiring it to post capacity on its website before entering a pre-arranged deal.

Implications

In this order, the Commission confirmed its long-standing policy that capacity sold as part of a pre-arranged deal must first be posted as available on the pipeline's website before entering into a pre-arranged deal. The Northern Border order also makes clear that even when a pipeline has complied with the requirements of its tariff, the Commission may take action to enforce its policies separate and distinct from tariff requirements, particularly with respect to fundamental Commission priorities like the preservation of a transparent market for pipeline capacity.

Notably, the Commission's remedy in this case goes farther than it has in similar situations. The Commission's usual practice of addressing improperly awarded contracts is to uphold the contracts and prohibit the pipeline from engaging in similar conduct in the future. While the Commission's rescission of Northern Border's contracts was atypical, the Commission emphasized that the complaints were filed shortly after the capacity was awarded and before service under the pre-arranged deals had begun. The Commission also noted there was no record evidence concerning the extent to which the shipper or other parties had relied on the capacity award and the parties should have been aware that the transactions involved regulatory risk.

Although the Commission did not penalize the pipeline or initiate any formal proceedings to take a broader look at its processes of awarding capacity, the order makes clear the Commission takes seriously alleged violations of the prohibitions against undue preference and discrimination.

For More Information

Van Ness Feldman's nationally recognized natural gas pipeline practice regularly counsels pipeline companies on rate and tariff issues under the Natural Gas Act. Should you have questions on the implications of FERC's recent order on your business, please contact [Paul Korman](#), [Lawrence Acker](#), [Michael Pincus](#) or [Michael Diamond](#).

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