

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on) Application No. NG-0051/
its own motion, to investigate) PI-130
jurisdictional issues pertaining to)
construction and operation of a)
natural gas pipeline within the) ORDER
state of Nebraska by Nebraska)
Resources Company, LLC, or any other)
entity.) Entered: October 30, 2007

BY THE COMMISSION:

On July 16, 2007, Nebraska Resources Company, LLC (NRC), filed a request that the Commission open an investigation on its own motion pursuant to Neb. Admin. Code, Title 291, Chapter 1, Section 012.01 (Request). Generally, NRC proposed to seek from the Commission a certificate as a "jurisdictional utility" to operate a new natural gas pipeline wholly within the state of Nebraska (NRC Pipeline) to deliver natural gas to local distribution companies (LDCs) and high-volume ratepayers in central Nebraska.

In response to NRC's request, the Commission opened a docket, NG-0051/PI-130, on July 24, 2007, to investigate issues related to NRC's proposal and similar proposals that may arise. In particular the Commission sought comments on the following questions:

1. Does the definition of "high-volume ratepayer" in *Neb. Rev. Stat. Sec. 66-1802(7)* include LDCs with volumetric demand in excess of 500 therms per day?
2. Does Nebraska's double-piping prohibition under *Neb. Rev. Stat. Sec. 66-1852* apply to a pipeline providing a new interconnection to an LDC?
3. Does the Commission have jurisdiction over an Application under *Neb. Rev. Stat. Sec. 66-1853(1)* for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?
4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?

Formal Interventions were filed by NRC, Northern Natural Gas, NorthWestern Corporation, Cornerstone Energy, Kinder Morgan, the Public Advocate, and SourceGas Distribution. Comments were filed by Nebraska Municipal Power Pool, Aquila, Inc., Cornerstone Energy, NRC, Northern Natural Gas, NorthWestern Corporation, the Public Advocate, and SourceGas Distribution. Additionally, several letters were received expressing support for the construction of a pipeline in the Norfolk area.

Hearing on the matter was held on September 25, 2007. A presentation regarding NRC's proposed pipeline project was made. Additional oral testimony was offered by City of Norfolk mayor, Gordon Adams; R.J. Baker, executive director of Elkhorn Valley Economic Development Council, who also read a written statement from Senator Mike Flood, Legislative District 19; Chris Dibbern, general counsel for NMPP; Pat Joyce, on behalf of Aquila; J.G. Porter, vice president and general counsel for Northern Natural Gas; John Linglebach, Cornerstone Energy; and Stephen Bruckner on behalf of SourceGas.

BACKGROUND

Although the propriety of the construction of the proposed NRC pipeline or the merits of any future application of NRC or any other entity or individual for a certificate of public convenience and necessity is not at issue, the general circumstances surrounding the project being proposed by NRC provide some factual context through which the Commission may address the jurisdictional questions presented in this investigation. Nothing in this order is intended to be or shall constitute any judgment or ruling on any possible future application.

In addressing the jurisdictional issues presented in this investigation, the Commission is assuming the following set of circumstances. The pipeline would be located wholly within the boundaries of the state of Nebraska but would be connected to an interstate pipeline regulated by the Federal Energy Regulatory Commission pursuant to the federal Natural Gas Act (NGA).¹ The interstate pipeline to which the proposed pipeline would be connected receives all of its natural gas from a source outside the boundaries of the state of Nebraska. All of the natural gas provided by the pipeline would be received and consumed within Nebraska.

¹ 15 U.S.C. § 717 et seq.

State Regulation of the Pipeline

The State Natural Gas Act² (SNGA) gives the Commission broad authority over the regulation of intrastate natural gas service.

(1) The commission shall have full power, authority, and jurisdiction to regulate natural gas public utilities and may do all things necessary and convenient for the exercise of such power, authority, and jurisdiction. Except as provided in the Nebraska Natural Gas Pipeline Safety Act of 1969, and notwithstanding any other provision of law, such power, authority, and jurisdiction shall extend to, but not be limited to, all matters encompassed within the State Natural Gas Regulation Act.

(2) The State Natural Gas Regulation Act and all grants of power, authority, and jurisdiction in the act made to the commission shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of the act are expressly granted to and conferred upon the commission.³

A "natural gas public utility" is defined as "any corporation, company, individual, or association of persons or their trustees, lessees, or receivers that owns controls, operates, or manages, except for private use, any equipment, plant or machinery, or any part thereof, for the conveyance of natural gas through pipeline in or through any part of this state."⁴

However, the Commission's jurisdiction does not extend to "interstate" pipelines defined as "any corporation, company, individual, or association of persons or their trustees, lessees, or receivers engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the federal Natural Gas Act, 15 U.S.C. 717 et seq., as such act existed on January 1, 2003."⁵

Therefore, the initial inquiry in determining whether this Commission has jurisdiction over the pipeline based upon the facts assumed herein is whether the pipeline is subject to FERC jurisdiction under the federal Natural Gas Act (NGA).⁶

² Neb. Rev. Stat. § 66-1802 et seq.

³ Neb. Rev. Stat. § 66-1804.

⁴ Neb. Rev. Stat. § 66-1802(11).

⁵ Neb. Rev. Stat. § 66-1802(8).

⁶ Natural Gas Act, 15 U.S.C. § 717, et seq. (NGA)

Scope of Federal Jurisdiction

The NGA applies

to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation of sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.⁷

The United States Supreme Court has interpreted "interstate commerce" in the context of the transportation of natural gas to include pipelines such as the pipeline described herein which receives its natural gas from an interstate pipeline but is itself wholly contained within the boundaries of a single state and distributes natural gas within the boundaries of that state for consumption within the state.⁸

However, the NGA was amended to include the "Hinshaw Exemption" which exempts from the NGA:

Any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.⁹

Furthermore, the exemption goes on to state, that such matters are "matters primarily of local concern and subject to regulation by the several States" and "[a] certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and

⁷ 15 U.S.C. § 717(b).

⁸ See *Federal Power Commission v. East Ohio Gas Co., et al.*, 338 U.S. 464 (1950).

⁹ 15 U.S.C. § 717(c).

service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

Although when discussing the Hinshaw Exemption in its comments and testimony, the NRC consistently refers only to whether the Commission has rate jurisdiction over the pipeline, the statute clearly requires that we examine the scope of the Commission's jurisdiction over rates, service and facilities with respect to the proposed pipeline.¹⁰

Scope of State Jurisdiction

NRC proposes that it would operate the pipeline as a jurisdictional utility subject to the Commission's jurisdiction in serving LDCs, which, NRC argues, are not high-volume ratepayers. However, NRC contends that with respect to high-volume ratepayers, the proposed pipeline would be subject to FERC jurisdiction and it would seek a limited jurisdiction certificate from FERC pursuant to 18 C.F.R. § 284.224 (2007) to transport natural gas on behalf of the high-volume ratepayers. NRC's proposal suggests a blended federal and state approach to regulation of the proposed pipeline based upon whether the entity served is an LDC or a high-volume ratepayer.

Due to the fact that we are not addressing the merits of the project proposed by NRC, but intend to only address the limited jurisdictional questions upon which the Commission sought comment, we find that there is no need to address the propriety of seeking the limited jurisdiction certificate from FERC. The Commission will only outline what it believes to be its jurisdiction based upon the facts assumed herein.

Application of the definition of "High-volume ratepayer" to Local Distribution Companies

"High Volume Ratepayer" is defined as "a ratepayer whose natural gas requirements equal or exceed five hundred therms per day as determined by average daily consumption."¹¹

The definition contemplates actual consumption of natural gas. An LDC does not "consume" gas in the same sense that an end-user consumes natural gas. Instead, an LDC purchases natural gas for the purposes of providing it to ratepayers who then consume it. Based on this, it is clear that the definition of "high volume ratepayer" is not intended to include an LDC.

¹⁰ Id.

¹¹ Neb. Rev. Stat. § 66-1802(7).

Because an LDC is not considered a high-volume ratepayer, the commission clearly has jurisdiction over the rates and service offered to an LDC. The rates offered to an LDC would have to be part of a tariff, along with the terms of service normally included in a tariff filing. Specifically, the SNGA requires the following:

Every jurisdictional utility shall publish and file with the commission copies of all schedules of rates and shall furnish the commission copies of all terms and conditions of service and contracts between jurisdictional utilities pertaining to any and all jurisdictional services to be rendered by such jurisdictional utilities.¹²

Additionally, the rates and services will be subject to the same review as rates charged by any other jurisdictional utility.¹³ The rates charged to LDCs by a natural gas public utility under circumstances described herein must be "just and reasonable" and "not be unreasonably preferential or discriminatory".¹⁴ Finally, any rates charged by the natural gas public utility must be cost-based.¹⁵

Cornerstone asserted that the Commission's jurisdiction is limited to *Neb. Rev. Stat. § 75-501 et seq.* which provides for oversight of the safety and cleaning of pipelines used for the transportation, transmittal, conveyance, or storage of any liquid or gas.¹⁶ However, the Commission finds that this contention unpersuasive as the SNGA more specifically addresses the issues outlined herein.

If a pipeline falls within the Hinshaw Exemption, as outlined herein, it is subject to the jurisdiction of the state in which it is located and the utility must comply with all state statutes and regulations. The exercise of the Commission's jurisdiction under these circumstances is not optional, but is instead a statutory obligation. Similarly, a utility is not free to either subject itself to the Commission's jurisdiction or not. It must instead, comply fully with state law and Commission regulations.

¹² Neb. Rev. Stat. § 66-1806.

¹³ See Neb. Rev. Stat. § 66-1808

¹⁴ Neb. Rev. Stat. § 66-1825(1).

¹⁵ See Neb. Rev. Stat. § 66-1825.

¹⁶ See Cornerstone Energy, LLC's Post-Hearing Brief, p. 10 (Oct. 13, 2007).

High-Volume Ratepayers Generally

Although an LDC is not within the definition of a "high-volume ratepayer", the question regarding the extent of the Commission's jurisdiction regarding service to "high-volume ratepayers" remains.

With respect to service to high-volume ratepayers, the SNGA states,

A jurisdictional utility **may** provide service at negotiated rates, contracts, and terms and conditions of service under contract to high-volume ratepayers. Service under the contracts shall be provided on such terms and conditions and for such rates or charges as the jurisdictional utility and the high-volume ratepayer agree, without regard to any rates, tolls, tariffs, or charges the jurisdictional utility may have filed with the commission. Upon the request of the commission, the jurisdictional utility shall file such contracts with the commission. The contracts are not public records within the meaning of sections 84-712 to 84-712.09 and their disclosure to any other person or corporation for any purpose is expressly prohibited, except that they may be used by the commission in any investigation or proceeding. Except as provided in this subsection, high-volume ratepayers shall not be subject to the jurisdiction of the commission.¹⁷

Pursuant to this section, a jurisdictional utility is **not required**, nor is a high-volume ratepayer **entitled to** a negotiated rate. Furthermore, the fact that the Commission lacks jurisdiction of the high-volume ratepayer itself, nothing in this section precludes the Commission from regulating a jurisdictional utility which provides service to a high-volume ratepayer.

Should a natural gas public utility choose to offer a tariff rate and service to a high-volume ratepayer rather than through a negotiated contract, the Commission would then have the same jurisdiction regarding the rate and service to that high-volume ratepayer as it does for the rates and service to any other ratepayer within Nebraska.

¹⁷ Neb. Rev. Stat. § 66-1810(1) (emphasis added).

Process to Obtain State Certificate of Public Convenience

Based upon the facts assumed herein, the Commission has the jurisdiction to regulate the pipeline as described. The question then becomes what is required with respect to any application by a natural gas public utility for the operation and construction of the pipeline.

[N]o jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the commission that public convenience will be promoted by the transaction of the business and permitting the applicants to transact the business of a jurisdictional utility in this state.¹⁸

The Commission does not have rules and regulations specifically addressing the requirements of any given application. Therefore, any entity applying for a certificate prior to the adoption of formal rules and regulation is taking some risk that the application may not address all questions or concerns of any intervenor or the Commission. However, clearly any utility applying for a certificate would have to submit sufficient information in order for the Commission to determine that its rates comply with state law.¹⁹ The Commission must apply a broad public interest standard. Any applicant would have to show sufficient evidence to demonstrate that it would "furnish reasonably adequate and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied, or produced by such utility."²⁰ Such evidence would likely include but not be limited to a demonstration of financial stability, technical ability to provide the service, and safety considerations.

Upon the filing of any application, all parties would be convened at a planning conference to discuss the proper time frames and procedures for addressing the application, including but not limited to any necessary supplemental information or discovery. Finally, in the absence of its own regulations, the Commission would look to applicable FERC regulations for guidance to the extent that they are consistent with Nebraska law.

The Commission is free to request additional information and take all necessary steps on any application to satisfy itself that the proposed service is in the public interest.

¹⁸ Neb. Rev. Stat. § 66-1853(1).

¹⁹ Neb. Rev. Stat. § 66-1825.

²⁰ Neb. Rev. Stat. § 66-1853.

Application of the Double-Piping Prohibition

The Commission requested comment regarding the application to the NRC's proposed pipeline of the SNGA's double-piping prohibition which states:

Except as otherwise expressly authorized in the State Natural Gas Regulation Act, no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has existing natural gas utility infrastructure or where a contract has been entered into for the placement of natural gas utility infrastructure.²¹

Several interested parties provided comment on whether the proposed pipeline constituted double-piping and should therefore be prohibited. However, the proper question is whether the double-piping prohibition may be applied to the proposed pipeline. This investigation is not the proper venue for determining whether a particular pipeline violates the double-piping prohibition.

The application of the prohibition is broad and would clearly encompass projects as described herein. This is in no way a determination that any particular project is in fact duplicative. However, the question of whether it is duplicative would likely be raised within the context of an application for a certificate of convenience to construct and operate a pipeline or a formal complaint proceeding.

The NRC stated in its post-hearing brief that federal preemption would prohibit the Commission from applying the double-piping prohibition and further stated that "If the Commission construed the state's double piping prohibition as applicable to the NRC Pipeline facilities delivering natural gas to LDCs, NRC would be compelled to abandon its effort to obtain a certificate from the Commission under the SNGRA."²² If the pipeline at issue constitutes a "Hinshaw Pipeline", then it is subject to the plain language of the SNGA and the Commission's jurisdiction, just as any other natural gas public utility operating within Nebraska would be. It would be inequitable to do otherwise. Furthermore, if a pipeline is determined to be within the Hinshaw Exemption, the NGA states clearly, that it becomes a matter "primarily of local concern and subject to

²¹ Neb. Rev. Stat. § 66-1852(1).

²² See Post-Hearing Comments of Nebraska Resources Company on Jurisdictional Issues, p. 21-22 (Oct. 12, 2007).

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regulation by the several States."²³ As previously stated herein, it is the Commission's position that if a pipeline is considered a Hinshaw Pipeline it is subject to the jurisdiction of the state in which it is located and the utility must comply with all state statutes and regulations.

Based upon the interpretation above, entities or individuals wishing to pursue projects similar to that described herein, should proceed with the filing of any necessary applications.

O R D E R

IT IS THEREFORE ORDERED by the Commission that it has jurisdiction to regulate rates and service to a local distribution company from a pipeline wholly located within Nebraska as described herein.


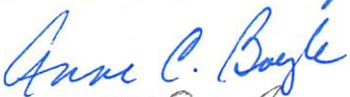

IT IS FURTHER ORDERED that a local distribution company does not constitute a high-volume ratepayer as defined by Neb. Rev. Stat. § 66-1802(7).

IT IS FURTHER ORDERED that inquiry regarding the application of Neb. Rev. Stat. § 66-1852 would be applicable to a pipeline as described herein.

MADE AND ENTERED at Lincoln, Nebraska, this 30th day of October, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:




 //s// Rod Johnson
 //s// Frank E. Landis

Chairman 

ATTEST:


 Executive Director

²³ 15 U.S.C. § 717(c).