

120 FERC ¶ 61,252  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Consumers Power Company

Docket No. PR97-1-004

ORDER GRANTING INTERVENTION,  
DENYING MOTION FOR SUMMARY DISPOSITION AND  
ESTABLISHING HEARING PROCEDURES

(Issued September 19, 2007)

1. On March 16, 2005, Consumers Energy Company (Consumers), formerly Consumers Power Company, made a filing to comply with the Commission's February 14, 2005 order in this proceeding.<sup>1</sup> The Commission was unable to determine from the information contained in Consumers' compliance filing whether the rates proposed by Consumers are fair and equitable. Therefore, the Commission sent two data requests to Consumers to obtain the necessary additional information. Consumers' responses to the data requests have not provided the Commission with the information that it sought and requires to render a decision on Consumers' filing. Therefore, the Commission is establishing a formal evidentiary hearing before an Administrative Law Judge to develop a record and issue an initial decision on the issues raised by Consumers' March 16, 2005 compliance filing, as set forth more fully below.
2. This order also grants the motion of Reliant Energy Services (Reliant) to intervene in this proceeding and denies Consumers' motion for summary disposition.

**Background**

3. Consumers is a Hinshaw pipeline with facilities in the state of Michigan. It performs interstate transportation services pursuant to a blanket certificate issued pursuant to section 284.224 of the Commission's regulations.<sup>2</sup> On September 27, 2002, the Commission issued an order<sup>3</sup> in this proceeding rejecting a filing by Consumers to impose a volumetric charge on non-physical title transfers of gas. The Commission stated that Consumers' proposed title transfer rate was not fair and equitable pursuant to

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<sup>1</sup> *Consumers Power Company*, 110 FERC ¶ 61,156 (2005).

<sup>2</sup> 18 C.F.R. § 284.224.

<sup>3</sup> *Consumers Power Company*, 100 FERC ¶ 61,354 (2002) (September 27 Order).

section 284.123(b)(2)(ii) of the Commission's regulations because the costs of the service are more a function of each transaction, rather than the volume transferred.<sup>4</sup> The Commission stated that Consumers could refile a proposed title tracking transfer (TTT) fee that would be charged on a per transaction basis, rather than a volumetric basis, and provide a justification for that fee. In addition, the Commission made clear that it has jurisdiction over the type of title transfers engaged in by Consumers.

4. On December 23, 2003, the Commission issued an order<sup>5</sup> denying Consumers' request for rehearing of the September 27 Order. On April 20, 2004, the Commission issued an order<sup>6</sup> granting clarification of the December 23 Order stating that Consumers would be required to provide refunds to all customers who paid a TTT rate, and that the refunds would be in an amount equal to the difference between the rate that is ultimately accepted as fair and equitable in this proceeding and the rejected rate paid by shippers, with interest in accordance with the Commission's regulations. The April 20 Order also directed Consumers to make a filing in compliance with the two prior orders. On May 20, 2004, Consumers made a filing in purported compliance with the April 20 Order (May 20 Compliance filing).

5. On February 14, 2005, the Commission issued an order<sup>7</sup> denying requests for rehearing of the April 20 Order. That order also rejected Consumers' May 20 2004 Compliance filing because Consumers had provided no cost justification for its proposed rate. The Commission directed Consumers to file a new proposed TTT rate in accordance with the prior orders in this case with appropriate cost support.

### **The Compliance Filing and the Data Requests**

6. On March 16, 2005, Consumers made a filing to comply with the February 14 Order (March 16 Compliance filing). In its March 16 Compliance filing, Consumers proposed a TTT rate of \$5.30 per transaction, which is substantially lower than the approximately \$12 to \$21 Consumers depicts it has been charging since October of 1996. However, it appears that Consumers derived its proposed rate based on selective cost data from several, but not all, of the years the charge has been in effect.

7. Consumers' May 16 Compliance filing was protested by Reliant, Duke Energy and Trading and Marketing, LLC (Duke), and Dynegy Marketing and Trading (Dynegy). The protests allege, among other things, that Consumers did not provide any cost support for its proposed TTT rate.

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<sup>4</sup> The Commission cited *CNG Transmission Corp.*, 89 FERC ¶ 61,278 (1999).

<sup>5</sup> *Consumers Power Company*, 105 FERC ¶ 61,369 (2003) (December 23 Order).

<sup>6</sup> *Consumers Power Company*, 107 FERC ¶ 61,061 (2004) (April 20 Order).

<sup>7</sup> *Consumers Power Company*, 110 FERC ¶ 61,156 (2005) (February 14 Order).

8. The Commission staff also found that it was unable to properly evaluate Consumers' proposed rate based on the limited information and lack of cost data provided by Consumers in its compliance filing. Therefore, on January 12, 2007, the Commission staff sent to Consumers data requests seeking the information needed for the Commission to resolve the issues in this proceeding. Consumers filed responses on January 19, 2007, but these responses did not contain sufficient information to enable the Commission to evaluate Consumers' proposal. Therefore, on May 7, 2007, the Commission staff issued another data request again seeking the necessary cost and other information it needed to evaluate Consumers' proposed rate. And, again, Consumers' response, filed May 17, 2007, failed to provide the requested information. For example, in response to the Commission staff's request for cost data for each year that the TTT service was performed, Consumers did not supply the requested information, but instead responded that it "does not understand what additional cost analysis would achieve."

9. The Commission staff provided an opportunity for the parties to comment on Consumers' responses, and Duke and Dynegy (jointly) and Reliant filed comments on the responses. Duke and Dynegy state that Consumers ignored the Commission staff's data requests by failing to provide any cost data for the years between 1996 and the present. Further, they state that Consumers has failed to supply any data to support its contention that all of its thousands of TTT transaction fees were imposed on gas flowing from Michigan sources.<sup>8</sup> These parties also note that neither of the annual reports provided in Consumers' response details any TTT transactions, even though Dynegy states that it was charged for TTT service in every month of 2002 and for three months in 2003. These parties assert that this suggests that Consumers is in violation of the annual reporting requirements of Section 284.126(b) because it has failed to report its TTT transactions and charges. Similarly, Reliant states that Consumers has not fully responded to the data requests and that its responses do not support its claim that it has never charged a TTT rate under its blanket certificate.

## **Procedural Motions**

### **A. Intervention**

10. Reliant Energy Services, Inc. (Reliant) filed a timely motion to intervene in this proceeding, and Reliant, Duke, and Dynegy filed protests to Consumers' compliance filing. Consumers filed an answer in opposition to Reliant's motion to intervene. In its answer, Consumers asserts that Reliant has not shown that it was a TTT customer in connection with service provided under Consumers' blanket certificate during the relevant period. Therefore, Consumers contends, Reliant is not entitled to a refund, and its motion to intervene should be denied.

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<sup>8</sup> These parties state that even the most cursory look at the data provided by Consumers confirms the fact that all of the pools involved in the TTT transactions are those assigned to national and large regional marketers.

11. The Commission finds that Consumers' answer does not provide a basis for denying Reliant's motion to intervene. As stated above, the protesters dispute Consumers' contention that the TTT service was not provided in interstate commerce, and this hearing has been established to develop a record upon which to decide this and other issues raised in the protests. Moreover, Consumers' May 17, 2007 response to Question 4 of the Commission staff's data requests acknowledges that Reliant did receive TTT service. Reliant's motion to intervene is granted.

**B. Motion for Summary Disposition**

12. On June 21, 2005, Consumers filed a motion for summary disposition of this proceeding pursuant to Rule 217 of the Commission's Rules of Practice. In its motion, Consumers states that no party to this proceeding has produced factual support for the contention that it was a customer of Consumers for service under Consumers' blanket certificate, and that these parties have thus waived their right to contend otherwise. Further, Consumers contends that the attached affidavit of Stephen N. Caylor demonstrates that Consumers does not provide TTT service in conjunction with its blanket certificate.

13. Duke and Dynegy filed answers to Consumers' motion. Dynegy states that Consumers did not produce any contracts, invoices, or business records to substantiate its claims that it does not provide this service under its blanket certificate. These parties also point out that the Commission has held that Consumers' TTT service is jurisdictional. Duke asserts that the vast majority of the gas subjected to Consumers' TTT charges is gas that is flowing in interstate commerce prior to the physical nomination onto Consumers' system and subsequent flow under a Consumers' transportation contract.

14. The Commission may grant summary disposition under Rule 217 only if "there is no genuine issue of material fact in dispute." That is certainly not the case here. Consumers has made the unsupported assertion that it has not provided the TTT service under its blanket certificate and, thus, suggests that all the gas involved in these transactions is intrastate gas. The pleadings and documentation submitted by the protestants raise a material issue of fact with regard to this assertion, and this pivotal issue is clearly in dispute. The Commission staff requested documentation from Consumers to enable it to analyze the transactions to determine whether the service was provided in interstate commerce, but Consumers failed to provide the Commission staff with the information needed to resolve this issue. Summary disposition is not appropriate in these circumstances and Consumers' motion is denied.

**Discussion**

15. As explained above, the Commission issued several orders directing Consumers to file its proposed TTT rate with a cost justification for its proposal. Consumers made two compliance filings that did not comply with the Commission's direction to provide supporting cost data. The Commission staff then sent two sets of data requests to Consumers to attempt to obtain the information necessary to evaluate Consumers'

proposal, but Consumers' responses did not provide the Commission staff with the data it requested. When Consumers was asked to provide cost information for each year of TTT service in the Commission staff's May 7, 2007 data request, Consumers did not answer the question asked by the Commission staff, but responded that it "does not understand what additional cost analysis would achieve."

16. In addition, in its answer to Question 2 of the Commission staff's January 12, 2007 data request, Consumers states that none of the TTT services provided to the three protesters, and the related billings and collections, were for an interstate service. In Question 4 of the Commission staff's May 7, 2007 data request, the Commission staff asked for information from Consumers about the individual TTT transactions of the three protesters to determine if they were interstate or intrastate transactions. Again, Consumers did not answer the questions posed, but instead stated there was no instance in which Duke was provided transportation pursuant to the blanket certificate, and only one instance for Dynegy and Reliant.

17. In view of Consumers' failure to comply with the Commission's orders directing it to supply cost data to support its proposal and its deficient replies to the Commission staff's data requests, the Commission has determined that the appropriate procedure to be followed in this proceeding is to set this matter for a formal evidentiary hearing before an Administrative Law Judge. We recognize that a more informal Staff Panel proceeding is generally used to resolve the issues raised in filings by Hinshaw and NGPA section 311 pipelines.<sup>9</sup> However, in circumstances similar to those in this proceeding, the Commission established a formal evidentiary hearing to develop a record in a section 311 proceeding. In *Producer's Gas Company*,<sup>10</sup> the Commission established a formal hearing to adjudicate the issues in a section 311 proceeding because of the "dilatatory and obstructive discovery tactics" used by the pipeline. As the Commission explained in that proceeding, the pipeline's failure to provide the necessary information to support its proposal damaged the procedural rights of the other parties to the proceeding and the quality of the record. The Commission stated that the pipeline's tactics had deprived other participants of a reasonable opportunity to review, analyze, and comment on the factual basis underlying the proposed rates.

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<sup>9</sup> Section 284.123(b)(2)(iii) of the Commission's regulations provides for an advisory proceeding in rate cases filed pursuant to section 284.123(b)(2)(i) of the regulations. While the Commission regulates Hinshaw pipelines under sections 4 and 5 of the NGA, the Commission's Part 284 regulations provide for rate filings by Hinshaw pipelines performing service pursuant to a section 284.224 blanket certificate to be governed by section 284.123 of the regulations. Thus, Hinshaw pipelines are subject to the same Commission regulations with regard to rates as are NGPA section 311 pipelines. See *Consumers Energy Co.*, 94 FERC ¶ 61,287 at 62,028 (2001).

<sup>10</sup> *Producer's Gas Company*, 33 FERC ¶ 61,338 at 61,668 (1985) (*Producer's Gas*).

18. Similarly here, Consumers had not provided the Commission staff and the other parties to this proceeding with the information required to evaluate its rate proposal. The Commission has stated that Consumers' TTT rate must be justified on a cost basis,<sup>11</sup> yet when the Commission staff requested relevant cost data, Consumers replied that it doesn't understand what a cost analysis would accomplish. Consumers also has asserted that none of the thousands of TTT transactions for which it assessed a charge took place in interstate commerce, an allegation contested by each of the protesters. In order to resolve this issue, the Commission staff requested data for individual TTT transactions. Again, Consumers failed to provide the requested information.

19. We clarify that in setting this proceeding for formal hearing, the Commission is not departing from its usual procedure, and will continue to use the Staff Panel procedures to resolve the issues in most proceedings involving Hinshaw or section 311 pipelines. In *EPGT Texas Pipeline, L.P.*,<sup>12</sup> the Commission denied a request that the NGPA section 311 proceeding be set for formal hearing, and distinguished *Producer's Gas*. The Commission explained that the reason that *Producer's Gas* case was set for hearing was that the pipeline was not responsive in supplying answers to staff data requests, while in *EPGT*, the pipeline had cooperated and responded to extensive data requests. The Commission will continue to make this distinction and will not establish formal hearing procedures for these types of cases unless the circumstances, such as those present in *Producer's Gas* and this proceeding, so warrant.

20. The hearing should address the issues raised by the protests, including (1) whether Consumers' proposed TTT fee is fair and equitable, (2) whether refunds are due and the amount of any refunds, (3) whether the TTT transactions were jurisdictional interstate transportations of gas as suggested by the three protesters or non-jurisdictional intrastate transportations of gas as suggested by Consumers, and (4) whether Consumers has violated the annual reporting requirements of section 284.126 (b) of the Commission's regulations.<sup>13</sup>

The Commission orders:

- (A) The motion to intervene of Reliant is granted.
- (B) The motion for summary disposition of Consumers is denied.

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<sup>11</sup> *Consumer Power Company*, 100 FERC ¶ 61,354 at P 17.

<sup>12</sup> *EPGT Texas Pipeline, L.P.*, 99 FERC ¶ 61,295 at 62,248 (2002) (*EPGT*).

<sup>13</sup> Duke and Dynegy also point out that Consumers has never paid its filing fee mandated by section 284.123(b)(2)(i). The Commission will pursue this matter separately.

(C) Pursuant to the Commission's authority under the NGA, particularly sections 4, 5, and 15, and the Commission's rules and regulations, a public hearing is to be held in this proceeding concerning the lawfulness of Consumers' proposed TTT rate.

(D) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304 (2007), must convene a prehearing conference in this proceeding to be held within 20 days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The prehearing conference shall be held for the purpose of clarification of the positions of the participants and establishment by the presiding judge of any procedural dates necessary for the hearing. The presiding administrative law judge is authorized to conduct further proceedings in accordance with this order and the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.