

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE:)	
PETITION OF B&W PIPELINE, LLC)	DOCKET NO. 15-00042
FOR AN INCREASE IN RATES)	

**POST-HEARING BRIEF OF THE CONSUMER PROTECTION AND ADVOCATE
DIVISION REGARDING THE HINSHAW PIPELINE ISSUE**

Comes now the Consumer Protection and Advocate Division of the Office of the Attorney General (“Consumer Advocate”) and hereby submits this post-hearing brief. The Tennessee Regulatory Authority (“TRA” or “Authority”) has requested that the parties submit post-hearing briefs on the following issue: Is the B&W Pipeline a “Hinshaw” Pipeline? This is a critical jurisdictional issue because if the B&W Pipeline (the “Pipeline”) is a Hinshaw Pipeline, then it is not subject to regulation by the Federal Energy Regulatory Commission (“FERC”) and the TRA would retain jurisdiction. If, on the other hand, the Pipeline is not a Hinshaw Pipeline, then it would be subject to FERC regulation that could, at least potentially, end TRA jurisdiction and regulation.

It is possible for the TRA to maintain jurisdiction over the Pipeline even though it does not qualify as a Hinshaw Pipeline, however. This is because under FERC law, even if a pipeline does not qualify as a Hinshaw Pipeline in its entirety, it may still maintain Hinshaw Pipeline status by receiving an Order No. 63 limited jurisdiction blanket certificate (“Order No. 63 certificate”), as explained in Section I below. FERC commonly grants these certificates in circumstances similar to this Docket, and it is consistent with the Congressional intent underlying the Hinshaw exemption that the TRA maintain jurisdiction over the Pipeline until B&W receives an Order No. 63

certificate. The Consumer Advocate, therefore, requests that the TRA require B&W to request an Order No. 63 certificate from FERC, and that the TRA maintain jurisdiction over the Pipeline while the certificate decision is pending.

FACTS

B&W Pipeline, LLC (“B&W”) operates a gas transportation Pipeline that is geographically located within the borders of Tennessee.¹ B&W receives gas from the Spectra Interstate Pipeline and transports gas to a distribution facility owned by Navitas TN, LLC (“Navitas”), which is also located in Tennessee.² Navitas distributes this natural gas to customers in upper-east Tennessee and southern Kentucky.³ B&W and Navitas are separate companies and do not share any affiliates or common ownership.⁴

On September 14, 2015, a panel of TRA directors heard the above-captioned matter regarding B&W’s request for an increase in the rates it charges to Navitas.⁵ At the conclusion of that hearing, the Authority questioned whether it properly has jurisdiction over this matter because Navitas transports gas across state lines, which may implicate regulation by FERC:

Here we have an intrastate pipeline engaged in the transportation of natural gas for a local distribution company served by an interstate pipeline. It is unclear to the TRA whether the Hinshaw exclusion applies. Therefore, the parties are requested to file a response or brief on the question of whether FERC or the Authority has jurisdiction over the transportation rates in this case.⁶

¹ Ramon Direct Testimony, *Petition of B&W Pipeline, LLC for an Increase in Its Rates and Charges*, TRA Docket 15-00042, 4 at lines 8-9 (April 2, 2015).

² See, e.g., *Petition of B&W Pipeline, LLC for an Increase in Its Rates and Charges*, TRA Docket 15-00042, 3-4 (April 2, 2015).

³ Hartline Direct Testimony, *Petition of B&W Pipeline, LLC for an Increase in Its Rates and Charges*, TRA Docket 15-00042, 4 at Answer 3 (August 11, 2015).

⁴ Response to CAPD Data Request #1, *Petition of B&W Pipeline, LLC for an Increase in Its Rates and Charges*, TRA Docket 15-00042, 7 at Answer 6 (July 2, 2015).

⁵ Tr. at 4

⁶ Tr. at 193.

The Consumer Advocate recognizes that given the facts there may be no clear all-TRA or all-FERC resolution to this issue, but concludes that the TRA should continue to exercise jurisdiction over this Docket.

ARGUMENT

I. Although B&W Is Not Strictly a Hinshaw Pipeline, It May Qualify to Be Treated as a Hinshaw Pipeline by Receiving an Order No. 63 Limited Jurisdiction Blanket Certificate from FERC.

A Hinshaw Pipeline is an intrastate pipeline that is not subject to regulation by FERC even though it receives gas from an interstate pipeline:

The provisions of this chapter shall not apply to 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. *The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States.* A certification from such State commission to the Federal Power Commission⁷ that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.⁸

Thus, there are two main criteria for determining whether a pipeline qualifies as a Hinshaw Pipeline: (1) it receives gas within the boundaries of a particular state; and (2) the gas so received is “ultimately consumed” within that state.

Here, the B&W Pipeline is entirely within Tennessee and it receives gas from the Spectra Interstate Pipeline. But the B&W Pipeline does not fit the Hinshaw exemption because its in-state customer Navitas sends some gas to Kentucky for ultimate consumption. While this appears to

⁷ The Federal Power Commission is the precursor agency to FERC.

⁸ 15 U.S.C.A. § 717(c) (emphasis added).

require FERC regulation, the federal regulatory scheme has recognized that pipelines that are nevertheless “primarily of local concern” should be regulated by the states.⁹ This outcome is accomplished through an Order No. 63 certificate.

An Order No. 63 certificate is a product of 18 C.F.R. § 284.224, which allows pipelines that nearly meet the Hinshaw requirements to apply for a limited jurisdiction blanket certificate.¹⁰ This certificate enables such pipelines to “engage in the sale or transportation of natural gas that is subject to the Commission’s jurisdiction under the Natural Gas Act [(“NGA”)].”¹¹ The certificate is subject to FERC enforcement, but the state agency continues to have jurisdiction over the Hinshaw Pipeline:

[A]cceptance of a certificate or conduct of an activity authorized thereunder will: (i) Not impair the continued validity of any exclusion under section 1(c) of the Natural Gas Act which may be applicable to the certificate holder, and (ii) Not subject the certificate holder to the Natural Gas Act jurisdiction of the Commission, except to the extent necessary to enforce the terms and conditions of the certificate.¹²

As an example, Pacific Gas and Electric Company (“PG&E”) was a Hinshaw Pipeline that was exempt from FERC jurisdiction.¹³ Yet PG&E’s facilities were being “used to transport gas volumes which [were] ultimately consumed in another state.”¹⁴ The question presented to FERC was whether such transportation prevented PG&E from continuing to qualify as a Hinshaw Pipeline. FERC ruled that because PG&E had sought an Order No. 63 certificate, it could still maintain its Hinshaw status.¹⁵ FERC Commissioners elaborated, “[A] Hinshaw pipeline may

⁹ See 15 U.S.C.A. § 717(c); *Pacific Gas and Electric Co.*, 69 FERC ¶ 61,140, 61,504 (1994).

¹⁰ 18 C.F.R. § 284.224(b).

¹¹ 18 C.F.R. § 284.224(b)(3).

¹² 18 C.F.R. § 284.224(d)(2); see *Pacific Gas & Electric Co.*, 67 FERC ¶ 61,355, 62,242 (1994).

¹³ *Pacific Gas and Electric Co.*, 69 FERC at 61,503.

¹⁴ *Id.* at 61,504.

¹⁵ *Id.* at 61,506.

engage in the activities contemplated in section 1(c) [of the NGA that establishes the Hinshaw exemption]—while at the same time participating in the restricted types of jurisdictional transactions specified in section 284.224 of the Commission’s regulations—and retain its NGA-exempt Hinshaw status.”¹⁶ Moreover, the Order explained that since 1980, FERC has routinely granted limited jurisdiction blanket certificates that authorize these types of transactions.¹⁷

Similarly here, B&W fits all elements of the Hinshaw exemption but for Navitas’ transmission of gas to Kentucky end-users: the Pipeline receives natural gas at or within Tennessee, all the gas is consumed in Tennessee, and the Pipeline is regulated by the TRA.¹⁸ Consequently, B&W is eligible to apply for an Order No. 63 certificate. If granted, the Pipeline would be subject to the Hinshaw exemption and the TRA would maintain jurisdiction. The TRA should therefore require B&W to request an Order No. 63 certificate from FERC.

The TRA can expect that this certificate will be granted, as “[FERC] has long employed limited jurisdiction certificates as a means to promote particular policy objectives to effectuate the regulatory scheme of the NGA and [Natural Gas Policy Act].”¹⁹ The policy objectives of the federal regulatory scheme favor TRA regulation of the Pipeline, as explained in Section II. Therefore, B&W should receive an Order No. 63 certificate and the TRA should maintain jurisdiction in the meantime.

II. It Is Consistent with Congressional Intent that the TRA Maintain Jurisdiction over the Pipeline While B&W Seeks an Order No. 63 Certificate.

It is important to consumers that the TRA maintain jurisdiction over the Pipeline while B&W seeks an Order No. 63 certificate. This will prevent the Pipeline from falling into regulatory

¹⁶ *Id.* at 61,505.

¹⁷ *See id.* at 61,506; *see, e.g., CenterPoint Energy-Illinois Gas Transmission Co.*, 120 FERC ¶ 62,156 (2007) (an order granting a limited jurisdiction blanket certificate).

¹⁸ *See Hopkinton LNG Corp.*, 82 FERC ¶ 61,218, 61,858 (1998) (listing the elements of a Hinshaw Pipeline).

¹⁹ *Pacific Gas and Electric Co.*, 69 FERC ¶ 61,140, 61,506 (1994).

uncertainty, i.e., a state where neither the TRA nor FERC has affirmatively exercised jurisdiction. In such a state, for example, B&W might attempt to unilaterally raise rates or discontinue service to its customers. That outcome would surely be an unintended consequence of the federal regulatory scheme, which instead supports state regulation of “matters primarily of local concern.”²⁰ FERC itself has interpreted Congressional intent to reserve jurisdiction for the states in such instances:

In 1954, Congress amended the NGA in response to the Commission's assertion of jurisdiction over certain companies whose activities took place within a single state. Congress found that the Commission's action “has resulted in unnecessary duplication of State and Federal jurisdiction, and has caused extra expense to individual companies because of overlapping requirements regarding the filing of reports and information. *This bill [the section 1(c) Hinshaw exemption] eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, as always has been intended.*”²¹ Congress recognized that it was exempting from Commission jurisdiction certain companies that were engaged in interstate commerce. However, Congress determined that the “purchase, transmission, and sale of natural gas for ultimate use within a State” constituted a matter primarily of local concern and “believed that all aspects of such transactions should be regulated locally by State regulatory bodies, which were better acquainted with local needs and the activities of local companies.”²¹

Consistent with this intent, the TRA is the proper agency to regulate B&W. B&W's operations are primarily Tennessee's concern. The B&W Pipeline is entirely contained in Tennessee.²² Its sale of gas to Navitas occurs within Tennessee.²³ Although Navitas transports gas to Kentucky, B&W does not.²⁴ B&W is also a distinct corporate entity from Navitas.²⁵ Given the predominance of these local connections, federal policy objectives favor the TRA maintaining jurisdiction over the Pipeline while B&W seeks an Order No. 63 certificate.

²⁰ See 15 U.S.C.A. § 717(c).

²¹ *Pacific Gas and Electric Co.*, 69 FERC at 61,504 (internal citations omitted) (emphasis added).

²² Ramon Direct Testimony at 4, lines 8-9.

²³ See, e.g., *Petition* at 3-4.

²⁴ Hartline Direct Testimony at 4, Answer 3.

²⁵ Response to CAPD Data Request #1 at 7, Answer 6.

III. Conclusion

Given the time, resources, and money already expended by the TRA and the parties, it would be a disservice to abruptly drop TRA jurisdiction before all avenues of retaining Tennessee jurisdiction are explored, especially this issuance of a FERC Order No. 63 certificate. Accordingly, the Consumer Advocate requests that the TRA require B&W to apply for an Order No. 63 certificate from FERC, and that the TRA maintain jurisdiction over the Pipeline while the certificate decision is pending.

Respectfully submitted,

 9/28/15

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CERTIFICATE OF SERVICE

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This the 30th day of Sept, 2015


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