

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**May 18, 1999**

**IN RE:**

**APPLICATION OF TENGASCO PIPELINE  
CORPORATION FOR A CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY TO  
PROVIDE INTRASTATE NATURAL GAS  
SERVICES**

**Docket No.**

**98-00156**

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**ORDER AFFIRMING JULY 21, 1998, ORDER GRANTING  
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

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This matter came before the Tennessee Regulatory Authority (the "Authority") at a regularly scheduled Authority Conference held on April 20, 1999, for a decision on the merits with respect to the issues raised in the Petition to Re-Open. For the reasons set forth below, the Authority hereby unanimously affirms its July 21, 1998, Order Granting Certificate of Public Convenience and Necessity.

**I. TRAVEL OF THE CASE**

On March 9, 1998, Tengasco Pipeline Corporation ("TPC") filed its Application for a Certificate of Convenience and Necessity to provide intrastate natural gas services in Hawkins, Claiborne and Hancock Counties, Tennessee, pursuant to Tenn. Code Ann. § 65-4-201 et seq. On May 22, 1998, TPC filed an Amended and Restated Application. On June

30, 1998, and July 7, 1998, this matter was considered by the Directors of the Authority.<sup>1</sup> Hereinafter, the Application and the Amended and Restated Application shall be collectively referred to as the “Application” and the Certificate of Convenience and Necessity granted on July 21, 1998, shall be referred to as the “CCN.” The Authority’s Order granting TPC’s Application following the hearing in this matter shall be hereinafter referred to as the “CCN Order.”

The CCN Order resulted in the issuance of a CCN to TPC to provide intrastate natural gas services within Claiborne, Hawkins, and Hancock Counties, Tennessee, subject to Tenn. Code Ann. § 7-82-301 et seq. and other applicable Tennessee laws.<sup>2</sup> The CCN Order specifically provided that its terms “shall not be construed to contravene any statutory rights of any municipality or utility district.”<sup>3</sup> TPC did not dispute the terms of the CCN Order.

On July 30, 1998, the Claiborne County Utility District (the “CCUD”) and Natural Gas Utility District of Hawkins County, Tennessee (the “UDHC”) jointly filed a Petition to Re-Open Docket for Reconsideration and to Permit Intervention (“Petition to Re-Open”). In the Petition to Re-Open, the CCUD and the UDHC requested that the Authority: reconsider the CCN Order; re-open this matter for further proof; allow the CCUD and the UDHC to intervene; and amend the CCN Order to limit the scope of TPC’s CCN in Hawkins County to transportation only.<sup>4</sup> On August 14, 1998, the Authority issued a Notice of Filing Deadline through its Executive Secretary requiring TPC to provide a written response to the allegations

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<sup>1</sup> The hearing was recessed on June 30, 1998, without a decision, upon the vote of a majority of the Directors, to allow TPC additional time to supplement its testimony and supporting documentation concerning the leak surveying process and other safety issues. Director Kyle voted to grant TPC’s Application on the basis of the testimony already presented. On July 7, 1998, the hearing resumed.

<sup>2</sup> See footnote 8, infra.

<sup>3</sup> CCN Order at 4.

contained in the Petition to Re-Open. TPC responded thereto on August 19, 1998, and filed supporting affidavits on August 20 and 21, 1998. On August 31, 1998, the CCUD and the UDHC filed the Statement of Authorities and Arguments Supporting Petition of CCUD and UDHC to Re-Open Docket for Reconsideration and to Permit Intervention.

On September 1, 1998, the Authority heard arguments on the Petition to Re-Open, at which time TPC conceded that “[W]hat we have been granted in this proceeding does not prejudice the rights of these utility districts. The order is subject to the utility district statute. So we don’t have any more than the state law can grant us.”<sup>5</sup> After due consideration of the matters presented, and being unable to obtain an agreement of the parties on how to proceed, the Directors voted 2-to-1, in favor of re-opening the proceeding on their own motion.<sup>6</sup>

The Authority’s majority concluded that the CCUD and the UDHC raised new evidence that (1) was not available to the Authority for consideration during TPC’s CCN hearing; and (2) is relevant to TPC’s request for a CCN to serve Claiborne and Hawkins Counties, Tennessee, to the extent that TPC interprets its grant of such authority to permit TPC to “transport the gas of Tengasco, Inc., . . . in any of those three counties where Tengasco sells gas, whether that gas be sold to a utility district or whether it be sold to some industrial user.”<sup>7</sup> The majority’s position was rendered in recognition of Tennessee

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<sup>4</sup> For a more detailed recitation of the arguments of CCUD and UDHC in support of their Petition to Re-Open, refer to **Exhibit A** attached hereto.

<sup>5</sup> *September 1, 1998, Authority Conference Transcript* at 65-66.

<sup>6</sup> Director Sara Kyle voted against the motion to re-open the docket, stating “I want to clarify my position of the vote that was taken on this CCN. I voted to grant that CCN for the transportation of wholesale natural gas to these utility districts. That clarifies my vote. That’s what I intended; therefore, I don’t see a need to reopen this case, and I so move.” *Id.* at 60.

<sup>7</sup> *Id.* at 55.

Consumer Advocate v. TRA, 1997 WL 92079, \*3 (Tenn. Ct. App. 1997), requiring administrative agencies to take pains to adhere to the basic rules of fairness.<sup>8</sup>

On September 29, 1998, a Petition to Intervene Filed On Behalf Of An Informal Coalition Of Utility Districts was filed in this matter. The coalition submitted arguments similar to those raised by the CCUD and the UDHC. The petition to intervene was granted. A hearing on the issues raised in the Petition to Re-Open was held on December 15th and 16th, 1998. The parties filed post-hearing briefs in late January, 1999.<sup>9</sup>

## **II. MOTION OF TPC TO DEFER DECISION ON THE MERITS**

On March 31, 1999, TPC filed the following request: “due to legislation that is pending before the Tennessee General Assembly which would clarify the definition of ‘retail distribution’ and activities of intrastate pipelines, [TPC] respectfully requests that the Authority refrain from deciding the substantive issues in this matter until the General Assembly has acted on the pending legislation.” By letter dated April 1, 1999, the CCUD and the UDHC vehemently objected to this request.

The request of TPC was considered by the Authority at its regularly scheduled April 6, 1999, Authority Conference. After hearing the positions of the parties, the Authority directed the parties to make a good faith attempt to reach agreement on a deferral. Particularly, TPC was asked to consider maintaining the “status quo” during any agreed upon

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<sup>8</sup> A copy of the November 16, 1998, *Order Re-Opening Case for Additional Consideration* is attached hereto as **Exhibit A**. Copies of both the July 1998, *Order Deferring Action on the Certificate of Public Convenience and Necessity* and the July 21, 1998, *Order Granting Certificate of Public Convenience and Necessity* are attached as exhibits to the *Order Re-Opening Case for Additional Consideration*.

<sup>9</sup> A *Petition of the Tennessee Oil and Gas Association to Intervene* was filed on February 3, 1999. CCUD and the Informal Coalition of Utility Districts objected to the petition. Under Tenn. Code Ann. § 4-5-310, and consistent with the current posture of this case, the petition was denied on April 20, 1999.

deferral period.<sup>10</sup> The parties were directed to file such agreement on or before April 13, 1999.<sup>11</sup>

On April 8, 1999, counsel for the CCUD and the UDHC filed a letter in which he set forth language that would be acceptable to the CCUD and the UDHC should the Authority grant the request for a deferral. On April 16, 1999, TPC filed a letter stating that it had been unable to reach some mutually agreeable language with the parties. In sum, no mutual agreement was submitted by the parties. At the April 20, 1999, Conference, when questioned about the request for deferral, counsel for TPC advised the Authority that TPC had withdrawn its request for a deferral.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Directors of the Authority deliberated on the merits of this case at the regularly scheduled Authority Conference held on April 20, 1999. In rendering their decision in this case, the Directors make the following findings of fact and conclusions of law.

At the first hearing in this matter on June 30th and July 7th, 1998, the Authority addressed whether TPC met the requirements of Tenn. Code Ann. § 65-4-201. The agency's conclusions in this respect are not specifically at issue here. At the December hearing, the primary issue concerned TPC's contention that it always intended to transport, distribute, and otherwise directly deliver natural gas to commercial and industrial end-users in Hawkins,

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<sup>10</sup> Counsel for CCUD and UDHC conceded at the April 6, 1999, Conference that if TPC maintained the status quo and thus refrained from any attempts to serve end-users directly, the utility districts would not suffer harm. *April 6, 1999, Authority Conference Transcript at 14*. Counsel for the Informal Coalition of Utility Districts stated that "We want to maintain the status quo. We don't really have a problem with the deferral, but we would like an interim order preventing them from servicing end users[.]" *Id.* at 18.

<sup>11</sup> Director Greer was of the opinion that the Authority should render a decision on April 6, 1999, and not further delay this matter.

Claiborne and Hancock Counties and that the CCN Order granted it authority to do the same. Thus, the decision on the issues currently before the Authority center on the construction of Tenn. Code Ann. § 7-82-301 et seq. The arguments of the parties are well documented in the record.

To the extent TPC contends that it may deliver natural gas to end-users, either commercial or industrial, on the basis that the Authority found in its CCN Order that under Tenn. Code Ann. § 7-82-301(a)(1) the public convenience and necessity required some entity other than a utility district in Hawkins, Hancock, or Claiborne County, such contention is inaccurate. First, no such finding was made by the Authority. Second, Tennessee case law reveals that the Authority is not the appropriate forum for such a finding under § 7-82-301.<sup>12</sup>

Tenn. Code Ann. § 7-82-301(a)(2)(C) provides that “Notwithstanding anything contained in this section, a utility district shall retain the exclusive authority to engage in the **retail distribution** of natural gas within its area (emphasis added).” Among other things, TPC maintains that the transportation and delivery (excluding the sale) of natural gas to commercial or industrial end-users within a utility district’s service area does not constitute “retail distribution.” According to TPC, retail distribution only occurs when there is a bundled sale, transportation, and delivery of natural gas to end-users. To the contrary, the utility districts assert that the lack of a gas sale by TPC to end-users, as distinct from transportation of that gas, is not outcome determinative because the end result is the same: natural gas is provided to an end-user by one or more entities that are not a utility district.

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<sup>12</sup> See City of Crossville v. Middle Tennessee Utility District, 345 S.W.2d 865 (Tenn. 1961) and West Wilson Utility District v. Z.D. Atkins, 442 S.W.2d 612 (Tenn. 1969).

Section 7-82-301 et seq. reveals that the Authority has the statutory authority to authorize TPC to engage in some limited activities within the service territory of a utility district, including the delivery of natural gas to such utility district. Therefore, TPC rightly asserts that the service territory of a utility district is not and was not intended to be exclusive for all purposes. While the statute is no doubt susceptible to various interpretations, one point nonetheless rings clear -- whatever services a non-utility district may provide in a utility district's service area, those services do not include the retail distribution of natural gas.

The question then becomes one of determining what is retail distribution. The Authority has concluded that Tenn. Code Ann. § 7-82-301(a) prohibits the Authority from authorizing TPC to transport natural gas for delivery to an end-user customer within the service territory of a utility district. For the purposes of this case, the Authority finds that once natural gas is delivered to an end-user from a source other than the utility district in whose service territory the end-user operates, retail distribution has occurred in violation of Tenn. Code Ann. § 7-82-301(a)(2)(C).<sup>13</sup>

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<sup>13</sup> It is the opinion of Chairman Malone that the result reached here is dictated and mandated by state law. The TRA is not sitting as policy makers on this issue, but as interpreters of the law as intended by the General Assembly. Whether we agree or disagree with the policy of the General Assembly as embodied in § 7-82-301 et seq. is not controlling here. As noted by the court in Hamblen Cty Education Ass'n v. The Hamblen Cty Bd. of Education, 892 S.W.2d 428, 432 (Tenn. App. 1994), "[i]t is not for the courts to question the wisdom of legislative enactment. We 'must take statutes as we find them.'" In this instance, it is our duty to apply the law as we find it, not to construe the law as we think, or as others think, it ought to be. The law is what it is. See Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend its Service Territory into Areas Currently Served by Tennessee Telephone Company, at 8, TRA Docket No. 98-0001, April 9, 1998 ("Tenn. Code Ann. § 65-4-201(d) is currently the law in the state of Tennessee as both parties have acknowledged. Recognizing this fact, we are not sitting as policymakers on this piece of legislation."); Order Approving in Part and Denying in Part Tariff No. 96-201, TRA Docket No. 96-01423, September 4, 1997 (Notwithstanding previous policy in this area Authority determined that directory assistance is a non-basic service solely because this conclusion was mandated by the statute and the legislative history).

Given the changes that have taken place in this industry over the years, and given that the State may have some interest, including, but not limited to, less expensive natural gas, in facilitating both the discovery and the development of in-state natural gas wells, the General Assembly may wish to take an exploratory look into these and other ancillary issues. Today, however, the policy of the General Assembly embodied in § 7-82-301

TPC maintains that it requested both in its Application and during the initial hearing, for the authority to transport, distribute and otherwise deliver natural gas within the counties of Hancock, Hawkins, and Claiborne to commercial and industrial end-users. Even assuming that TPC asked for such, the CCN Order clearly reveals that TPC did not obtain such a broad grant of authority. To do so would have been clearly inconsistent with Tenn. Code Ann. § 7-82-301 et seq.

It is the reasoned opinion of the Authority that the July 21, 1998, CCN Order is not in violation of any portion of Tenn. Code Ann. § 7-82-301, as the CCN Order is expressly made subject to all limitations of said statute. Further, under current state law, the CCN Order does not nor could it authorize TPC to provide either transportation or distribution services directly to end-users within a utility district's service territory.<sup>14</sup>

**IT IS THEREFORE ORDERED THAT:**

1. The Petition of the Tennessee Oil and Gas Association to Intervene is denied.
2. The Authority's July 21, 1998, Order Granting Certificate of Public Convenience and Necessity is hereby reaffirmed, consistent with state law.
3. The terms of this Order and the July 21, 1998, Order Granting Certificate of Public Convenience and Necessity shall be construed subject to Tenn. Code Ann. § 7-82-301

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et seq. clearly mandates the above-stated result, and this result is consistent with the intent of the General Assembly.

<sup>14</sup> It should be noted that under state law a company may engage in retail distribution in an area of a county that is not included either within a utility district's service area or within the area of an exclusive franchise, as long as such activity is otherwise consistent with state law. Even in an area served by a utility district, a company could be permitted, under appropriate circumstances, to engage in retail distribution after it has been established by the creator of such utility district that the public convenience and necessity requires other or additional services in that area, in accordance with Tenn. Code Ann. § 7-82-301(a)(1).



et seq. and other applicable Tennessee laws and shall not be construed to contravene any statutory rights of any municipality or utility district.


4. Neither the July 21, 1998, Order Granting Certificate of Public Convenience and Necessity, nor this Order, grant to TPC the authority to transport, distribute, or otherwise deliver natural gas to commercial or industrial end-users in areas serviced by utility districts within the counties of Hancock, Hawkins, and Claiborne.

5. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after the date of this Order.

6. Any party aggrieved with the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

  
CHAIRMAN MELVIN J. MALONE

  
DIRECTOR H. LYNN GREER, JR.

  
DIRECTOR SARA KYLE

ATTEST:

  
EXECUTIVE SECRETARY