

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00A-415G

IN THE MATTER OF THE APPLICATION OF K N GAS GATHERING, INC. AND
PUBLIC SERVICE COMPANY OF COLORADO FOR AUTHORIZATION TO TRANSFER
CERTAIN NATURAL GAS PIPELINE ASSETS BY SALE AND TO PROVIDE
SERVICE TO SPECIFIC CUSTOMERS BY CONTRACT WITHOUT REFERENCE TO
TARIFFS.

**RULING ON REHEARING
AND DECISION GRANTING APPLICATION**

Mailed Date: March 27, 2001
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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for ruling on rehearing. This docket concerns the joint application by K N Gas Gathering, Inc. ("KNGG") and Public Service Company of Colorado ("Public Service") to transfer gas pipeline

facilities, the Golden and NARCO Pipelines, from KNKG to Public Service. Public Service also seeks a Commission order authorizing it to provide natural gas transportation service to three customers ("Customers") currently being served from these pipeline facilities pursuant to contract. These contracts are currently in effect between each of the Customers and KNKG. The contract terms differ from Public Service's tariff now on file with the Commission.

2. In Decision No. C01-37 (Mailed Date of January 12, 2001), we determined that the proposed sale of the Golden and NARCO Pipelines to Public Service was in the public interest. We approved the sale, by approving the Stipulation between the parties, subject to certain conditions described in that decision. Those conditions substantially modified the Stipulation. Most notably, we expressed concern that the provision of gas transportation service to the Customers (CoorsTek, Coors Energy, and Trigen-Nations Energy Company, L.L.L.P.) under contract and without regard to Public Service's existing tariff would be illegally discriminatory to ratepayers in general under § 40-3-106(1)(a), C.R.S. We did authorize Public Service to serve the Customers based upon the same terms and conditions reflected in the existing contracts. To alleviate the concern of illegal rate discrimination, we directed that Public Service treat the Golden Pipeline as a

stand-alone system for ratemaking purposes. See Decision No. 01-37, pages 13-15.

3. Public Service and Commission Staff, pursuant to the provisions of § 40-6-114, C.R.S., filed Applications for Rehearing, Reargument, or Reconsideration ("RRR"). Notably, Public Service's application disputed our conclusion that the provision of transportation service to the Customers by contract instead of tariff would be unlawfully discriminatory against other ratepayers, and objected to the stand-alone treatment of the Golden Pipeline. In Decision No. C01-164 (Mailed Date of February 15, 2001), we granted the applications and scheduled a rehearing (on February 22, 2001) for the purpose of accepting additional argument regarding the issues discussed in that decision. The parties appeared at the rehearing and submitted their Stipulated Motion to Amend Application to Include Declaratory Ruling Request and to Approve Application As Amended ("Stipulated Motion").¹

4. Essentially, the Stipulated Motion requests that we issue a declaratory order to the following effect: Section 40-3-104.3(1)(a)(II), C.R.S., permits a gas utility, upon approval by the Commission, to offer service to "existing customers" by contract and without reference to its filed tariff

¹ All parties to this case, with the exception of Staff, agreed to the Stipulated Motion.

under certain enumerated conditions. The original application in this case requested approval to provide service to the Customers by contract pursuant to the provisions of § 40-3-104.3(1)(a)(II). In the Stipulation approved in Decision No. C01-37, however, the applicants abandoned that request, apparently in the belief that the statute did not apply because, at this time, the Customers were not "existing" customers of Public Service. The Stipulated Motion, still premised upon the assumption that § 40-3-104.3(1)(a)(II) requires that the Customers be "existing" customers of Public Service, requests a declaratory ruling that, if Public Service were to begin serving the Customers, pursuant to the sale proposed here, all conditions in § 40-3-104.3(1)(a)(II) would be met. As such, Public Service could, upon approval of a future application (*i.e.* after Public Service acquired the Golden and NARCO Pipelines), serve the Customers by contract without any concern that these arrangements would be illegally discriminatory. Additionally, according to the Stipulated Motion, such a declaratory ruling would give the Customers the assurance they require² before agreeing to the sale of the pipeline facilities to Public Service.

² The currently effective contracts between KNGG and the Customers give the Customers the right to veto any proposed sale of the Golden and NARCO Pipelines. The Customers will not agree to any sale unless the purchaser agrees to continue providing service to them under the existing contracts.

5. After the rehearing, the parties submitted supplemental argument regarding the Stipulated Motion.³ Now being duly advised, we will grant the Joint Application by KNGG and Public Service for Authorization to Transfer Certain Natural Gas Pipeline Assets by Sale and to Provide Service to Specific Customers by Contract without Reference to Tariffs. In light of our ruling on the Joint Application, the Stipulated Motion will be denied as moot.

B. Discussion

1. Determination of whether the transfer is in Public Interest

a. The Commission must first determine whether the transfer of the Golden and NARCO pipelines to Public Service, with the terms and conditions requested by applicants, is in the public interest. The Applicants claim that the transfer is in the public interest for several reasons. We confirm our findings about these issues in the Initial Commission Decision, C01-37 and add further discussion as follows.

b. First, Public Service states that parts of the NARCO line can be used in place of facilities that will be required in the near future to replace capacity that is currently provided by the Leyden Natural Gas Storage Facility.

³ Staff's Motion for Leave to Reply to the Response of the Customers to Staff's Post-Reargument Comments will be granted.

Public Service applied for authority to abandon Leyden in Docket No. 00A-206G, and the Commission granted such authority in Decision No. C01-0170. We agree that these are tangible benefits of the transfer. Next, Public Service states that revenue received from the three existing customers will pay for the remaining \$1,000,000 of purchase costs. Public Service states that 1999 revenue from the contracts of \$336,618 would actually justify a capital investment of \$1,367,254. Staff points out that 1999 revenue was higher than recent years, and ratepayers would be at risk if future revenues declined. Staff also raises the issue that if the pipeline facilities in question require significant maintenance or replacement expenditures in the future, Public Service's ratepayers are at risk, under the rolled-in treatment initially proposed. The parties addressed these concerns to our satisfaction in the December 5th Stipulation, by establishing maximum maintenance costs and minimum customer revenues for the facilities at issue. Further, the applicants provided substantial evidence that the pipelines are in good condition.

c. If these facilities remain in KNGG's hands, KNGG and Public Service will likely have conflicts over service territory and the provision of service to new customers in the future in the area of the Golden and NARCO Pipelines. This sale will clarify which utility will have responsibility for serving customers in this area in the future. As proposed, the sale of

the pipeline facilities under the terms of the December 5, 2000 Stipulation also provides certainty to the existing customers on the pipeline, while providing adequate protection to Public Service's ratepayers. We find that a properly structured transfer will benefit KNGG, the existing customers on the Golden Pipeline, Public Service, and existing Public Service ratepayers. The proposed settlement, with the conditions agreed to in the December 5th Stipulation, is in the public interest.

2. Authority for the Transfer

a. The Commission has authority to approve the transfer of public utility facilities. See § 40-5-105, C.R.S. The question at issue is how to maintain the current rights, terms and conditions that the Customers currently benefit from under their existing contracts with KNGG, after the facilities are transferred to Public Service. The Commission finds that the public interest, as well as the interests of the Customers and utilities, warrants that the current rights, terms and conditions in the contracts be substantially maintained through this transaction. Through the course of this proceeding, the parties have presented a number of sources of Commission authority to approve the settlement. Initially, the Applicants proposed that the Commission maintain the existing Customers contracts through the competitive response statute, § 40-3-104.3 C.R.S. In its answer testimony, Staff suggested that the pipeline be treated as a stand-alone pipeline, not rolled into

Public Service's rates and operations, as proposed by the Applicants. All parties then agreed to the provisions in the December 5th Stipulation. This Stipulation abandoned the earlier notion of using § 40-3-104.3 C.R.S., and instead proposed two alternatives for the Commission to consider. The parties proposed that the Commission could approve the contracts pursuant to its general powers under Article XXV of the Colorado Constitution, or the Commission could approve tariff sheets containing the contracts as new rate schedules.

b. The Commission, in its initial decision No. C01-37, rejected the two methods proposed in the December 5th stipulation. These methods were rejected largely on the basis that either method would produce discriminatory rates. The Commission then approved the transfer on the basis that the Golden line would be operationally integrated into the Public Service system, but would be treated as a stand-alone pipeline for ratemaking purposes. Public Service opposes this approach. In its February 1, 2001 application for Rehearing, Reargument or Reconsideration, it states that stand-alone rate treatment is not fair to Public Service. Public Service also states that the record in this docket does not provide adequate detail to separate the Golden and NARCO pipeline costs or the system benefits derived from these segments. Though the December 5th Stipulation addressed some of the fairness and equity issues Public Service raises, we agree that a more equitable solution

can be implemented. Further, Public Service raised questions as to how additional customers will be served off the Golden pipeline under stand-alone rates. Such future uncertainty will likely extend the legal difficulties we face in this docket.

c. We affirm our prior conclusion that the two solutions proposed in the December 5th stipulation without stand-alone rate treatment would discriminate against similarly situated customers. However, on rehearing we find that treatment under § 40-3-104.3 C.R.S., which was abandoned by the parties in the December 5th Stipulation, resolves the discrimination issue and can be properly applied in this case. For reasons set forth below, we find that the rates, terms and conditions in the Customers' contracts can be established under the competitive response statute, § 40-3-104.3 C.R.S.

d. Staff raised concerns about the applicability of § 40-3-104.3(1)(a)(II) because the statute applies only to existing customers of a natural gas utility. We note, however, that the Customers are existing customers of KNGG, and this application is a joint application by KNGG and Public Service. Therefore, we are approving the contracts under the competitive response statute while the Customers are served by KNGG, and then approving the transfer of facilities to Public Service.

e. This is a unique situation where a competitive pipeline already exists. In the current situation,

a "competitive alternative" pipeline was constructed in the heart of one utility's service territory, and is now owned by another utility. The customers and utilities have developed a solution that provides benefits to all parties and all customers, which is consistent with the overriding intent of the competitive response statute.

f. In order to grant authority under § 40-3-104.3(1)(a)(II), the Commission must make the following findings:

(1) The customer has the ability to provide its own service or has competitive alternatives available from other providers of the same or suitable service, except from another public utility providing or proposing to provide the same type of service;

(2) The customer will discontinue using the services of the public utility if the authorization is not granted;

(3) Approval of the application will not as adversely affect the remaining customers of the public utility as would the alternative;

(4) The price of any service shall be justified and shall not be less than the marginal cost of the service to the public utility; and

(5) The approval of the application is in the public interest.

g. We find that the existing customers on the Golden Pipeline have the ability to provide their own service or have competitive alternatives. First, we look at the history of pipeline. Adolph Coors Company installed the pipeline some twenty-eight years ago, as a bypass to utility service. This twenty-eight-mile pipeline was constructed before the competitive response statute was enacted, and before the Federal Energy Regulatory Commission ("FERC") established open-access rules for interstate pipelines. If the Coors businesses use gas in sufficient volumes and load factors to have made self-provision feasible twenty-eight years ago, self-provisioning of service is certainly plausible under FERC's open-access rules today. Further, the Customers have shown, through their lengthy service record, that this type of business can take advantage of long-term contracting and facility ownership that is consistent with the self-provisioning of service. This pipeline is one of the best examples of a competitive alternative to utility service that has ever been built in Colorado.

h. We find that two general alternatives to utility service exist for the Customers. First, we find that the Customers have a degree of control over the ownership of the pipeline, and they may be able to buy it back from KNKG. The Customers have long-term contracts that require their approval if pipeline ownership and contract assignment is transferred to another party. The contracts envision assignment to other

affiliates of KNGG, and include language that the Customers must not unreasonably withhold approval of contract assignment. We find that the Customers plausibly have a right to purchase the Golden and NARCO Pipelines if the this application is not approved in a manner that is acceptable to them.

i. The second alternative service is a new pipeline to Colorado Interstate Gas ("CIG") approximately 15 miles away. Staff estimates that a fifteen-mile pipeline would cost significantly more than the contract rates would allow. However, Staff used an average inch-mile value to approximate the cost, and did not perform a full engineering study. On one hand, we have an existing system consisting of sixty-one miles of pipe, with capacity substantially more than is necessary to serve the Customers, valued at \$1.75 million. On the other hand, we have an estimate of \$2.7 million for a new fifteen-mile pipeline to serve only the Customers. On balance, we find that CIG is a viable alternative that could provide the same or suitable service to the Customers.

j. Information in the record adequately supports the finding that the Customers will discontinue using the services of the public utility if authorization under § 40-3-104.3(1)(a)(II) is not granted. Since KNGG has not yet established tariff rates for the pipeline system, we cannot predict the outcome of such a proceeding. Nevertheless, we find that because the Customers maintain a degree of control through

contracts, tariffs implemented by KNGG would likely honor the terms of the contracts, resulting in a similar outcome to § 40-3-104.3, C.R.S. The Customers would not likely continue using the services of KNGG if such terms were not honored, either in this docket or in tariffs developed by KNGG⁴ if the transfer is not completed as contemplated in this docket. Moreover, we conclude that the Customers would likely discontinue service by Public Service, if Public Service attempted to charge its ordinary tariffed rates.

k. We find that approval of the application will not adversely affect the remaining customers of the public utility. Because the public utility pipeline in question serves only the Customers, no "remaining customers" will be adversely affected. To the contrary, we find that it is in the public interest that Public Service acquire the pipeline facilities. This acquisition will enable Public Service to better serve ratepayers in general. If the Customers refuse to consent to the sale of the facilities to Public Service, adverse consequences to the public will likely result.

l. As to a determination that the contract price is not less than the marginal cost of utility service, Public Service provides transportation services similar to those

⁴ The Commission ordered KNGG to file tariffs in Docket 98C-414G. By transferring the Golden Pipeline to Public Service as approved in this Docket, KNGG will eliminate the need to file tariffs.

offered by KNGG on the Golden and NARCO pipelines. We find that the contract rates are well above the marginal cost established by Public Service in its tariffs, and are above the marginal cost of service on the Golden and NARCO pipelines especially when such facilities are rolled-in to Public Service's existing system for operational and ratemaking purposes.

m. The last finding required under § 40-3-104.3(1)(a)(II) is that approval of the application is in the public interest. The discussion above explains why it is in the public interest that Public Service acquire the Golden and NARCO Pipelines pursuant to the proposed sale. We find that action by

n.

o. this Commission that would likely result in the failure of that sale (*i.e.* disapproval of the proposal to provide service to the Customers under contract) would disserve the public interest.

p. In order to ensure that Public Service's general ratepayers are protected by approval of the application here, we approve the Stipulation with all terms and conditions consistent with the modifications required to implement the approval granted in this decision. In particular, we do not adopt either of the two options listed in paragraph 12 of the Stipulation, but instead grant authority under § 40-3-104.3 C.R.S. as described above.

II. ORDER

A. The Commission Orders That:

1. The Joint Application by KNGG and Public Service for Authorization to Transfer Certain Natural Gas Pipeline Assets by Sale and to Provide Service to Specific Customers by Contract without Reference to Tariffs is granted consistent with the above discussion.

2. The Stipulation and Agreement in Resolution of Proceeding filed by the parties December 5, 2000 is adopted consistent with the above discussion.

3. The Stipulated Motion to Amend Application to Include Declaratory Ruling Request and to Approve Application as Amended is denied as moot.

4. Staff's Motion for Leave to Reply to the Response of the Customers to Staff's Post-Reargument Comments will be granted.

5. The twenty day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

6. This order is effective immediately upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 7, 2001.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

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Commissioners