UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission Providers	§ §	Docket No. RM01-10

POST-CONFERENCE COMMENTS OF MARITIMES & NORTHEAST PIPELINE, L.L.C.

Pursuant to the "Notice of Agenda for Technical Conference," issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on May 17, 2002, as revised June 13, 2002, Maritimes & Northeast Pipeline, L.L.C. ("Maritimes" or "Maritimes-U.S.") submits these comments with respect to the Commission Staff's April 25, 2002 "Staff Analysis of the Major Issues Raised in the Comments" ("Staff Analysis").[1]

Maritimes' system is physically one pipeline operating in both the United States and Canada, but is owned by two separate joint venture entities, one Canadian and the other U.S. Maritimes recommends that the Commission, in any final rule, adopt regulatory text making clear that interstate pipelines may freely communicate with their affiliates in Canada and Mexico, provided those affiliates are subject to appropriate regulation. Maritimes specifically proposes the following language:

> (ii) the definition of energy affiliate excludes . . . [;] and (3) affiliates that are engaged in natural gas or electric transmission activities for others, which activities are regulated by the state, provincial or national regulatory boards of the country outside the United States in which such affiliate's facilities are located.

In support hereof, Maritimes states as follows:

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[1] The Staff Analysis and Technical Conference concerned the Commission's Notice of Proposed Rulemaking ("NOPR") to modify its standards of conduct applicable to natural gas pipelines and transmitting public utilities and their affiliates. Standards of Conduct for Transmission Providers, IV FERC Stats. & Regs., Regulations Preambles ¶ 32,555 (Sept. 27, 2001).

RM01-10

POSITION SUMMARY

MARITIMES & NORTHEAST PIPELINE, L.L.C.

In its Analysis, Staff has proposed to exclude foreign affiliates from the new regulations proposed by the Commission in its NOPR. While this is a step in the right direction, Maritimes is concerned that the exemptive language proposed by Staff is not broad enough to capture cross-border transmission providers. Maritimes requests that any final rule preserve the ability of affiliated pipelines and their owners to engage in confidential and unencumbered communications. Specifically, Maritimes recommends the inclusion of the following language:

> (ii) the definition of energy affiliate excludes . . . [;] and (3) affiliates that are engaged in natural gas or electric transmission activities for others, which activities are regulated by the state, provincial or national regulatory boards of the country outside the United States in which such affiliate's facilities are located.

The Maritimes system is a newly constructed 650-mile pipeline that brings natural gas from the Sable Island area, offshore of Nova Scotia, to markets in New England and the maritime provinces of Canada. The Maritimes system is *physically* one pipeline, operating in both Canada and the United States. Maritimes is, however, *legally* two separate joint venture entities, one in Canada and one in the United States. These two entities are each owned by four separate companies, which include affiliates of two major gas producers, a Canadian natural gas pipeline company and a United States natural gas pipeline company.

The development and construction of Maritimes have required the close coordination of all of these affiliated companies in the United States and Canada. It is critically important to the development, expansion and seamless operation of the Canadian/U.S. pipeline network that there continue to be free and confidential communications between affiliated companies in the United States and Canada, and between project partners, joint venturers and operators that own and maintain such systems.

Projects such as Maritimes require an enormous capital outlay and years of planning and development by project partners. Such projects will require the coordinated and long-term efforts of project partners, project operators, producers and consumers. No company considering such a joint undertaking will be willing to invest the billions of dollars needed to construct, operate and expand the facilities if they cannot communicate freely and in confidence with the co-owners, partners and operating companies that develop, build and operate the facilities.

Failure to make clear that cross-border affiliate relationships may continue unimpeded will block the numerous benefits that such relationships can bring about. The Commission is urged to adopt Maritimes' proposed regulatory language, and is likewise urged to preserve free communications between entities involved in joint venture pipeline projects.

RELEVANT BACKGROUND INFORMATION REGARDING MARITIMES

Maritimes owns the U.S. portion of a newly constructed 650-mile pipeline engaged in the interstate transportation of natural gas, bringing natural gas from offshore Nova Scotia near the Sable Island area to markets in New England and the maritime provinces of Canada. The Canadian portion of this line is owned by Maritimes' Canadian affiliate, Maritimes & Northeast Pipeline, Limited Partnership ("Maritimes-Canada"). Maritimes and Maritimes-Canada provide approximately 530,000 Dth per day of incremental natural gas capacity on the Canadian side and approximately 440,000 Dth per day on a peak day basis on the U.S. side. The Canadian portion of the Maritimes mainline stretches 568 kilometers from St. Stephen, New Brunswick to Goldsboro, Nova Scotia. Maritimes transports gas from the United States-Canada border near Goldsboro, Nova Scotia, through Maine, New Hampshire, and Massachusetts to a terminus near Dracut, Massachusetts.

Maritimes is 75 percent indirectly owned by Duke Energy Corporation ("Duke"). WEI Holdings (U.S.) Inc., a subsidiary of Westcoast Energy Inc. ("Westcoast"), indirectly owned a 37.5 percent share of Maritimes prior to Westcoast's purchase by Duke. A 12.5 percent share is indirectly owned by ExxonMobil Corporation ("ExxonMobil"). The remaining 12.5 percent share of Maritimes is indirectly owned by Emera Inc. ("Emera").

Approximately 101 miles of Maritimes' U.S. mainline facilities, from Westbrook, Maine, to Dracut (the "Joint Facilities"), are jointly owned with Portland Natural Gas Transmission System ("PNGTS"). At Dracut, the Joint Facilities interconnect with the facilities of Tennessee Gas Pipeline Company ("Tennessee"). The Joint Facilities and the remainder of the U.S. portion of the Maritimes system are operated by a wholly-owned, indirect subsidiary of Duke, M&N

Operating Company.[2] Maritimes has also been authorized by the Commission to extend its system from Methuen, Massachusetts, to an interconnect with Algonquin Gas Transmission Company's ("Algonquin") HubLine Project facilities at Beverly, Massachusetts, in order to provide its existing customers with greater access to northeastern U.S. markets via the Algonquin system.

COMMENTS

I. <u>The New Rules, If Adopted, Should Exempt Affiliated Entities Operating Outside the United States and Foreign Pipelines That Interconnect Directly or Indirectly With U.S. Interstate Pipelines</u>.

Maritimes-Canada, the entity that owns and operates the Canadian portion of the overall Maritimes system, could arguably be considered an "energy affiliate" of Maritimes, the entity which owns and operates the U.S. portion of the Maritimes system. Unless corrected, this application of the term "energy affiliate" will force Maritimes and Maritimes-Canada to begin dealing with each other at arm's length, even though they own and operate what is physically a single pipeline. The adverse consequences of such a rule are obvious.[3]

Staff's proposed exemption of foreign affiliates from the "energy affiliates" definition is arguably insufficient to exempt closely coordinated cross-border affiliates from the harsh effects of the rules. Staff specifies in Section 358.3(d)(i) (the "energy affiliate" definition) that energy

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[2] St. Clair Pipelines, a wholly-owned, indirect subsidiary of Westcoast operates the Canadian portion of the Maritimes system.

[3] There are, additionally, jurisdictional problems with the Commission's forced disclosures of foreign corporations' business communications. Although the proposed rules ostensibly apply only to interstate pipelines, as a practical matter it is probable that those rules will reach much farther than interstate pipelines into the operations and practices of non-jurisdictional affiliates. The Commission has used the requirement in the current marketing affiliate rule that interstate pipelines and their marketing affiliates "function independently" as a means to control the behavior not just of the interstate pipeline, but of the marketing affiliate itself. *Amoco Production Co. and Amoco Energy Trading v. Natural Gas Pipeline Company of America*, 83 F.E.R.C. ¶ 61,197 (1998).

affiliate activities must take place "in U.S. energy or transmission markets." Despite this proposed text change, cross-border foreign affiliates may still be considered "energy affiliates" under the Staff's revised definition.

Due to their proximity and, in some cases, their interconnection with U.S. transmission facilities, Canadian affiliates are arguably "*engaging in or involved in transmission transactions in U.S. energy or transmission markets.*" While those affiliates do not participate in U.S. energy or transmission markets directly, it is conceivable that the Commission could take the position that activities and business decisions made by the cross-border affiliate, for example, the construction of new pipeline or storage facilities in Canada, extended periods of maintenance in Mexico, and the like, could influence activities and/or prices in U.S. markets.

A Canadian transmission facility that is regulated by the NEB or a provincial board could potentially qualify as an "other affiliated regulated transmission provider" under the exclusion for such entities at § 358.3(d)(ii)(1). However, the definition of "transmission provider" at § 358.3(a)(2) applies only to transmission providers that transport "pursuant to subpart A of part 157 or subparts B or G of part 284." Thus, foreign providers of transmission services cannot qualify for this exemption since no foreign affiliate operates under any section of the FERC's regulations. In sum, cross-border affiliates currently have an unclear status under the proposed regulations.

It would be poor policy for the Commission to make it more difficult for Canadian and U.S. energy companies to collaborate with one another. As the Commission well knows, Canadian natural gas imports are, and will continue to be, extremely important to the overall

U.S. energy market.[4] Consequently, it is important to continue to develop an interrelated energy infrastructure of the two nations. Cross-border application of the affiliate standards pf conduct would seriously undermine this goal. The Commission must clarify that Maritimes and Maritimes-Canada, and similarly situated U.S. transmission providers and their cross-border regulated affiliates, may continue to have unencumbered communications with one another.

The integration and coordination of U.S. transmission providers with their Canadian affiliates offers major operational efficiencies and is consistent with the goal of delivering the lowest priced energy supplies to U.S. markets. Among other things, such integrated activities offer greater operational ease to the shipper, access to wider and more diversified supply areas, and significantly lower overall operating costs due to economies of scale. These sorts of integrated cross-border activities are already occurring to a significant extent and should be encouraged to continue and further develop.

Subjecting Canadian transportation and storage affiliates to restrictions on communications and employment practices would serve no purpose, would be a disservice to shippers, and would constitute bad policy. These cross-border affiliate relationships do not involve the transfer of information from a regulated to an unregulated entity. At the same time, imposing the proposed rigid employment and communication rules will be highly expensive and burdensome. Alliance, for example, has provided some preliminary cost data in its NOPR

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[4] The Energy Information Administration ("EIA"), for example, has noted the sharp increases in natural gas imports from Canada have made that country the most important source of U.S. gas supplies, after the U.S. offshore and Gulf Coast regions. The EIA points out that lack of pipeline capacity has prevented access to large supplies of Canadian gas, but additional capacity from Western Canada and Eastern offshore Canada will contribute to meeting the need for increased U.S. gas supplies and to "further leveling of natural gas prices throughout North America."[4] These goals would be derailed by rules that prevented close coordination between cross-border natural gas transmission affiliates. *Deliverability on the Interstate Natural Gas Pipeline System*, EIA, 1998 ("EIA Report").

comments. If the Commission has any doubt about the need to exempt cross-border foreign affiliates, the Commission should focus upon the tremendous and needless expense that would be associated with segregating these affiliates.

Foreign pipelines that are interconnected either directly or indirectly with U.S. affiliates must be able to communicate with each other concerning important operational and business issues. Interference with such communications will adversely impact the existing, efficient flow of natural gas into the United States from foreign pipelines. Because the Maritimes pipeline from Goldboro, Nova Scotia to Dracut, Massachusetts is essentially a single pipeline system, Maritimes and Maritimes-Canada call upon each other frequently for operational information system pressures, flows, gas quality and production problems offshore Nova Scotia. They must communicate on expansions and the pursuit of new business. Often, it is critical that these communications remain confidential for competitive reasons.

These types of communications do not harm U.S. shippers or consumers in any way. In fact, these communications are beneficial to U.S. shippers because they help ensure efficient operation of the Maritimes system and allow for a seamless transportation service from the Nova Scotia shoreline to the U.S. market.

As proposed above, Section 358.3(d)(ii) should be revised to add a new clause specifically excluding cross-border affiliate relationships. While Maritimes is concerned specifically with U.S./Canadian relationships, the exemption should apply with equal force to U.S. transmission providers and their Mexican counterparts. A cross-border affiliate that is regulated by the National Energy Board ("NEB"), the Comisión Reguladora de Energia ("CRE") or the appropriate Mexican state or Canadian provincial agency poses no threat to competition. The Staff is correct to point out that "there is no reason to be concerned about the possibility that

a transmission provider will extend its market power by giving its foreign affiliates an undue preference . . . .[5] Staff expresses a similar lack of concern for the possibility that a transmission provider could transfer market power to an affiliate that is also a transmission provider.[6] Both rationales also apply with equal force to regulated cross-border affiliates. No party has produced any evidence that cross-border affiliates have abused -- or even could abuse -- their affiliate relationship.

Maritimes' proposed revision provides regulatory certainty and is in keeping with the spirit of the proposed rules -- to target for regulation only those affiliate relationships in which market power may be transferred. Maritimes urges adoption by the Commission of this proposed change.

II. Communications Between LLC Members, Partners and Joint Owners Should Not Be Subject to Disclosure or Limitation.

As discussed above, it is arguably the case that Maritimes-U.S. and Maritimes-Canada are "energy affiliates" and must be subjected to the onerous affiliate rules proposed in the NOPR. It is also arguably the case that Maritimes, a limited liability company ("LLC"), will confront corporate governance problems parallel to those faced by corporations and their subsidiaries: *i.e.*, that communications by Maritimes-U.S. with its owners would be subject to all of the rigorous restrictions called for under the NOPR.

It is vital that Maritimes retain the ability to have confidential and unencumbered communication with its project owners. As specifically concerns the operation and management of Maritimes, Maritimes' officers and personnel need to be able to communicate freely and confidentially with the members of Maritimes and vice versa. At management committee

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[5] Staff Analysis at 10.

[6] *Id.* at 8-9.

meetings, the Maritimes organization must be able to discuss, without impediments, all corporate strategy, operational, transactional, safety, competitive positioning, new business opportunities and other issues pertaining to operation and management of the Maritimes system, both the U.S. and Canadian side. Similarly, Maritimes must be able to have unencumbered communications with its operating company and the operating company for Maritimes-Canada.

Maritimes, like other LLCs and partnerships with multiple members/partners formed to construct and own a major pipeline or power plant, has no employees of its own. Rather, Maritimes is managed by a management committee made up of representatives from each member making major decisions for the company. The day-to-day management of Maritimes is handled by M&N Management Company, a Duke subsidiary, acting as the Managing Member of Maritimes. The definitions of "affiliate," "control," and "energy affiliate" -- even with Staff's recommended text changes -- are arguably broad enough to make M&N Management Company an affiliate of Maritimes, subject to the rigid restrictions set forth under the NOPR.[7] Taken to an extreme, employees of M&N Management Company would be required to make virtually every decision regarding the operation of the Maritimes system public. This result would, of course, require project sponsors to modify existing business structures, possibly entailing significant tax consequences, even though there is no apparent benefit served by making communications between a regulated entity and its management company "affiliates" subject to the proposed rules.

[7] Staff's proposed exclusion of "service companies" from the definition of "energy affiliate" at § 385.3(d)(ii) may be insufficient in light of the lack of clarity as to what constitutes a "service company" and, again, the meaning of "transmission transaction in U.S. energy or transmission markets."

As discussed above, it would hobble Maritimes competitively if it were forced to reveal, for public inspection, its business confidences, most of which will concern the "transmission system of the transmission provider or the transmission system of another." (§ 385.5(a)(2)). Moreover, such a rule would provide a powerful disincentive against the formation of joint ventures, partnerships, LLCs, co-ownerships and other such relationships that would facilitate, or even enable, the construction, operation and expansion of cross-border transmission facilities. In other contexts, the Commission has favored such relationships as highly beneficial to pipelines, shippers, and the environment.[8] These business combinations are highly effective in spreading the recognized risk associated with new pipeline projects and in formation of the significant amounts of capital necessary for construction or expansion of such projects. Indeed, most, if not all, of the major greenfield pipeline projects constructed (or presently under construction) in the United States during the last five years have been owned by multi-member/partner entities that are affected by the proposed rules in a manner similar to Maritimes.[9] That companies would come together to share the financial burden of these projects, often costing $1 billion or more, is not surprising. That practice certainly should not be discouraged, particularly when there is no reason to do so.

The applicability of the proposed rule to LLCs such as Maritimes would establish a policy that contradicts the Commission's often-expressed desire to provide incentives to the

[8] *See, e.g., Gulfstream Natural Gas System, L.L.C.*, 91 F.E.R.C. ¶61,119 at 61,468 (2000) ("*Gulfstream*"); *Maritimes & Northeast Pipeline, L.L.C.*, 76 F.E.R.C ¶ 61,124 (1996) (Phase I), 80 F.E.R.C. ¶ 61,134 (1997), 84 F.E.R.C. ¶ 61,130 *on reh'g* 85 F.E.R.C. ¶ 61,120 (1998) (Phase II) ("*Maritimes*"); *Portland Natural Gas Transmission Sys.*, 76 F.E.R.C. ¶61,123, at 61,659 (1996), *modified Portland Natural Gas Sys.*, 80 F.E.R.C. ¶ 61,134 (1997) ("*PNGTS*").

[9] *See, e.g., Alliance Pipeline L.P.*, 80 F.E.R.C. ¶61,149 (1997); *Horizon Pipeline Co., L.L.C.*, 92 F.E.R.C. ¶ 61,205 (2000); *Vector Pipeline L.P.*, 85 F.E.R.C. ¶ 61,083 (1998); *Guardian Pipeline L.L.C.*, 91 F.E.R.C. ¶ 61,285 (2000); *Gulfstream*; *Maritimes*, *PNGTS*.

energy industry to construct new pipeline infrastructure. The current administration has been careful to stress the importance of the role that new gas pipeline infrastructure will play in addressing the nation's energy problems.[10] Establishing rules that are unfriendly to the formation of partnerships, LLCs and other such business combinations is directly contrary to the Commission's recent efforts to streamline the certification application process[11] and to implement other policies and practices that encourage and facilitate pipeline construction.[12] The Commission must carefully consider any measure that would harm the formation of these beneficial business relationships. Clearly, the rigid restrictions proposed in Sections 358.4 and 358.5 should not apply to the operation and management of partnerships and other such business combinations.

The importance of carefully limiting the scope of the proposed rule is illustrated by considering just one of Maritimes' owners. Maritimes includes as an owner subsidiaries of ExxonMobil. ExxonMobil also has affiliates which are shippers on the Maritimes system. Maritimes and its owners need to be able to retain their ability to have confidential dialogue with one another about such things as customer satisfaction issues, new or expanded services, contract negotiations, preliminary discussions on whether a contract will or will not be renewed, and so

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[10] *See, e.g.,* EIA Report.

[11] *See, e.g., Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on reh'g and clarifying statement of policy*, 90 FERC ¶ 61,128, *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000); Order No. 603, FERC STATS. AND REGS. ¶ 31,073 (APR. 29, 1999), *order on reh'g*, Order No. 603-A, FERC STATS. AND REGS. ¶ 31,081 (Sep. 29, 1999), *order on reh'g,* Order No. 603-B, FERC STATS. AND REGS. ¶ 31,094 (Feb. 28, 2000).

[12] *See, e.g., Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States,* Docket No. EL01-47-000, *mimeo* at 18 (requesting comments on the Commission's proposal to encourage new pipeline construction into California by "offering rate incentives to expedite construction of projects that will make additional capacity available this summer on constrained pipeline systems.")

on. The Commission already requires extensive reporting on all shipping transactions, including those between Maritimes and ExxonMobil. The material terms of all transportation agreements between these parties, including all discounts, if any, granted ExxonMobil will be publicly posted.

The Commission should not heap additional harmful and burdensome disclosure requirements upon participants in joint ventures. As discussed above, such a requirement would provide a disincentive toward formation of partnerships, LLCs and other co-ownership relationships, would harm business innovation, would place affiliates of interstate pipelines at a competitive disadvantage, and would discourage pipeline construction in general.

CONCLUSION

For the reasons given above, any final rule should make clear that interstate pipelines may freely communicate with their affiliates in Canada, provided those affiliates are subject to regulation by the NEB or an appropriate provincial authority. Free communications between LLC members, Partners and Joint Owners should also be assured under any new regulations. Maritimes urges the Commission to clarify the status of cross-border affiliates and to adopt the revised regulatory text provided above.

Respectfully submitted,

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June 28, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of June, 2002, served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

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