

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Enhanced Natural Gas Market Transparency)	
)	Docket No. RM13-1-000
)	

**COMMENTS OF THE
AMERICAN PUBLIC GAS ASSOCIATION**

Pursuant to the Notice of Inquiry (“NOI”) ¹ issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) in the above-captioned proceeding on November 15, 2012, the American Public Gas Association (“APGA”) hereby submits limited comments on the NOI.

APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with some 700 members in 36 states. Overall, there are some 950 publicly-owned distribution systems in the United States. Publicly-owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

COMMENTS

In the NOI, the Commission states that to promote transparency in the interstate natural gas market, it may issue a rule pursuant to Section 23 of the Natural Gas Act (“NGA” or “Act”) to require market participants to report additional information on natural gas sales for resale. The Commission sets forth specific additional information that it believes should be reported and asks for comments on a number of related questions.

¹ 141 FERC ¶61,124 (2012).

Transparency Issues – Data Collection and Data Dissemination

As underscored in the NOI, market transparency is not only a goal, but an essential requirement to “assure prices [of sales of natural gas for resale in the interstate market] are a result of fundamental supply and demand forces and not the result of market manipulation.”² For these very reasons, APGA has historically encouraged the pursuit of market transparency and fully supported the Commission’s efforts to enhance market transparency.³

APGA takes the same position with respect to the proposals discussed in the NOI, with the caveats noted below.

First, APGA assumes that the Commission believes that it needs the indicated data (per NOI ¶ 17) to properly oversee the markets and to protect market participants from market manipulation. If that is the case, then APGA supports the Commission’s *collection* of such data.

Second, the Commission needs to understand there is an important difference between collecting sensitive market data in a timely fashion in order to monitor markets, and the release to the public of such commercially sensitive data. While APGA does not oppose the release of such data on an aggregated basis, it strongly opposes the release of the type of individualized commercially sensitive market data that the Commission is seeking to collect. APGA’s experience is that there are large players in the market that are able to use such public data in a fashion to discern market strategies, patterns, trends and the like that are not otherwise

² NOI, P 14.

³ See, e.g., “Comments of the American Public Gas Association,” filed September 10, 2004, in “*Enhanced Reporting of Natural Gas*,” FERC Docket No. AD04-10; “Comments of the American Public Gas Association” filed on June 11, 2004, in *Price Discovery in Natural Gas and Electric Markets*, FERC Docket No. PL03-3; “Comments of the Coalition for Energy Market Integrity and Transparency on Safe Harbor” filed on July 10, 2003, in *Natural Gas Price Formation*, FERC Docket No. AD03-7; “Comments of the American Public Gas Association” filed on August 6, 2003, in *Regulation of Cash Management Practices*, FERC Docket No. RM02-14; “Comments of the American Public Gas Association,” filed on August 6, 2003, in *Quarterly Financial Reporting and Revisions to the Annual Reports*, FERC Docket No. RM03-8; “Comments of the American Public Gas Association,” filed on December 20, 2001, in *Standards of Conduct for Transmission Providers*, FERC Docket No. RM01-10.

knowable, and simply delaying the release of such data is not adequate protection against such activity. APGA submits that unfortunately public disclosure of the particularized data that the Commission now wants to collect will foster gaming and undermine arms-length negotiation, with the outcome being that smaller players, such as APGA members, are not operating on a level playing field.

APGA observes that its position is not inconsistent with NGA Section 23, which, as the Commission correctly notes (NOI at note 27), requires the Commission to consider whether public dissemination of this information could be detrimental to the operation of an effective market (NGA Section 23(b)(1)) and requires the Commission to ensure that consumers and competitive markets are protected from the adverse effects of anticompetitive behavior that could be facilitated by untimely disclosure of transaction information (NGA Section 23(b)(2)).

APGA notes that the Department of Justice (“DOJ”) has filed comments in this proceeding focusing on “the competitive effects of the public dissemination of reported information”⁴ and urging the Commission “to avoid unnecessarily increasing the likelihood of coordination among gas suppliers”⁵ DOJ suggests in this regard that the Commission consider keeping the data confidential, distributing it only in limited circumstances, or at a minimum “aggregating, masking, and/or lagging the release of such information.”⁶ APGA believes the Commission should err on the side of caution.

Third, to the extent that the Commission follows through on the NOI with the issuance of a NOPR on this subject, it should as part of that NOPR propose the discontinuance of the Form

⁴ DOJ Comments at 1.

⁵ *Id.* at 9.

⁶ *Id.*

552 filing requirement as redundant and therefore unnecessary for its functions and unduly burdensome for the reporting entities.

Scope of FERC Jurisdiction

The NOI raises questions regarding the “scope of the transactional reporting requirement.”⁷ The Commission’s sensitivity to this issue is appropriate given the relatively recent decision of the Fifth Circuit in *Texas Pipeline Ass’n v. FERC* (“*Texas Pipeline*”).⁸ For the reasons given by the Fifth Circuit and below, the Commission should explicitly confirm in any notice of proposed rulemaking and ensuing final rule in this docket, if one issues, that its jurisdiction over “market participants” under NGA Section 23(a)(3)⁹ does not confer jurisdiction over entities, such as municipalities, that are exempt from FERC jurisdiction under NGA Section 1(b).¹⁰

In *Texas Pipeline*, the court rejected the Commission’s argument that, pursuant to its authority under Section 23 of the Act, the Commission could require intrastate pipelines as “market participants” to provide data to the Commission. The court held that under NGA Section 23, the Commission could only compel information from entities that were subject to the Commission’s jurisdiction under Section 1(b) of the Act. Because intrastate pipelines are not subject to Section 1(b) jurisdiction, the court concluded that the Commission could not compel an intrastate pipeline to provide information under Section 23 of the Act.

The same conclusion applies equally to municipal organizations, such as municipal local distribution companies. As the Commission has long recognized, a municipal organization is not

⁷ NOI, P.19.

⁸ 661 F.3d 258 (5th Cir. 2011); *see* NOI, P 7.

⁹ 15 U.S.C. §717t-2.

¹⁰ 15 U.S.C. §717(b).

subject to Section 1(b) of the Natural Gas Act. *See e.g., Northwest Alabama Gas District* (“[W]e are not vested with authority to regulate a municipality under the NGA.”)¹¹; *see also, Panhandle Eastern Pipe Line Co. v. Rolla* (“We hold that the plain language of the Act . . . expressly exclude (sic) municipalities from the ambit of Commission jurisdiction.”).¹² Accordingly, the Commission does not have authority under Section 23 of the Act to require municipal entities to provide information contemplated under the NOI, and it should rule accordingly so that there is no confusion on this issue going forward.¹³

The fact that APGA members are not subject to the Commission’s NGA Section 1(b) jurisdiction and thus would not be market participants subject to any enhanced reporting requirements that may be forthcoming in this proceeding does not take away from APGA’s interest and stake in the outcome of this proceeding. Presumably the wholesale transactions to which APGA’s members are parties will be reported by their counterparties to the Commission, so the Commission will have access to the sensitive data that it seeks to collect for purposes of market monitoring. As noted, APGA supports that outcome; APGA’s concern is that this particularized and commercially sensitive data should not be released to the public, even on a delayed basis, unless it is aggregated or otherwise masked in such a fashion to preclude misuse of such data by the more sophisticated market players in the manner described above.

¹¹ 42 FERC ¶61,371 at 62,086 (1988).

¹² 26 FPC 736 (1961).

¹³ Of course, this exemption should not meaningfully affect the Commission’s data collection efforts since APGA’s members make almost exclusively retail sales, and the wholesale sales to them would presumably be reportable by their counterparties.

CONCLUSION

APGA respectfully requests that, should the Commission issue a rule to require the reporting of additional information by market participants under NGA Section 23, it take into consideration the comments above, including (1) acknowledgment of the importance of protecting the confidentiality of commercially sensitive market data related to individual transactions and (2) an explicit recognition that municipal entities, by reason of their exempt status under NGA Section 1(b), are not market participants subject to the FERC reporting requirements under NGA Section 23.

Respectfully Submitted,

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