D.P.U. 94-104-B

Investigation by the Department of Public Utilities on its own motion for the purpose of setting standards for the recovery by Massachusetts gas utilities of FERC Order 636-related transition costs billed by interstate gas pipeline companies.

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ORDER ON APPEAL OF HEARING OFFICER RULING DENYING LATE PETITION TO INTERVENE BY MASSPOWER, INC. AND ALTRESCO PITTSFIELD, L.P.

I. INTRODUCTION

On June 28, 1994, the Department of Public Utilities ("Department") opened an investigation on its own motion for the purpose of setting standards for the recovery by Massachusetts gas utilities of Federal Regulatory Energy Commission ("FERC") Order 636-related ("Order 636") transition costs billed by interstate gas pipeline companies. See D.P.U. 94-104 (1994).

On September 19, 1994, the Department established a procedural schedule by which discovery would be completed by November 30, 1994, and hearings would be held December 9, 12, 14, 1994 and January 5 and 6, 1995. On December 9, 1994, a briefing schedule was established by which initial briefs are due on January 19, 1995 and reply briefs on January 26, 1995.

On December 23, 1994, MASSPOWER, Inc. ("Masspower") and Altresco Pittsfield, L.P. ("Altresco") (collectively, "Petitioners") filed a Petition to Intervene Late ("Petition") wherein the Petitioners stated that they were substantially and specifically affected by this proceeding, that no parties to the proceeding shared the Petitioners' particular interest in the effect of the proceeding, and that good cause existed for granting this petition.[1]

On December 30, 1994, Boston Gas Company, Colonial Gas

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1 The Petitioners also requested that they be allowed limited participant status for the purpose of submitting briefs should the Department deny their Petition (Petition at 4).

Company, Commonwealth Gas Company, Essex County Gas Company, Fall River Gas Company, Fitchburg Gas and Electric Light Company and North Attleboro Gas Company (collectively, "Respondents") filed their response to the Petition wherein they requested that Petitioners be limited to the filing of briefs and not be allowed to cross-examine witnesses, propound discovery or present direct testimony (Response at 3).

On January 4, 1995, the Hearing Officer issued a Ruling denying the Petition based upon a finding that Masspower and Altresco did not assert a specific or compelling reason to excuse the untimeliness of their filing and that allowing the petition would risk undue delay or disruption to the orderly conduct of the proceeding (Ruling at 2-3).

On January 11, 1995, The Berkshire Gas Company ("Berkshire") submitted a letter to the Department indicating their support for the request of Altresco to participate in the proceeding by means of filing a brief, in accordance with the established procedural schedule (Berkshire Letter). In its letter, Berkshire states that no party objects to Altresco's and Masspower's participation in this proceeding for the purpose of filing briefs and that based on an existing and positive contractual relationship which Berkshire has with Altresco, it does not want to restrict Altresco's presentation of positions to the Department (id.).

Also on January 11, 1995, Bay State Gas Company ("Bay State") filed a Motion in Support of Petitioner's request to

participate as interested persons, since Petitioners have long-term special contracts with transportation rates which have been approved by the Department and may therefore provide the Department with insights on the policy and legal reasons why transition costs should not be applied to such long-term special contracts (Bay State Motion at 2). No other responses to Petitioners' appeal were received.

II. POSITION OF MASSPOWER AND ALTRESCO ON APPEAL

Petitioners appeal the Hearing Officer Ruling on the grounds that the Ruling is arbitrary, fails to apply the appropriate standard of review for petitions of this kind, and is contrary to sound public policy (Appeal at 3).

Specifically, Petitioners state that in making his Ruling the Hearing Officer erred in not considering whether the Petitioners were substantially and specifically affected by the outcome of the proceeding (id.). Instead, they stated, the Hearing Officer found that the Petitioners had not asserted a specific or compelling reason for filing a late Petition to Intervene and therefore, did not consider whether the Petitioners were substantially and specifically affected by the proceeding (id.). Petitioners claim that in considering a motion to intervene late, the decisionmaker must consider the interest of the moving party in the proceeding at hand (id. at 4). Finally, Petitioners argue that the Hearing Officer erred in citing G.L. c. 30A §10(4) and 220 C.M.R. 1.03(1)(c) as support for his

decision to deny the joint petition to intervene without considering whether the Petitioners were substantially and specifically affected by the proceeding (id. at 7-8).

With regard to their interest in this proceeding, Petitioners note that they ship substantial volumes of natural gas over Local Distribution Companies' systems and, therefore, any change in rates beyond those contemplated in their service agreements could jeopardize the financial viability of their cogeneration facilities (id. at 8). Also, Petitioners note that they never made use of the firm sales services that gave rise to post-Order 636 transition costs (id.). Finally, Petitioners state that before the FERC's issuance of Order 636, Petitioners had entered into financing arrangements for their cogeneration projects in reliance upon Department-approved firm transportation contracts with Berkshire and Bay State (id.).

Petitioners also state that their interests in this proceeding are unique and that it would be inefficient to leave unanswered Order 636 transition cost questions as they relate to previously executed firm transportation agreements (id. at 9).

With regard to the reason for delay, the Petition states that the Petitioners only learned about the docket when Bay State informed Masspower thereof on December 21, 1994. The Petitioners claim that Masspower reasonably relied upon its contractual right to be informed of any Department proceeding that could affect the terms of its agreement (id. at 9).

Petitioners, therefore, request that they be granted intervenor status for all remaining phases of this proceeding or, in the alternative, be granted Limited Participant status for the purpose of submitting briefs (Id. at 3).

III. STANDARD OF REVIEW

In ruling on petitions to intervene, the Department must balance the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion. See New England Telephone and Telegraph Company, D.P.U. 89-300, at 5 (1990); NYNEX D.P.U. 94-50 (July 22, 1994)(Order on Appeal by Mark Brown of Hearing Officer Ruling Denying Late-Filed Petition to Intervene). The Department's interest is not confined to the instant proceeding but encompasses a general need for procedural regularity and timeliness that runs through all of its proceedings.

In evaluating a late-filed petition to intervene, the Department has also considered (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A (1993); NYNEX D.P.U. 94-50, at 3 (July 22, 1994).[2]

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2 Petitioners assert that the Department must consider whether a petitioner in a motion to intervene is substantially and specifically affected. The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding; see 220 C.M.R. §1.03 (1)(b); see also G.L. c. 30A, § 10; this is also a requirement in a late-filed petition to intervene.

The Department has denied petitions for late intervention solely on the issue of timeliness. See, e.g., New England Power Company, D.P.U. 91-115 (1992).

IV. ANALYSIS AND FINDINGS

A petition is untimely if it fails to conform to the filing dates established by the Department's regulations and the docket's Order of Notice. See 220 C.M.R. 1.03; Order of Notice, D.P.U. 94-104 (June 28, 1994). In determining whether a late petition to intervene or otherwise participate should be allowed, the Hearing Officer in this case considered whether there was a specific and compelling reason for the untimely filing. We concur with the Hearing Officer's conclusion that Petitioners offered no specific and compelling reason for the untimely filing. The request to intervene late was filed approximately five months after the Department-imposed and widely-published deadline for intervention[3], approximately two months after the submission of all pre-filed testimony, approximately one month after the close of the discovery period, and after the examination of all but one witness. Standards for procedural

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However, a showing that a petitioner is substantially and specifically affected is not and cannot be determinative on the question of intervention. See sec. IV, supra. It is only one of the factors that we may consider.

3 The Order of Notice was published in The Boston Globe, Boston Herald, Springfield Union News, Berkshire Eagle, and the Worcester Telegram. The publication established July 6, 1994 as the final date for intervention in this proceeding.

timeliness are essential to efficient management of the Department's crowded docket. Consistent with the flexibility of modern pleading and practice, adherence to and enforcement of these standards must be even-handed or will risk constant wrangling over why one dereliction was excused and another not. In the interest of administrative efficiency, once it has been determined that no specific or compelling reason exists for excusing the late filing of a petition, it is not necessary to reach and consider whether Petitioners are substantially or specifically affected by this proceeding[4]. Finally, the Hearing Officer was correct in stating that allowing intervention of any kind at this late date would risk undue delay or disruption to the orderly conduct of the proceeding. The intervention of a new participant so late in a proceeding, even for the limited purpose of briefing, has significant potential for disruption, for

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4 The Petitioners received notice of the present proceeding by publication in accordance with the Order of Notice. It is a potential petitioner's personal obligation to be aware of notices of proceedings which may interest said potential petitioner. A petitioner's pleading the failure of another (in this case, Bay State) as an excuse for his own inaction is singularly unpersuasive and does not absolve him of his own omissions. Thus, even assuming *arguendo* that we did find that Petitioners were substantially and specifically affected by this proceeding, we would nevertheless deny the Petition based on the lack of a specific or compelling reason for the untimely filing. A day or week late *may* be one matter, but five months late lies outside *the* zone of reasonableness and excusability. Moreover, filing a petition to intervene three weeks before briefs are due is unreasonable.

example, by raising issues or perspectives on issues that have not been developed on the record. One of the duties of a hearing officer is to conduct orderly proceedings. See Massachusetts Electric Company, D.P.U. 94-112 (1994).[5] Here, Petitioners' request to be granted full intervenor status for "all remaining phases of this proceeding," or in the alternative, Limited Participant status for the purpose of filing briefs, raises the same issue, since the only remaining phase of this proceeding is the submission of briefs from the parties. Moreover, given the Petitioners' failure to participate in this proceeding earlier, the granting of any rights of appeal would be inappropriate.

Therefore, we find that the Hearing Officer did not err in his analysis of the Petition.

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5 D.P.U. 94-112 involved a similarly untimely filing by one of the present petitioners.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the appeal of MASSPOWER, Inc. and Altresco Pittsfield, L.P. from the Hearing Officer Ruling on their Motion to Intervene Late in all remaining phases of this proceeding is hereby denied; and it is

FURTHER ORDERED: That the alternative request of MASSPOWER, Inc. and Altresco Pittsfield, L.P. to be granted Limited Participant status for the purpose of submitting briefs is also denied.

By Order of the Department,

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Kenneth Gordon, Chairman

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Mary Clark Webster, Commissioner