

125 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

City of Toccoa, Georgia

Docket No. CP08-437-000

ORDER ISSUING SERVICE AREA DETERMINATION

(Issued October 16, 2008)

1. On July 11, 2008, the City of Toccoa, Georgia (Toccoa) filed an application under section 7(f) of the Natural Gas Act (NGA)¹ requesting that the Commission determine a service area within which Toccoa may, without further Commission authorization, construct, enlarge, and expand its facilities. Toccoa also requests that it be considered a local distribution company (LDC) for purposes of section 311 of the Natural Gas Policy Act of 1978 (NGPA).² Further, Toccoa requests a waiver of the reporting and accounting requirements, as well as other regulatory requirements ordinarily applicable to natural gas companies under the NGA and NGPA.

2. For the reasons discussed below, we will grant Toccoa's requests.

I. Background

3. Toccoa is a city in northeast Georgia and a municipal corporation created by the laws of Georgia. Toccoa owns and operates a natural gas distribution system that serves approximately 6,300 customers in Stephens, Elbert, Hart, Franklin, Habersham, and Rabun Counties, Georgia. Toccoa's distribution system consists of approximately 333 miles of distribution and service lines with an annual throughput of an estimated 1.2 billion cubic feet. Toccoa's distribution system in Georgia has been in operation since 1952.

¹ 15 U.S.C. §§ 717 – 717z (2000).

² 15 U.S.C. §§ 3301 – 3432 (2000).

4. Since 1999, Toccoa has operated 58 miles of 8-inch-diameter pipeline facilities, known as the Northern Expansion facilities, that originate five miles south of Toccoa and extend in a westerly direction before turning north to provide retail service to the communities of Tallulah Falls, Tiger, Clayton, Mountain City, and Dillard, Georgia. The Northern Expansion facilities also cross the Georgia/North Carolina border and follow the right-of-way for U.S. Highway 441 before terminating in the Town of Franklin, North Carolina (Town of Franklin).³ The Northern Expansion facilities serve approximately 700 retail customers in North Carolina.⁴ Most of the customers are in the Town of Franklin, but the facilities also provide service to a small number of customers from farm taps in Macon County, North Carolina where the Town of Franklin is located. The annual throughput associated with service in North Carolina is approximately 75,000 Mcf.

5. In order to construct, own, and operate the Northern Expansion facilities, Toccoa and the Municipal Gas Authority of Georgia (MGAG) filed a joint application with the North Carolina Utilities Commission (NCUC).⁵ The NCUC approved the application and the tariff under which service is provided to retail customers in the Town of Franklin and Macon County.⁶

6. Prior to the Toccoa proceeding, Toccoa states that the NCUC granted the state franchise for local gas distribution service in Macon County to the Public Service Company of North Carolina (PSCNC). At the Toccoa hearing, the PSCNC stated that it was not feasible for it to provide natural gas service in Macon County and that it did not object to Toccoa's providing such service.

³ Approximately 46 miles of the Northern Expansion facilities are in Georgia and 12 miles are in North Carolina.

⁴ The distribution system in the Town of Franklin consists of lines that are two inches or less in diameter.

⁵ The MGAG was formed in 1987 by an Act of the Georgia General Assembly to assist municipal members who own and operate natural gas distribution systems. MGAG is the passive owner of the Northern Expansion facilities and issued bonds to provide the necessary financing for the construction of the facilities. MGAG leases the facilities to Toccoa and receives as payment amounts equal to the debt service on the bonds. Once the bonds are paid, ownership of the Northern Expansion facilities will transfer to Toccoa. Toccoa constructed the Northern Expansion facilities and operates the facilities.

⁶ Order issued December 8, 1998, in Docket No. G-41.

II. Proposals

7. Toccoa requests a determination that its service area includes the Northern Expansion facilities beginning at the northern city limits of Dillard, Georgia along U.S. Highway 441 (which is the northern-most and furthest downstream Georgia community served by Toccoa), crossing the Georgia/North Carolina border, and terminating at the intersection of U.S. Highway 441 and North Carolina Highway 64 in Macon County. The proposed service area also includes all of the facilities within the Town of Franklin. In addition, Toccoa states that it is requesting a service area determination for Macon County, even though it provides service only within the Town of Franklin and to farm taps along the Northern Expansion facilities route, because the NCUC authorized Toccoa to serve all of the communities in Macon County.

8. Toccoa asserts that it does not make sales for resale in the proposed service area and does not plan to do so in the future. Rather, Toccoa states that all sales in the proposed service area will be to residential, commercial, and industrial end users. Toccoa also contends that it does not operate a transmission system, that no other company provides retail gas service in the requested service area, and that it has submitted to the jurisdiction of the NCUC for the services it renders in the Town of Franklin and Macon County.

9. Toccoa contends that it is making a request for a service area determination at this time because it was not aware until recently about the *Intermountain Municipal Gas Agency (Intermountain)* decision, which found that a municipality that owns and operates pipeline facilities that cross state boundaries is subject to the Commission's jurisdiction under the NGA.⁷ Prior to learning about the *Intermountain* decision, Toccoa states that it assumed that as a municipality it was not subject to the Commission's jurisdiction.

10. In addition, Toccoa requests a determination that it qualifies as an LDC for NGPA section 311 purposes. Finally, Toccoa requests a waiver of all reporting and accounting requirements that are normally applicable for natural gas companies under the NGA and NGPA.

III. Interventions

11. Notice of Toccoa's application was published in the *Federal Register* on July 28, 2008 (73 Fed. Reg. 43,737). The NCUC and the United States Department of the Interior filed notices of intervention.

⁷ 97 FERC ¶ 61,359 (2001), *order denying reh'g*, 98 FERC ¶ 61,216 (2002).

12. The United States Fish and Wildlife Service (FWS) protested Toccoa's application. Toccoa filed an answer to the protest. Answers to protests are not allowed under our rules.⁸ Nevertheless, we will accept Toccoa's answer to the FWS' protest because the answer provided information that assisted us in our decision making.

IV. Discussion

A. Section 7(f) Determination

13. Section 7(f)(1) of the NGA provides that:

The Commission, after a hearing on its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service areas determined by the Commission, a natural gas company may enlarge or extend its facilities without further authorization.

14. We have recognized that a section 7(f) service area determination is appropriate where a company is primarily engaged in the local distribution of natural gas, but is subject to the Commission's NGA jurisdiction because its facilities cross state lines.⁹ The purpose of section 7(f) is to enable companies to enlarge or expand their distribution facilities to supply market requirements without prior Commission approval. Among the factors considered in determining if a company qualifies for a service area determination are whether (1) state or local agencies regulate the company's rates; (2) the company has an extensive transmission system; (3) authorizing the service area will have a significant effect on neighboring distribution companies; and (4) the company makes sales of gas for resale.

15. We find that Toccoa has submitted to the jurisdiction of the NCUC for the services it renders in Macon County, North Carolina, that no other company provides retail gas service in the requested service area, that Toccoa does not operate a transmission system, and that Toccoa does not make sales for resale in the proposed service area and does not plan to do so in the future. Thus, for the reasons stated above, we will grant Toccoa's section 7(f) service area determination, as requested. The service area determination will relieve Toccoa of Commission regulations otherwise applicable to the enlargement or

⁸ 385 C.F.R. § 385.213(a)(2) (2008).

⁹ See, e.g., *Indiana Gas Co.*, 95 FERC ¶ 61,075 (2001); *North Shore Gas Co.*, 83 FERC ¶ 61,149 (1998) (*North Shore*); *Mountain Fuel Supply Co.*, 82 FERC ¶ 61,057 (1998).

extension of its facilities within the service area and the transportation of gas in interstate commerce within the service area.

16. As for the request that Toccoa be treated as an LDC for purposes of section 311 of the NGPA, we have previously determined that section 7(f) companies should be treated as such.¹⁰ Although Toccoa owns pipeline facilities that cross the Georgia/North Carolina border, it will operate as an LDC within its service area.

B. FWS' Protest

1. FWS' Pleading

17. The FWS contends that the Commission should not waive the regulations that provide oversight of Toccoa's current or future expansion of distribution facilities in Macon County because Toccoa operates as an interstate system. The FWS asserts that federal agencies are required to assess the effects of their actions and to consult with the FWS on any action that may affect a listed species or its designated critical habitat and to prepare a biological assessment for any "major federal activity affecting the quality of the human environment." The FWS requests that the Commission initiate interagency coordination under the Energy Policy Act of 2005 (EPAAct)¹¹ and consultation under the Endangered Species Act of 1973 (ESA)¹² to determine the direct impacts associated with Toccoa's proposals, as well as cumulative and secondary impacts from future operation, gas distribution, and the enlargement or expansion of Toccoa's facilities.

18. The FWS also alleges that the Northern Expansion facilities cross wetlands and streams, endangered species habitats, and designated critical habitats but that it has no record of contact with Toccoa concerning the construction of these facilities. The FWS asserts that the Northern Expansion facilities may have been constructed without adequate contact and consultation with the FWS.

2. Toccoa's Answer

19. Toccoa contends that the FWS' assertions are inconsistent with the explicit provisions in section 7(f), which is to enable a natural gas company engaged in the local distribution of natural gas, but subject to Commission jurisdiction only because it crosses state lines, to expand or enlarge its system without Commission oversight. Toccoa

¹⁰ *E.g., Energy North Natural Gas, Inc.*, 106 FERC ¶ 61,318 (2004); *North Shore*, 83 FERC at 61,660.

¹¹ 109 Pub. Law 58, 119 Stat. 594 (2005).

¹² 16 U.S.C. §§ 1531, *et seq.* (2000).

asserts that EAct coordination is limited to projects that seek an NGA section 7(c) authorization and that ESA consultation is limited to projects that involve construction. Toccoa points out that neither situation is present here.

20. Finally, Toccoa asserts that it was in contact with the FWS and the United States Army Corps of Engineers, among others, when it constructed the Northern Expansion facilities and made costly changes to the design of the facilities in direct response to the FWS' requests. Specifically, Toccoa alleges that (1) the FWS recommended directional drilling under all stream and wetland crossings to avoid potential erosion and sediment impacts to the Spotfin chub and that it complied; (2) the FWS requested additional measures for erosion and sediment control and that it incorporated the requests into its plans for construction; (3) it provided an environmental assessment and a biological assessment of the North Carolina portion of the project even though it had no obligation to perform either analysis; and (4) it provided erosion control plans to the North Carolina Department of Environment, Health, and Natural Resources, which approved the plans.¹³

3. Commission Response

21. Under the express language of section 7(f)(1), the service area determination issued here relieves Toccoa of Commission regulation otherwise applicable to the enlargement or extension of its facilities within the service area and the transportation of natural gas in interstate commerce within the service area. The FWS is concerned about the waiver of Commission oversight.

22. We find that the FWS' concerns are unfounded. Even though we granted a service area determination here, Toccoa remains subject to all applicable federal, state, and local environmental and safety laws governing the Northern Expansion facilities and any other facilities Toccoa may decide to construct and operate in the future within the service area. Since Toccoa is subject to all applicable environmental and safety laws, we find that it is not necessary to initiate interagency coordination and consultation in this proceeding, particularly since Toccoa did not propose to construct any facilities. Thus, we will deny the FWS' protest.

C. Waiver of Regulatory Requirements

23. With respect to Toccoa's request for waiver of regulatory requirements, we note that, notwithstanding a section 7(f) service area determination, a company remains a natural gas company under the NGA.¹⁴ In granting section 7(f) service area

¹³ See Toccoa's August 25, 2008 answer, Affidavit of David Ashley.

¹⁴ *E.g.*, *Kansas Power and Light Co.*, 47 FERC ¶ 61,331, at 62,148 (1989).

determinations, however, we have included appropriate regulatory waivers. Here, no regulatory gap will exist because Toccoa will remain subject to the accounting, reporting, and other rules and regulations of the NCUC. There is no need to duplicate on the Federal level requirements already imposed on Toccoa by state regulatory agencies. Our review of Toccoa's proposals indicates that there are no accounting, environmental, gas supply, or rate issues involved.

24. At a hearing held on October 16, 2008, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) Toccoa is granted a service area determination under section 7(f) of the NGA, as described more fully herein and in the application.

(B) The determination granted in Ordering Paragraph (A) will not otherwise affect the non-jurisdictional status of any other operation in which Toccoa is currently engaged.

(C) Toccoa is determined to be an LDC for purposes of section 311 of the NGPA.

(D) Toccoa is granted a waiver of the reporting and accounting requirements, as well as all other rules and regulations under the NGA and NGPA that are ordinarily applicable to natural gas companies.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.