TENNESSEE GAS PIPELINE COMPANY, L.L.C. (ON RECONSIDERTAION)

193 IBLA 187  Decided October 29, 2018
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(ON RECONSIDERATION)

IBLA 2014-266-1

Decided October 29, 2018

Motion for reconsideration of *Tennessee Gas Pipeline, L.L.P.*, 191 IBLA 80 (2017), affirming a Final Order by the Bureau of Safety and Environmental Enforcement that Outer Continental Shelf pipeline right-of-way grants had expired. OCS-G 01684, *et al.*

Reconsideration granted; Board’s Decision vacated; BSEE’s Final Order and Expiration Notices set aside and remanded.

1. Rules of Practice: Appeals: Reconsideration

The Board may reconsider its decision under “extraordinary circumstances.” Under the Board’s regulations, extraordinary circumstances that may warrant granting reconsideration include, but are not limited to, error in the Board’s interpretation of material facts.


OPINION BY ADMINISTRATIVE JUDGE JACKSON

Tennessee Gas Pipeline Company, L.L.C. (TGP) appealed from a series of expiration notices issued by the Gulf of Mexico Outer Continental Shelf (OCS) Region, Bureau of Safety and Environmental Enforcement (BSEE), dated July 9, 17, and 23, 2014, and August 13, 2014 (Expiration Notices), and from a BSEE order that denied TGP applications to reinstate their OCS rights-of-way (ROWs), dated
October 22, 2015 (Final Order). Based on their Federal Energy Regulatory Commission (FERC) approved sale of assets,\(^1\) TGP and Kinetica Partners, LLC (Kinetica), jointly requested that BSEE approve assignment of certain pipeline ROW grants from TGP to Kinetica. These assignments were denied by BSEE, after which it sent Expiration Notices to TGP that deemed 12 pipeline ROW grants to have expired and directed TGP to decommission their associated pipelines. In its Final Order, BSEE denied TGP’s applications to reinstate its expired ROW grants because it found the purpose for which they were granted had ceased to exist. BSEE also directed TGP to complete all decommissioning activities of these OCS pipelines and their ROWs by no later than October 20, 2016. We consolidated these several appeals by Order dated October 9, 2014.

The Board affirmed the Final Order and its decommissioning actions in *Tennessee Gas Pipeline Company (Tennessee Gas).*\(^2\) In doing so, the Board dismissed TGP’s appeals of the several Expiration Notices as moot because their resolution was overtaken by events and subsumed within our rationale for affirming the Final Order. BSEE and TGP timely filed a Joint Motion for Reconsideration, asking the Board to vacate *Tennessee Gas* and remand this matter back to BSEE for further consideration. The parties also ask that we stay the effectiveness of our decision during our consideration of the motion for reconsideration.

**SUMMARY**

The Board may reconsider a decision under extraordinary circumstances, which include an error in its interpreting material facts or evidence not presented to the Board that demonstrates error in its decision. In this case, the parties concede they did not provide the Board with material facts from the FERC Docket, which resulted in our erroneously affirming BSEE actions in this case. The Board finds these are “extraordinary circumstances,” grants reconsideration, vacates our decision in *Tennessee Gas,* sets aside the appealed from Final Order and Expiration Notices, and remands this matter to BSEE so it can decide whether to approve TGP’s assignment of these 12 pipeline ROW grants to Kinetica.

**CRITERIA FOR RECONSIDERING A BOARD DECISION**

[1] The Board may reconsider a decision under “extraordinary circumstances,” which include: (1) error in the Board’s interpretation of material facts; (2) recent judicial development; (3) change in Departmental policy; or

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\(^1\) *See Tennessee Gas Pipeline Co., 143 FERC ¶ 61,196 (2013) (FERC Order).*

\(^2\) 191 IBLA 80 (2017).
(4) evidence that was not before the Board at the time the Board’s decision was issued and that demonstrates error in the Board’s decision.\(^3\) The Board may also exercise its reconsideration authority when there is an error in the premise upon which the Board based its decision.\(^4\)

**DISCUSSION**

As recounted in *Tennessee Gas*,\(^5\) TGP is a natural-gas company primarily engaged in transporting natural gas in interstate commerce under FERC authorizations, which approved its sale of numerous pipelines to Kinetica upon condition that FERC would determine whether it has jurisdiction over the pipeline assets being sold. If FERC determined it had jurisdiction over a pipeline segment, it would approve TGP’s abandonment by sale and grant Kinetica Energy a certificate of public convenience and necessity to operate under the Natural Gas Act (NGA).\(^6\) But if FERC determined it did not have jurisdiction over a pipeline, it would be abandoned as sold by TGP and acquired by Kinetica Midstream LLC.\(^7\) In approving this transaction, FERC found most pipelines to be transferred to Kinetica were under its jurisdiction and therefore granted a certificate of public convenience and necessity to Kinetica Energy but separately addressed unused or underutilized TGP pipelines.\(^8\)

Since BSEE represented to the Board that none of the 12 pipelines at issue had transported oil for extended periods of time that ranged from 2 to 17 years, the Board assumed they were necessarily among the “unutilized” facilities discussed by FERC.\(^9\) However, after we issued *Tennessee Gas*, BSEE and TGP reviewed the FERC Docket and discovered that 2 of the 12 OCS pipelines at issue were granted certificates of public convenience and necessity so they could be operated by Kinetica Energy and that FERC “reserved jurisdiction over 2 other [pipeline segments].”\(^10\) We therefore accept the parties’ characterization: “Given the complexity of the FERC orders, it is easy to understand how this mistake was made” regarding the pipelines BSEE ordered TGP to decommission as abandoned for non-use.\(^11\)

\(^3\) 43 C.F.R. § 4.403(b), (d).
\(^4\) *See Barton Coffman (On Reconsideration)*, 190 IBLA 1, 3 (2017) (citing cases).
\(^5\) 190 IBLA at 81.
\(^6\) *Id.* at 82.
\(^7\) *Id.*
\(^8\) *Id.*
\(^9\) *Id.* at 83.
\(^10\) Motion for Reconsideration at 14-15; *see id.* at 9, 13-14.
\(^11\) *Id.* at 13.
In their motion for reconsideration, the parties represent that the appealed-from BSEE decisions “created an interagency conflict” between BSEE and FERC and that the Board’s affirmance in *Tennessee Gas* “deepens this conflict.”\(^{12}\) Moreover, they candidly state: “BSEE, unfortunately, was not sufficiently aware of the extent of representations that Kinetica made to both FERC and TGP in reaching its decision on the assignment requests and in its determination that the ROWs had expired, and did not consider any of Kinetica’s statements to FERC or FERC’s findings when it made its decisions.”\(^{13}\) The parties assert that reconsideration is needed “to harmonize BSEE and FERC’s exercise of jurisdiction in this matter and to consider TGP and Kinetica’s sworn testimony before FERC.”\(^{14}\) They urge the Board to grant reconsideration, vacate its decision, and set aside the appealed from BSEE decisions so it can act in consideration of all material facts necessary for proper decisionmaking. We agree to do so.

In our decision, we relied upon the Unutilized Facilities section of the FERC Order to conclude that none of the 12 pipelines at issue were granted a certificate of public convenience and necessity to operate in interstate commerce, but the parties now claim this “does not appear to be correct.”\(^{15}\) They state: “The 2013 FERC order, when parsed out in detail actually holds that of the twelve pipelines at issue, FERC deemed only two of the pipelines to be inactive.”\(^{16}\) The parties explain that a footnote in the section of the FERC Order the Board relied on refers to Data Responses in the FERC Docket that show only 2 of the 12 pipeline segments at issue were “inactive” for more than 1 year.\(^{17}\) The parties state the FERC Docket shows that the Board erred in affirming BLM’s finding that all of the pipelines at issue “were deemed inactive by FERC.”\(^{18}\) In addition, the parties point to a different section of the FERC Order as suggesting that 2 other pipeline segments at issue were actually granted certificates of public necessity and convenience, a fact later “confirmed” by FERC to BSEE.\(^{19}\)

Further, the parties state that BSEE was unaware of Kinetica statements in the FERC proceedings that it would continue operating and maintaining these 12 segments.

\(^{12}\) *Id.* at 2.

\(^{13}\) *Id.* at 12.

\(^{14}\) *Id.*

\(^{15}\) *Id.* at 13 (citing *Tennessee Gas*, 191 IBLA at 83-84).

\(^{16}\) *Id.*

\(^{17}\) *Id.* at 13-14.

\(^{18}\) *Id.* at 14; see *id.* at 13-14 (citing FERC Order, 143 FERC at ¶ 62,328 n.141, Data Responses dated Dec. 18, 2012, FERC Docket Nos. CP12-490 and RP12-887 (Motion Exhibits 7 and 8)).

\(^{19}\) *Id.* at 15 n.53.
pipelines. As a result, when it decided the purpose of the pipelines had ceased to exist, BSEE relied only on subsequent Kinetica statements that differed from its earlier representations. In fact, had BSEE known about those earlier Kinetica statements, the parties assert “BSEE might have found that the pipelines had a continuing purpose under 30 C.F.R. § 250.1014.” The parties then conclude:

Because BSEE and the Board were unaware of material facts contained within the FERC docket—facts that would have demonstrated a purpose for the ROW consistent with 30 C.F.R. 250.1014—the Board should grant reconsideration, vacate its Decision, and remand to BSEE to reconsider expiration determinations, which could also re-open BSEE’s decision on assignment applications. Such a result will allow BSEE to issue a new decision that harmonizes the decisions of both agencies.

Extraordinary circumstances are here presented because the parties failed to provide the Board with relevant data from the FERC Docket, which resulted in our affirming BSEE’s Final Order and dismissing all of TGP’s challenges to the Expiration Notices as moot. Based on their motion and our finding that extraordinary circumstances exist, we grant the parties’ joint motion for reconsideration, vacate our decision in *Tennessee Gas Pipeline,* and set aside and remand BSEE’s October 22, 2015 Final Order and Expiration Notices. We also deny the parties’ petition for a stay as moot.

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20 See id. at 15-16; see also id. at 10 (“During the [June 29, 2015,] meeting, Kinetica stated for the first time that it did not have any future utility for any of the twelve pipelines.”).
21 Id. at 16.
22 Id.; see id. (“BSEE requests reconsideration and remand to determine whether BSEE should give less weight to post hoc statements by Kinetica that it appears were inconsistent with prior FERC submissions made on the record and under oath.”).
23 Id.
24 191 IBLA 80.
Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we grant reconsideration, vacate our decision, set aside BSEE's Final Order and Expiration Notices, and remand this matter for further action by BSEE.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge

26 191 IBLA 80.