**TCPA Follow-up Comments from November 8, 2022 NAESB GEH Forum**

**November 28, 2022**

In response to comments made by Mr. James Mann on behalf of the Texas Pipeline Association at the NAESB Gas-Electric Harmonization Forum Virtual Meeting on Friday November 8, 2022, the Texas Competitive Power Advocates (TCPA) would like to submit the following comments:

Excerpts of comments by James Mann, TPA:

***“One of the things that has struck me most forcefully, is this discussion about the difficulties of building pipelines in the interstate market. That seems to be a foreign concept to us here in Texas since we can build a pipeline with less paperwork than it takes to become a participant on this phone call. We file a construction notice with the Railroad Commission 30 days before we start digging. So that the pipeline safety people can observe if they wish to. We can build competing pipelines. We don't have to show anybody that there's need, and we do all that at “our own risk.”***

**The Texas Pipeline industry enjoys a great deal of latitude in their ability to construct new natural gas pipeline facilities in Texas with minimal regulatory oversight. Consequently, pipelines can be built more quickly in the state of Texas than in other parts of the country. TPA and TXOGA often state that they build these pipelines “at their own risk” while FERC regulated interstate pipelines can be built by companies that get a “guaranteed rate of return”. I would like to comment on several aspects related to these comments.”**

1. The ability to quickly build pipeline does not justify or support the intrastate pipeline’s position on protecting their operational or commercial information from public disclosure.
2. Interstate pipelines also build their pipelines “at their own risk”. FERC does not guarantee a pipeline regulated rate of return, rather in exchange for operating as a monopoly, FERC allows the pipeline to earn a reasonable rate of return up to a capped rate. FERC actively tracks interstate pipeline cost recovery and will initiate a Section 5 proceeding to determine if the pipeline is over-collecting their costs, resulting in unjust and unreasonable rates. This highlights two points; 1) Interstate Pipelines have an active regulator and 2) there is enough transparency for FERC to have the data to know if the pipelines are over-collecting their rate cap. If market conditions change, pipelines are still at commercial risk of failure just as the intrastate pipelines. As an example, the Ruby Pipeline, a 682-mile interstate gas pipeline jointly owned by Kinder Morgan Inc. and Pembina Pipeline Corp. filed for chapter 11 bankruptcy in April 2022 despite having rates regulated by FERC. The $ 3.5 Billion pipeline failed to generate the necessary revenues required for financial success and was forced to file for bankruptcy protection.
3. The difference between Texas and FERC regulated pipelines is that FERC pipelines must demonstrate “need” to be approved for construction whereas Texas intrastate pipelines can build pipelines without demonstrating “need”. The reality is that Texas intrastate pipelines, just like their FERC regulated counterparts, do not build pipelines on the speculation that “build-it-and-they-shall-come” basis. Rather they canvass the marketplace for need using an open season process and once they have sufficient contracts in place for long-term gas transportation agreements to ensure financial success, they will then proceed to reach a positive financial investment decision to move forward with construction of the pipeline. Recent examples of this would be Kinder Morgan’s Gulf Coast Express and Permian Highway Pipelines. Each of these pipeline projects held “Open Seasons” to solicit potential shippers to sign up for transportation agreements prior to announcing a final investment decision to proceed.
4. Incremental gas-fired power generation requirements are not geographically intensive enough to achieve the types of economies of scale necessary to incentivize new pipeline construction (“Demand-Pull”). This is unlike recent pipelines constructed to move gas from the Permian Basin that have relatively few large shippers (producers) that underwrite the cost to construct the pipeline through large long-term contracts.
5. As regulated utilities under the Texas Utility Code, Texas interstate pipelines enjoy the privilege of eminent domain as a means of acquiring and securing right-of-way for their pipeline projects in exchange for being regulated under the same Utility Code. The purpose of eminent domain is to ensure that the pipeline can acquire land assets that benefit the public good. Part of the Utility Code requires that pipelines charge fair and reasonable rates, yet the the Texas Railroad Commission, which is charged with the enforcement of fair and reasonable rates, fails to protect Texas companies and consumers from intrastate pipelines that can exert market power from their virtual regional pipeline monopolies.

***“I have a lot of sympathy for the problems I've heard today. We have many of those problems in Texas simply because the construction and contracting in this state is not permission-based. We have a very different type of gas business than we've heard described in the interstate market. Ours is contract based. It is not tariff based. Every customer has the opportunity to come in and customize the service they receive, contract by contract.”***

***Now with respect to Michele’s (TCPA) problem with lack of cooperation, just let me describe what we have done……”***

***We have heard Michele's comments about her vision of what the gas market in Texas should look like. But what we are convinced of after all this work and after all the hearings, is that the problem in Texas is a problem of electric rate design. We fail to see how the electric rate design problem is going to be cured by turning the Texas oil and gas industry upside down and changing how everybody who participates in it, does their business. When we hear about transparency, the first thing we hear is somebody wanting us to disclose our customers’ contracts. Texas is a competitive market. It is not regulation-based. It is customer by customer competition based. And in competitive markets, you don't disclose your customers’ contracts. In fact, we have had no group of customers come to us and tell us that they think things would work better if their competitors and their suppliers knew what kind of deals, they were making with us.”***

1. TPA’s member pipelines have worked well to ensure that their pipelines are physically ready to handle weather emergencies, and TCPA commends them for these efforts. However, Winter Storm Uri also exposed commercial issues and practices by the Texas intrastate pipelines that negatively impacted electric system reliability and the cost of natural gas and electricity to Texas consumers that allowed many of the Texas intrastate pipelines to earn astronomical windfall profits at the expense of Texas Consumers. The lack of market transparency, competition, and regulatory oversight of the Texas intrastate pipeline industry all contributed to the severe negative impact winter storm URI had on Texas residents.
2. Transparency
   1. Most members of NAESB recognize that transparency is the cornerstone of a well-functioning marketplace. Both the wholesale gas and electric markets have been successful in creating efficient and robust energy trading markets that have an extraordinary amount of data transparency showing market prices and operational data available for all market participants to see. This same transparency does not exist in the Texas intrastate gas transportation and storage marketplace.
   2. The lack of transparency and unfair market rules prevents willing sellers and buyers from arranging flexible gas transportation receipt and delivery points to maximize market efficiency. This limitation allows intrastate pipelines and their marketing function to restrict buyer’s and seller’s access to deal directly with one another in a way that allows the pipeline marketing function to charge unfair prices for gas supply and pipeline services that in turn, create windfall profits for pipelines especially during extreme weather events.
   3. The lack of transparency and in some cases the lack of competitive alternatives limits the ability for power generators and other transportation customers to know if the prices being offered by the pipelines are justified by the scarcity of available capacity or if the pipeline is exerting market power.
   4. The lack of transparency and unfair market rules prevents willing sellers and buyers from arranging flexible gas transportation receipt and delivery points to maximize market efficiency. This limitation allows intrastate pipelines and their marketing function to restrict buyer’s and seller’s access to deal directly with one another in a way that allows the pipeline marketing function to charge unfair prices for gas supply and pipeline services that in turn, create windfall profits for pipelines especially during extreme weather events.
   5. Texas intrastate pipeline and storage operators should be required to post operational and commercial data on an electronic bulletin board similar to what interstate pipeline operators already provide.
3. Lack of Competition
   1. The lack of pipeline competition in many areas of Texas creates conditions where pipeline can and do exert market power with pricing and market rules in order to financially benefit the pipeline and their market affiliates.
   2. Pipeline customers are left with a take-it-or-leave-it situation when it comes to contract negotiations.
4. Lack of adequate regulatory oversight
   1. TPA states that Texas pipeline market is competition based not regulation based; however, the Texas Utility Code requires the Texas Railroad Commission, among other things, to:
      1. establish and enforce the adequate and reasonable price of gas and fair and reasonable rates of charges and rules for transporting, producing, distributing, buying, selling, and delivering gas by pipelines subject to this chapter in this state;
      2. establish fair and equitable rules for the full control and supervision of the pipelines subject to this chapter and all their holdings pertaining to the gas business in all their relations to the public, as the Railroad Commission determines to be proper;
   2. The Railroad Commission has relied on market competition between pipelines to ensure a level playing field and competitive rates. By and large, this competition works reasonably well in areas where there are multiple pipelines for customers to choose from. This is particularly true along the gulf coast areas of the state.
   3. However, in other areas of the state, particularly North Texas, the intrastate pipeline and storage system is a geographic monopoly with limited market competition. This allows some pipelines to exert market power to the detriment of their pipeline customers and ultimately to electric power customers particularly during extreme weather events.
   4. The informal and formal complaint processes established by the Texas Railroad Commission (TRC) are generally viewed by most market participants as being slow and expensive processes that benefit the pipelines and not the customers. Contractual disputes are routinely referred to the courts rather than being resolved by the TRC. These facts discourage customers from filing complaints with the TRC.
   5. Transparency would expose pipelines that use their positions as natural monopolies to charge unfair or unreasonable rates, as well as unfair contracting practices that limit other market participants from providing competitive alternative services. For example:
      1. Pipelines charging OFO fees to unoffending shippers and keeping those revenues for their shareholders rather than redistributing to their other customers (e.g., charging shippers that were “long”, OFO fees during Winter Storm Uri, when their systems were “short” gas).
      2. Creating unreasonable hourly balancing fees that are not cost based, but rather a means of creating windfall profits.
      3. Limiting customer access to third-party storage services in order to enhance the value of their own storage services.
      4. Limiting shipper access to receipt and delivery points in order to protect their own marketing arm business.

***“We're always willing to talk to Michele but there is a wide gulf between her version of what the gas market in Texas ought to look like and ours. I don't know if that's going to be bridged. I've expected to come up to a next session of the Legislature. It has already come up numerous hearings, and we'll see how the Texas legislature determines that issue. We will see how the Railroad Commission of Texas determines those issues. Be glad to answer any questions. But I did want to make the point. That when we listen to this discussion about the interstate market and transparency and what you guys do, That is not anything like the business we've had in Texas. The Texas market has been quite successful. We build pipeline every day. We connect customers every day. We come up with new contract products every day.”***

TPA describes the Texas Market as being “quite successful”. We believe they mean quite successful for the pipeline companies themselves. During winter storm Uri, Texas intrastates created significant windfall profits for their shareholders at the expense of Texas consumers:

* + - ETF
      * Following Winter Storm URI, one of the largest Texas intrastate pipelines announced their Q1 2021 Adjusted EBITDA was $2.8 billion, compared to $240 million in the first quarter of last year. Primarily driven by Winter storm URI.
      * Their CCO stated that “we believe that our transportation service, and, more importantly, our storage capacity, has been undervalued for many years.”
      * I would ask the questions: How much of the perceived value was due to a unique weather event and how much of the value can be attributed to having a regional unregulated monopoly in north Texas with little or competition?
    - KMI
      * The financial performance for the first quarter of this year versus the first quarter of last year, they generated revenues of $5.2 billion, up $2.1 billion.
      * We estimate that the Uri impact, and this is across all of our segments, was roughly worst-season hand grenades $1 billion.
    - EPD
      * As far as on the first quarter, net income attributable to common unitholders for the first quarter of 2021 was $1.3 billion or $0.61 per unit on a fully diluted basis. This compares to $1.4 billion or $0.61 per unit on a fully diluted basis for the first quarter of 2020.

***“Reliability depends on three things. Finding a reliable gas supplier that has the assets that can actually deliver gas during an emergency. That may not be a marketing company at Waha 500 miles from the power plant.***

***You need Firm Transportation Service on a pipeline. To my knowledge, the only pipeline in Texas that does not offer firm service is a line that was built specifically and dedicated to LDC service. That line is 100 years old by now. It was built by the LDC [inaudible]. It has never offered firm service to any third party. People who have built generating plans on that line have known that. I know that the plant that seems to be most often mentioned has had offers. So at least three pipeline companies. To build an additional pipeline to it. That has not occurred.***

***The third piece you need for a reliable gas supply during the winter emergency is storage. We have storage facilities in this state. They're being used for load following. By electric generators. Today. If they don't be all the gas, they've laid in for the day they put it in storage. If they need more gas than they laid in for the day, they take it out of storage. You can in Texas, unlike the Interstate market, buy all those services piece by piece, or you can buy them in a bundled service. And just let me sum up by saying this one thing. We are always willing to talk to anybody about their needs.***

***At this point, we fail to see how an electric rate design issue that prevents generators from paying for the services that are available. Ah… can really be cured by changing how people do business, the thousands of people that do business in the Texas gas market do their business.”***

1. Although many gas-fired generators do utilize firm pipeline transportation and storage services in their gas supply portfolios, electric rate design does not support cost recovery of the fixed costs which are rather substantial. These shortfalls in electric rate design are currently being addressed by ERCOT, TERC and PUCT. However, resolution of the rate design issues does not resolve the problem of intrastate pipelines exerting market power as regional monopolies.
2. This firm transportation and storage works for large, efficient power generating facilities that have a high utilization factor, but does not work so well for smaller, quick start peaking generating facilities that are utilized only during peak demand periods and for grid reliability purposes. Similarly, this approach does not work for older generating units that are dispatched by ERCOT for reliability purposes, but for whom the market signals very limited run times and opportunities.
3. Creation of transparent, open access gas pipeline transportation and storage markets is more efficient and fair to customers.
   1. A robust capacity release mechanism would encourage third-party marketers to participate in the market and compete against the pipeline marketing affiliates.
   2. Intrastate pipelines that are geographical monopolies limit the shipper’s ability to negotiate the type of flexibility described above.
   3. If industrial consumers are 48% of the market, as asserted by TXOGA and API, then they, along with producers, will also benefit from open access and transparency.
4. Power plants connected to the LDC pipeline described by Mr. Mann utilize this pipeline as a secondary fuel supply to augment their supply during the summer demand period and provide fuel supply diversity and a competitive alternative to other intrastate pipelines.
   1. In the past, winter gas demand for electric generators was not as large as it is now and therefore FT pipes could easily handle the load.  Also, in the past the generation mix included a lot more coal, oil, and dual fuel (oil/gas) plants. Much of ERCOT’s coal and oil-fired generation capacity has recently been retired, thus increasing the need for gas-fired generation during high demand periods or to address the intermittency of renewable electric generation.
   2. Many of these generating plants were also built and interconnected by incumbent electric utilities prior to restructuring of either the electric or gas markets.  It should also be noted that some of the current day Texas Intrastate Pipelines were originally built and operated by the incumbent electric companies that owned the power plants prior to restructuring of the gas and electric markets.
5. With regards to Mr. Mann’s comments on a specific power plant receiving 3 offers to construct new gas pipelines, Mr. Mann is missing the larger point. These plants are older, gas-fired steam plants that were built while the market was fully regulated—and in most cases with gas and power regulated. This means these plants were inherited by a generator, long after the decision on where to locate these plants was made. More importantly, the question is not whether generators could have done something different at one point, or if it is physically or economically possible to build more pipelines (which it may not be); rather, the question is whether we want a system that is designed to retire these older legacy plants at a time when they are most needed to provide reliability during extreme weather events.