UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company Docket No. RP07-396-000

ORDER ACCEPTING TARIFF SHEETS
SUBJECT TO CONDITION

(Issued May 9, 2007)

1. On April 9, 2007, Tennessee Gas Pipeline Company (Tennessee) filed revised tariff sheets[1] that would add additional contract flexibility to the tariff provisions applicable to extensions of long-term firm service agreements. Tennessee's proposal will allow Tennessee and its long-term service customers to mutually agree to extend the customer's service on Tennessee's system through the re-negotiation of the customer's existing service agreement(s) prior to expiration of the agreement(s). Tennessee requests that the tariff sheets be made effective May 9, 2007. The Commission accepts the proposed tariff sheets, to become effective May 9, 2007, subject to the condition discussed in the body of the order.

I. <u>Details of the Filing</u>

2. Tennessee proposes a new section 10.4.3 to Article III of the General Terms and Conditions (GT&C) of its tariff that will allow Tennessee and its long term service customers to mutually agree to extend the customer's service on Tennessee's system through the re-negotiation of the terms of the customer's existing service agreement(s) prior to the expiration of the agreement(s). Tennessee states that such re-negotiation may include the extension, amendment and/or early termination/substitution of the customer's existing service agreement(s), provided that the customer is agreeing to extend its use of at least part of its existing service under the resulting restructured arrangement.

3. Under Tennessee's proposal, if Tennessee and its customer mutually agree to this restructured arrangement, the underlying capacity does not have to be re-posted as available before the arrangement can be executed and the customer will not have to

[1] Ninth Revised Sheet No. 324 and Fifth Revised Sheet No. 324A to FERC Gas Tariff, Fifth Revised Volume No. 1

separately participate in the posting and bidding procedures for shippers exercising right-of-first-refusal ("ROFR") rights under Article III, section 10.4 of the GT&C. Similarly, the customer would not have to separately go through the posting and bidding procedures of Article XXVIII, section 5 of the GT&C for any generally available, posted and previously unsold capacity that is made part of the restructured arrangement. Tennessee states that the shipper's election to re-negotiate its long term firm service agreements under the proposed new section 10.4.3 is entirely optional and subject to mutual agreement. Tennessee also states that the shipper will always have the right to avail itself of the procedures of Article III, section 10.4, if applicable and if the shipper elects not to early extend or restructure its service agreement(s).

4. Tennessee asserts that its proposal is consistent with Commission policy and precedent where the Commission has previously approved other pipeline's tariff provisions that reflect a flexible approach to re-contracting. Tennessee also states that the overall proposed enhancement to shippers' contracting options is beneficial in terms of those shippers who may have been reluctant to renew their service on Tennessee if such renewal was strictly limited to the terms they originally signed up for. Tennessee also states that it is beneficial to both Tennessee and the overall system in that it helps mitigate the marketing risk for turned-back capacity.

II. Notice and Responsive Pleadings

5. Public notice of the filing was issued on April 20, 2007 with comments, interventions and protests due as provided in the Commission's regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2007)), all timely motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Comments in support of Tennessee's proposal were filed by the East Ohio Gas Company, d/b/a Dominion East Ohio, KeySpan Delivery Companies, Nicor Gas, and the Tennessee Valley Authority. Hess Corporation (Hess) filed comments that seek to place limits on Tennessee's proposal. The New England Local Distribution Companies (New England)[2] filed a protest and a request for a technical conference.

6. On April 27, 2007, Tennessee filed an answer to Hess' comments and New England's protest. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2007), answers to protests are not accepted

[2] The New England Local Distribution Companies consist of Bay State Gas Company, the Berkshire Gas Company, Connecticut Natural Gas Corporation, Fitchburg Gas and Electric Light Company, City of Holyoke, Massachusetts Gas and Electric Department, the Narragansett Electric Company d/b/a National Grid, Northern Utilities, Inc., NSTAR Gas Company, the Southern Connecticut Gas Company, and Yankee Gas Services Company.

unless otherwise ordered by the Commission. We will accept Tennessee's answer because the answer will help clarify the issues and provide useful and relevant information which will assist in our decision making process.

7. Hess states that Tennessee's proposed contract extension procedures that include exemption from the ROFR process should not be available for affiliates of Tennessee to ensure that Tennessee does not extend any contracts with affiliates on an unduly discriminatory basis.

8. Hess also contends that the Commission should not permit the addition or substitution of capacity under the contract to be extended, noting that Tennessee proposes to utilize this extension procedure to allow existing shippers to include, in contracts extended under the procedure, additional "generally available, posted and previously unsold capacity that is made part of the restructured arrangement". Hess asserts that Tennessee should not be permitted to contract for capacity that was not specifically posted. Further, Hess contends that a contract extension that combines contracted capacity with previously unsubscribed capacity that is not made available for bid as a complete package could provide the existing shipper with an undue preference, and discriminate against prospective shippers, because those prospective shippers might well have bid for the combined capacity at a net present value higher than the unsubscribed capacity standing alone.

9. Hess also notes that in theory, under Tennessee's proposal, Tennessee and the existing customer could conduct the non-ROFR extension negotiation after the ROFR had already been triggered and bids submitted. Hess asserts that Tennessee and the shipper not be permitted to post the expiring contract capacity under the ROFR, and subsequently elect to use the non-ROFR extension process after reviewing the competing bids.[3]

10. Hess states that Tennessee should be required to clarify that non-quantity and non-rate and non-duration contract terms are not negotiable under the contract extension process. Hess submits that aside from rate, duration, and quantity, the service should not change in the context of a non-ROFR extension. Hess asserts that Tennessee and an existing shipper should not be able to use this process to agree to extension of a contract in a manner that permits the shipper to receive service under the existing contract, without providing other parties an opportunity to bid for the "new" service.

[3] *Citing ANR Pipeline Co.*, 116 FERC ¶ 61,201 (2006) at P 3. (As proposed by ANR, the agreement to extend must be reached prior to the initiation of any applicable ROFR procedures.)

11. Hess also states that at a minimum, the Commission should require Tennessee to post the extension of firm long-term discounted agreements outside the ROFR procedure as a separate category of postings on its website, to allow shippers and the Commission to determine whether the extension was granted on a not unduly discriminatory manner.

12. New England contends that Tennessee's proposal is overly broad. New England is concerned that Tennessee could use proposed section 10.4.3 to require a shipper that wants to extend its contract or acquire a totally new service to take additional capacity that Tennessee has been unable to market. New England states that Tennessee's market power in the New England region leads to shippers entering into packaged capacity. New England observes that Tennessee serves constrained capacity markets including New England and the New York City/New Jersey metropolitan area. New England states that capacity in these areas is always sold at the maximum tariff rate and, in fact, the market value of this capacity far exceeds Tennessee's maximum rate. New England states, that in contrast, capacity on other sections of Tennessee's system is much less valuable and often sells at discounted rates. New England contends this situation gives a pipeline an incentive to exercise its market power by effectively charging market based rates in constrained areas. New England states that this can be accomplished by packaging together sales of capacity in a constrained area with a sale of capacity in unconstrained areas. New England submits that Tennessee's award of capacity to "packaged deals" is a type of tying arrangement and New England contends that Tennessee's proposal here does not preclude those types of tying arrangements.

13. In its answer, Tennessee notes that Hess states that it does not object to Tennessee's proposal in general based on prior Commission precedent and that Hess seeks to place limitations on Tennessee's proposal that have not been placed on prior proposals approved by the Commission. Tennessee asserts that the practical effect of the Hess limitations would be to totally negate Tennessee's proposal such that Tennessee would be left with nothing more than the ability to extend a maximum rate contract with a ROFR earlier than would be required under the notice procedures of Tennessee's tariff. Tennessee states that, as such, no filing would be necessary as nothing in Tennessee's current tariff prevents such extensions.

14. In response to Hess' claims that no change in service other than rate, duration and quantity be made as part of a non-ROFR extension, Tennessee states that it does not intend to negotiate any terms and conditions of service not otherwise provided under its tariff and Commission policy. Tennessee points to *Northern Natural Gas*

Company[4] where the Commission found that a pipeline can permit a shipper to extend the use of the capacity that it currently holds under new terms, thereby permitting it to continue to use of the capacity it currently holds.

15. Tennessee also refutes Hess' claims that Tennessee's proposal should exclude non-maximum rate shippers who do not have ROFR and affiliates of Tennessee. Tennessee states that Hess ignores the precepts of Order No. 637 which permits pipelines to offer either a contractual ROFR or an evergreen clause to non-maximum rate shippers who did not qualify for the regulatory ROFR as long as the pipeline did so on a non-discriminatory basis.[5] Also, Tennessee contends, Hess makes no mention of the long line of cases confirming a pipeline's ability to extend non-maximum rate contracts.[6] Further, Tennessee asserts Hess has submitted no evidence why affiliates should be precluded from the application of proposed section 10.4.3. On one point raised by Hess, Tennessee takes no issue with Hess' request that any contract extension be exercised prior to initiation of the ROFR procedures.

16. Tennessee opposes New England's claims that proposed section 10.4.3 somehow allows Tennessee to exercise "market power" by requiring tying arrangements. Tennessee states that New England's protest is rife with sensationalistic language meant to disguise its lack of substance. Tennessee states that nowhere in New England's protest does New England point to actual tariff language that requires shippers to take unwanted capacity or service in order to restructure their existing service agreements; that Tennessee's open seasons impose limitations on what portion of the available capacity shippers may bid on as a condition of participating in the open season; or that Tennessee has acted in contravention of its Commission approved tariff.

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[4] *Northern Natural Gas Company*, 113 FERC ¶ 61,188 at 61,768 (2005).

[5] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats & Regs. ¶ 31,091 at 31,340, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127, *order on reh'g*, 106 FERC ¶ 61,088, *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F3d 255 (D.C. Cir. 2005).

[6] *See, e.g., Gulf South Pipeline Company, LP*, 118 FERC ¶ 61,262 (2007); *TransColorado Gas Transmission Co.*, 109 FERC ¶ 61,117 (2004); *Northern Natural Gas Co.*, 111 FERC ¶ 61,379 (2005), *order on reh'g*, 113 FERC ¶ 61,188 (2005).

17. Tennessee states that New England's claims of a "package deal" is in actuality a pre-arranged deal where the shipper requested, for its specific transaction, the capacity that it wanted under the service agreements that it requested. Tennessee states it cannot force a pre-arranged shipper to take certain capacity as a condition of taking the service or capacity that it wants. Moreover, Tennessee asserts that there is nothing in Tennessee's tariff that prevents a pre-arranged shipper from making a request for capacity in the fashion that it chooses. Tennessee submits that New England's protest is nothing more than a collateral attack on the approved provisions of the pre-arranged deal tariff provisions. Finally, Tennessee states that New England has raised no issues that warrant a technical conference in this proceeding.

III. Discussion

18. The Commission finds that Tennessee's proposed tariff revisions are just and reasonable for the reasons stated by Tennessee in its filing and its answer, and we accept them to be effective May 9, 2007, subject to condition. Our acceptance is subject to Tennessee, filing within 15 days of the date of this order, a revised section 10.4.3 to provide that any contract extension must be exercised prior to initiation of the ROFR procedure. The argument that New England raises in its protest and its request for a technical conference are denied.

19. The Commission has approved tariff provisions permitting a pipeline and a shipper to mutually agree to an extension of the term of a service agreement before expiration of the agreement and before posting the capacity under the pipeline's ROFR provisions.[7] While Commission policy is to enable those who value capacity the most to obtain it,[8] the Commission assumes that the pipeline will generally seek

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[7] *Texas Eastern Transmission, LP*, 112 FERC ¶ 61,235 at P19 (2005). *ANR Pipeline Company*, 116 FERC ¶ 61,201 at 61,850 (2006). *See also Northern Natural Gas Company*, 118 FERC ¶ 61,053 at 61,292 (2007).

[8] Order No. 636-A, at page 30,630 ("when a contract has expired, it is most efficient, within regulatory constraints, for the capacity to go to the person who values it the most, as evidenced by its willingness to bid the highest price for the longest reasonable term."). *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order on Remand,* 101 FERC ¶ 61,127, at P 20, *order on reh'g,* 106 FERC ¶ 61,088, at P 17, *aff'd sub nom. American Gas Ass'n v. FERC,* 428 F.3d 255 (D.C. Cir. 2005).

the highest possible rate from those to whom it sells capacity, since that is in the pipeline's economic interest. Therefore, the Commission has allowed pipelines some degree of flexibility in how they market their capacity in order to accomplish that goal.[9]

20. Tennessee's instant proposal would also give it the flexibility, when negotiating an extension of an existing shipper's contract, to include in the new contract additional capacity which it has previously posted as available but no other shipper has purchased. We find this aspect of Tennessee's proposal to be permissible. As the Commission has previously stated, we do not require pipelines to sell capacity solely through open seasons. Rather, so long as the pipeline posts all available firm capacity, it may sell that capacity on a first-come, first-serve basis.[10] Here, Tennessee's ability to offer the existing shipper additional capacity that has been posted but not sold should assist Tennessee in obtaining the greatest value for its capacity. Not only will that benefit the existing shipper who obtains the capacity, it will also benefit other shippers on the system by enabling Tennessee's fixed costs to be spread over more units of service in its next rate case.

21. We reject Hess's request that Tennessee be required to modify its tariff to clarify that non-quantity and non-rate and non-duration contract terms may not be negotiated under the contract extension process. As Tennessee points out, its tariff permits it to negotiate certain other contract terms, including, for example, minimum pressure provisions. Also, section 284.13(b)(viii) of the Commission's regulations requires Tennessee to post any such special details of its contracts. We see no reason, in the context of negotiating an extension of an existing agreement, to restrict Tennessee's ability to negotiate those matters its tariff already permits it to negotiate. However, if Tennessee negotiates provisions not authorized by its tariff, then it must file the agreement with the Commission for approval as a material deviation from its form of service agreement.

22. We also reject Hess's request that Tennessee be prohibited from negotiating contract extensions with affiliates under the proposed tariff provision. For the reasons set forth in *Tennessee Gas Pipeline Co.*,[11] we do not believe that the danger posed by

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[9] *See Northern Natural Gas Co*., 111 FERC ¶ 61,379, at P 38-39 (2005), holding that a pipeline can extend the contract of an existing shipper with a ROFR without posting the capacity for third party bids, and *Gulf South Pipeline Co.,* 119 FERC ¶ 61,032 at P 11 (2007).

[10] *Northern Natural Gas Company*, 110 FERC ¶ 61,361 at P 10 (2005).

[11] 94 FERC ¶ 61,097 at 61,399-400 (2001), *aff'd, Process Gas Consumers v. FERC*, 292 F.3d 831 (D.C. Cir. 2002).

affiliate abuse is so great that it warrants special rules concerning the allocation of capacity to affiliates. Rather, if any party perceives an abuse it may submit a complaint pursuant to the Commission's regulations.

23. Tennessee has agreed to clarify that any contract extension pursuant to proposed section 10.4.3 must take place before initiation of the ROFR procedure. Accordingly, we require Tennessee, within 15 days of the date of this order, to file revised tariff language making this clarification.

24. We conclude that Tennessee’s proposal provides customers flexibility that they did not possess before, without taking away any existing protections, at no additional cost and at their sole election.

The Commission orders:

(A) The tariff sheets listed in Footnote No. 1 are accepted to become effective on May 9, 2007, subject to the condition discussed in the body of the order.

(B) Tennessee is directed to file the required changes within 15 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.