

155 FERC ¶ 61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

ONEOK WesTex Transmission, L.L.C.

Docket No. PR16-11-001

ORDER APPROVING STATEMENT OF OPERATING CONDITIONS

(Issued June 22, 2016)

1. On April 6, 2016, ONEOK WesTex Transmission, L.L.C. (OWT) filed a revised Statement of Operating Conditions and rate statement (SOC) in Docket No. PR16-11-001, revising and superseding their January 11, 2016 filing in Docket No. PR16-11-000. OWT elected to use the optional notice procedures set forth in section 284.123(g) of the Commission's regulations.¹ Atmos Energy Corporation (Atmos) protests the April 6, 2016 filing. We find that OWT's SOC is fair and equitable under section 311 of the Natural Gas Policy Act (NGPA), and approve the April 6, 2016 filing effective January 1, 2016, as requested.

2. OWT is a Texas intrastate pipeline that provides interstate service under NGPA section 311, from the New Mexico border near El Paso to the Oklahoma border in the North Texas Panhandle. In Order No. 781, the Commission established "optional notice procedures which intrastate pipelines may elect to use when filing proposed rates or operating conditions."² Acting under those new notice procedures in section 284.123(g) of our regulations,³ on January 11, 2016 OWT filed a revised SOC that proposed numerous changes, including a more detailed description of how OWT would handle a service interruption that affected firm transportation. On January 15 and February 1, 2016,

¹ 18 C.F.R. § 284.123(g) (2015).

² *Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines*, Order No. 781, 78 Fed. Reg. 45850, 144 FERC ¶ 61,034, at PP 56-64 (2013).

³ 18 C.F.R. § 284.123(g) (2015).

respectively, NJR Energy Services Company (NJR) and Golden Spread Electric Cooperative, Inc. (Golden Spread) separately filed Motions to Intervene. On March 11, 2016, Golden Spread protested OWT's proposed revisions. On March 15, 2016, the Commission publicly noticed an informal settlement conference and on March 22, 2016, Commission Staff, OWT, NJR, and Golden Spread engaged in informal settlement discussions. As a result of those discussions, on April 6, 2016, OWT filed a revised SOC and rate statement that purported to resolve Golden Spread's protest and also make other mutually agreeable and ministerial changes to the SOC.

3. OWT revised Article XI of its SOC, Priority of Transportation Service, in its January 11, 2016 filing but not in its April 6, 2016 filing. The preexisting section covered service interruptions generally but did not provide any detail on firm service, except to list it as superior to interruptible service. The proposed SOC adds the following section 11.1(a), which is intended to govern priority among firm service obligations:

In the event that the Company, from time to time, does not have sufficient capacity available to accommodate all nominations through specific Point(s) of Receipt, specific Point(s) of Delivery, specific compression stations, and/or specific segments of Company's System, interruption of Firm Transportation Service will be pro rata, or as otherwise may be required by applicable regulations or orders of a governmental or regulatory authority having jurisdiction over the Services provided hereunder.

Notice and Responsive Pleadings

4. Public notice of the April 6, 2016 filing was issued on April 8, 2016 with interventions and protests due on or before April 27, 2016. Pursuant to Rule 214,⁴ all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

5. On April 27, 2016 Atmos Energy Corporation filed an intervention and adverse comments. Accordingly, on May 6, 2016, the Commission publicly noticed a second informal settlement conference, which took place as scheduled on May 10, 2016. Atmos and OWT, however, were not able to resolve their dispute at that conference.

⁴ 18 C.F.R. § 385.214 (2015).

6. In its April 27, 2016 comments, Atmos argues that SOC section 11.1(a) conflicts with the following provision of the Texas Administrative Code:

No sales pursuant to [NGPA] §311(b) shall be made unless a public utility is able to provide adequate service to all of its existing intrastate customers. Adequate service includes all requirements of existing customers, notwithstanding contractual limitations, and gas needed to fill storage reservoirs for anticipated peak usage or to build up "line pack" to fill expected customer requirements

In its comments, Atmos raises the hypothetical example in which an intrastate shipper and a section 311 shipper, each with 60,000 Dth/day firm contracts, attempt to schedule on the same day for a receipt point which has only 100,000 Dth/day of capacity. Atmos asks OWT to state whether in that situation OWT's obligations to the Commission and to the Texas Railroad Commission (TRC) would be "mutually incompatible," or else to "acknowledge that a conflicting intrastate priority of service would trump the section 311 priority of service."⁵

7. OWT, in its May 9, 2016 answer, argues that Atmos's concerns are misplaced for three reasons. First, OWT argues, section 311 service is solely under Commission jurisdiction, not Texas jurisdiction, so the Commission's "firm is firm" policy would supersede any Texas regulation.⁶ Second, OWT argues that when the quoted Texas regulation is read in its full context, it does not apply to transportation, but to physical sales, which OWT does not offer.⁷ Third, OWT argues that as a practical matter, Atmos's hypothetical conflict would not occur, because OWT has not oversubscribed its capacity. If constraints were to occur, OWT clarifies that under "firm is firm" policy, it would give all firm services equal priority, and then allocate *pro rata* among the firm nominations if necessary.⁸

8. On May 27, 2016, Atmos filed an answer, in which it not only answered OWT's May 9, 2016, answer but confirmed that Atmos continued to oppose OWT's proposed SOC section 11.1(a). Atmos stated that Commission Staff had referred parties at the settlement

⁵ Atmos April 27, 2016 Comments at 4.

⁶ OWT May 9, 2016 Answer at 3, 5.

⁷ OWT May 9, 2016 Answer at 3-4.

⁸ OWT May 9, 2016 Answer at 5-6.

conference to relevant precedent. In response, “Atmos agrees that since OWT has chosen to offer § 311 firm transportation service, it should not, as a general matter, subordinate that service to its intrastate firm service.”⁹

9. Atmos argues that a conflict remains, however, for a limited group of “preexisting firm intrastate customers whose contracts state a different curtailment priority.”¹⁰ Atmos quotes the following “Special Provision” in its intrastate contract:

[OWT] and [Atmos] agree to follow their applicable curtailment plan as approved by the [TRC], as such curtailment plan may be amended and approved by the [TRC] from time to time. If a party does not have an approved curtailment plan on file with the [TRC], such party will follow the curtailment plan issued by the [TRC] in Docket No. 489.¹¹

Atmos argues that even one of the landmark cases that confirmed that section 311 service is not subordinate to intrastate service, *Transok I*, nevertheless held that such prior arrangements should be considered:

An intrastate pipeline, however, may have a prior contractual arrangement with an intrastate transportation customer that may provide that shipper with certain rights not available to the interstate shipper. However, if the intrastate pipeline chooses to provide interstate service, it may not use these prior intrastate arrangements to give a higher priority to intrastate service than firm interstate service. These prior arrangements should be considered by the intrastate pipeline in determining how much capacity it will offer for firm 311 service.¹²

Atmos contends that OWT’s proposed SOC section 11.1(a) fails to take pre-existing contracts into consideration, as *Transok I* requires. Atmos concluded that SOC

⁹ Atmos May 27, 2016 Answer at 3.

¹⁰ *Id.*

¹¹ Atmos May 27, 2016 Answer at 4 (quoting Currently effective Atmos/OWT firm intrastate contract, Special Provision #1).

¹² *Transok, Inc.*, 54 FERC ¶ 61,229, at 61,673 (1991) (*Transok I*), order on reh’g, 56 FERC ¶ 61,275 (1991) (*Transok II*).

section 11.1(a) must be amended to make an exception to *pro rata* curtailment “to the extent of preexisting firm contract demand” for those contracts that expressly state a different curtailment priority.¹³

10. OWT filed a June 1, 2016 answer to respond to Atmos’s contentions regarding its intrastate transportation contract. OWT argues that since 1991, the Commission’s policy has been that “both firm intrastate and firm interstate service must be subject to pro rata curtailment,”¹⁴ subject to a narrow exception for preexisting contracts. Further, OWT argues that the Atmos contract’s “Special Provision” does not offer a practical exception to the “firm is firm” rule. Rather than arranging for heightened priority, OWT argues “that provision simply calls out the parties’ agreement to follow the orders of the TRC regarding the priority of intrastate service and curtailment on their respective systems.”¹⁵ OWT argues that the referenced TRC Order 489 is a generally applicable order, implemented for all shippers via section 2.1 of OWT’s intrastate SOC on file with the TRC, and thus “Atmos gained no greater rights from the provision” than the general rights available to all intrastate shippers.¹⁶ Since Atmos has no unique contractual right, OWT concludes that Atmos’s newest argument for heightened priority fails to overcome the “firm is firm” rule.

11. Finally, on June 8, 2016, Atmos filed an answer to OWT’s latest answer. Atmos warns that OWT is asking the Commission to predetermine matters of Texas law. Atmos notes that both Atmos and OWT agree that its intrastate contract contains a “special provision,” and argues that interpretation of this “special provision” as well as the general terms of OWT’s intrastate SOC are best left to the TRC.¹⁷ Atmos argues that its requested revision to OWT’s interstate SOC is narrowly defined to preserve this question for the TRC, without unduly harming OWT.

Procedural Determination

12. The Commission’s Rules of Practice and Procedure do not permit answers to answers unless otherwise ordered by the decisional authority.¹⁸ We find good cause to accept the

¹³ Atmos May 27, 2016 Answer at 4.

¹⁴ *Transok II*, 56 FERC at 62,082.

¹⁵ OWT June 1, 2016 Answer at 4.

¹⁶ OWT June 1, 2016 Answer at 4.

¹⁷ Atmos June 8, 2016 Answer at 3.

¹⁸ 18 C.F.R. § 385.213(a)(2) (2015).

above answers because it will not delay the proceeding, and the answers have assisted the Commission in understanding the issues discussed. Furthermore, the procedural rules under section 284.123(g) afford some flexibility.

13. As noted above, on May 6, 2016, the Commission publicly noticed a second informal settlement conference, which took place as scheduled on May 10, 2016. However, because the dispute between Atmos and OWT was not been resolved through the optional notice procedures by May 27, 2016, the Commission must, under subsection 284.123(g)(5), “establish procedures to resolve the proceeding.”¹⁹ As explained below, the parties’ dispute is legal in nature, and therefore we shall act under this subsection by resolving the proceeding on the merits.

Commission Determination

14. In its two filings, OWT proposed numerous changes to its SOC. OWT’s April 6, 2016, SOC filing resolves all of the disputed items in its January 11, 2016, filing, except for Atmos’ April 27, 2016, protest regarding OWT’s curtailment priority policy. We accept these undisputed items as fair and equitable under section 311 of the NGPA, and turn for the remainder of our discussion to curtailment priority policy.

15. We accept OWT’s proposed section 11.1(a), because it protects the Commission’s longstanding “firm is firm” policy for interstate shippers. We further find that OWT’s section 11.1(a) does not, as alleged, prejudge or interfere with any matters that are properly the exclusive jurisdiction of state regulatory or contract law.

16. As Atmos concedes, Commission policy since *Transok I* is that “if the intrastate pipeline chooses to provide interstate service, it may not use these prior intrastate arrangements to give a higher priority to intrastate service than firm interstate service.”²⁰ This interpretation of “firm is firm” is longstanding Commission policy and nothing raised herein compels us to change that policy. Indeed the Commission’s regulations require “that intrastate pipelines that offer section 311 transportation service on a firm or interruptible basis must provide such service without ... undue discrimination or preference of any kind.”²¹ “Essentially, an interstate or intrastate pipeline providing section 311 service is

¹⁹ 18 C.F.R. § 284.123(g)(5); *see also Enterprise Texas Pipeline LLC*, 152 FERC ¶ 61,024 (2015) (establishing settlement procedures).

²⁰ *Transok I*, 54 FERC at 61,673.

²¹ *Peoples Gas Light & Coke Co.*, 118 FERC ¶ 61,203, at 61,920 (2007) (citing 18 CFR §§ 284.7(b) and 284.9(b)).

held to the same nondiscriminatory access standards as an interstate pipeline providing [Natural Gas Act] section 7 service.”²²

17. Atmos nevertheless maintains that its Texas intrastate contract protects it from being treated equally with firm interstate service in the event of curtailment or oversubscribed capacity. In essence, Atmos seeks the same remedy as the shipper in *Transok*: an SOC provision allowing it to be curtailed last and not *pro rata*. As we ruled in *Transok*, Atmos could only receive such preferential treatment if it “had an existing firm contract ... that **expressly** provided that [Atmos] be so treated.”²³ Atmos’s contract contains no such provision but appears to give Atmos the same rights available to all intrastate shippers, by referring to general principles of TRC law. Thus Atmos has not shown, as required by *Transok*, that its preexisting contract specifically grants a unique priority to Atmos not merely a right available to all similarly situated intrastate shippers. Accordingly, we accept OWT’s proposed SOC section 11.1(a) as fair and equitable, and do not require any further revisions.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²² *Sw. Pub. Serv. Co.*, 63 FERC ¶ 61,125 (1993).

²³ *Transok I*, 54 FERC at 61,676 (emphasis added).