109 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

TransColorado Gas Transmission Company Docket No. RP04-602-000

ORDER ACCEPTING TARIFF FILING SUBJECT TO CONDITIONS

(Issued October 29, 2004)

1. On September 20, 2004, TransColorado Gas Transmission Company (TransColorado) filed tariff sheets[1] to include a new provision for rollover rights, a modification of its existing Right of First Refusal (ROFR) tariff provision, and revisions to its pressure requirements. The Commission accepts the filing, effective November 1, 2004, subject to conditions. The Commission also finds that TransColorado's current tariff provision regarding bid matching must be modified prospectively. This order serves the public interest by insuring that capacity on this fully subscribed pipeline is assigned on a non-discriminatory basis to those that value it the most.

BACKGROUND

2. In the instant filing, TransColorado proposes to: (1) establish rollover rights for shippers on the pipeline; (2) expand the availability of the ROFR tariff provisions for shippers; and (3) provide additional flexibility to shippers with regard to delivery pressure on the pipeline. TransColorado contends that Commission precedent permits

[1] Fourth Revised Sheet No. 200; Original Sheet No. 227J; Second Revised Sheet No. 228; First Revised Sheet No. 229; First Revised Sheet No. 240; First Revised Sheet No.402; First Revised Sheet No.404; First Revised Sheet No. 406; and First Revised Sheet No.408, to TransColorado's FERC Gas Tariff, First Revised Volume No. 1.

parties to agree to evergreen or rollover provisions in contracts[2] and permits shippers receiving service under a negotiated rate, or discounted rate, to agree to grant ROFR rights on a non-discriminatory basis.[3]

Notice, Interventions, and Protests

3. Notice of this filing was published in the *Federal Register*, 69 Fed. Reg. 59,911 (2004), with comments, protests, or motions to intervene due on or before October 4, 2004. Pursuant to Rule 214 of the Commission's regulations, 18 C.F.R. § 385.214 (2004), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted.

4. Motions to intervene were filed by BP American Production Company, BP Energy and ChevronTexaco Natural Gas. These intervenors (Indicated Shippers) also filed a joint protest requesting three separate actions. First, Indicated Shippers note that TransColorado's existing tariff governing ROFR states that if a prospective shipper bids for the capacity, the existing shipper can retain the capacity if the shipper elects to match the price and duration of the accepted bid. Indicated Shippers argue that the Commission, acting pursuant to its authority under section 5 of the Natural Gas Act (NGA),[4] should require TransColorado to eliminate the rate component requirement and to revise its tariff to allow an existing shipper to retain its capacity via ROFR by matching the Net Present Value (NPV) of the best competing bid received from prospective shippers. Second, Indicated Shippers request that the Commission require TransColorado to revise its proposed tariff language regarding rollover rights to state that such rollover must be at the maximum or recourse rate rather than at a rate that is subject to agreement by TransColorado. Finally, Indicated Shippers argue that the Commission should find that, because Commission policy is that a negotiated ROFR is a material

[2] *See Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, 65 Fed. Reg. 10,156 (Feb. 25, 2000), FERC Stats. & Regs ¶ 31,091 at 31,341 (2000), *order on reh'g*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 (2000), *order denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *order on remand*, 101 FERC ¶61,127 (2002), *order on reh'g and clarification*, 106 FERC 61,088 (2004).

[3] *See Columbia Gas Transmission Corp*., 101 FERC ¶ 61,337 (2002).

[4] 15 U.S.C. § 717d (2000).

deviation from a pipeline's tariff, TransColorado should be required to file a newly negotiated ROFR contract with the Commission, listing the contract in the tariff as a material deviation, pursuant to Commission regulations, 18 C.F.R. § 154.1(d) (2004).

5. On October 15, 2004, TransColorado filed an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. The Commission is not persuaded to accept TransColorado's answer and will, therefore, reject it.

DISCUSSION

Bid-Matching Provision

6. TransColorado's section 7.4 regarding bid matching states that if a prospective shipper bids for an existing shipper's capacity, the existing shipper can retain the capacity if it matches the price and duration of the prospective shipper's bid. As discussed above, Indicated Shippers argue that TransColorado should consider only the NPV of the existing shipper's bid, without any requirement that the existing customer match a specific component of the bid, such as price or duration. Indicated Shippers argue that this position is consistent with the principle that underlies Commission policy on the allocation of capacity: those parties who value the product or service the most should be the ones to have it.[5] Indicated Shippers emphasize that the Commission has approved of the use of NPV method for determining the value of competing bids.[6]

7. The Commission will grant Indicated Shippers request on this point. Since TransColorado uses the NPV method to evaluate the bids of prospective shippers, it must also use the NPV method to determine whether the existing shipper has matched the

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[5] *See Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295 at 62,053, *order on reh'g*, 48 FERC ¶ 61,122 (1989), *appeal dismissed without order sub nom., Wisconsin Public Service Commission v. FERC*, 966 F.2d 702 (D.C. Cir. 1992).

[6] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 106 FERC ¶ 61,088 at P 19 (2004).

winning third party bid. In a recent order,[7] the Commission acted, pursuant to section 5 of the NGA, to require a pipeline that used the NPV methodology in its evaluation of competing bids by prospective shippers to use the same methodology for determining whether an existing shipper has matched the best bid by a prospective shipper and stated that to do otherwise would be unduly discriminatory. Accordingly, we will require TransColorado, within 30 days of this order, to file tariff sheets with tariff language consistent with this requirement.

Rollover Rights

8. TransColorado has proposed a new section 7.1 of the General Terms and Conditions of its tariff governing rollover rights, which provides that a shipper under any firm transportation service agreement with a term of three years or longer has rollover rights to continue receiving service on a firm basis beyond the term of the current contract. The new tariff language governing rollover rights allows TransColorado the choice of whether or not to continue a discounted rate arrangement. The new rollover provision takes the place of the ROFR process in section 7.2, which requires that third party bids be matched.

9. Longstanding Commission policy permits pipelines to offer rollover or evergreen rights in contracts. Here, TransColorado proposes to do so for longer-term contracts. The option to rollover a contract is the shipper's. However, there is no guarantee that any pre-existing rate discount may or will continue on a rolled-over agreement because Commission policy permits, but does not require, pipelines to offer service at a discount or negotiated rate less than the recourse rate. For non-affiliate shippers, TransColorado would have to decide, based on economic principles, whether to continue at a discount or negotiated rate. Furthermore, as Indicated Shippers note, TransColorado's pipeline capacity is virtually fully subscribed, and a substantial portion of its capacity is held by affiliates. The Commission notes that the Commission's standards of conduct for transmission providers stipulate that a transmission provider such as TransColorado must post on its website any offer of a discount for transmission service at the time the discount offer is contractually binding and state whether the customer is an affiliate.[8]

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[7] *Transcontinental Gas Pipe Line Corp.*, 105 FERC ¶ 61,365 at P 19 (2003) (*Transco*).

[8] 18 C.F.R. § 358.5(d) (2004).

10. Accordingly, the Commission rejects Indicated Shippers' request that the Commission require TransColorado to require the maximum or recourse rate for contract extensions under the rollover rights provision. TransColorado should have the flexibility to offer discounts to non-affiliates if that is consistent with economic principles. The Commission's standards for affiliate abuse are satisfied, given that affiliate transactions are subject to separate reporting requirements, which will ensure that these rollover rights are exercised in a just and reasonable manner.

Filing of NonConforming Agreements

11. Indicated Shippers request that the Commission require TransColorado to file negotiated ROFR contracts as a non-conforming agreement. Indicated Shippers acknowledge that, ordinarily, a pipeline would also have the option to have a tariff provision that makes such a non-regulatory ROFR available generally to all discount rate or negotiated rate shippers on a non-discriminatory basis.[9] However, Indicated Shippers argue that because TransColorado is essentially fully subscribed, and affiliates of TransColorado hold a large portion of that capacity, the risk of undue discrimination, absent a reporting requirement, is greater than usual.

12. The Commission notes that the Commission's regulations do not require TransColorado to file such contract or list such contract in its tariff as a contract with a material deviation. Rather, such non-regulatory ROFR or rollover arrangements constitute "special details pertaining to a transportation contract" within the meaning of the Commission's regulations, 18 C.F.R. § 284.13(b)(viii) (2004), and must be posted on the pipeline's internet web site consistent with that regulation.[10]

Right of First Refusal

13. TransColorado has revised section 7.2 of its tariff to include a provision that states that a shipper paying a discounted rate or a negotiated rate will not have the ROFR, unless agreed to in writing by TransColorado. TransColorado characterizes this provision as an expansion to the ROFR in that it permits shippers receiving service under

[9] *See, e.g., Columbia Gas Transmission Corp*., 101 FERC ¶ 61,337 at 62,392 (2003).

[10] *See, e.g., Columbia Gas Transmission Corp.,* 97 FERC ¶ 61,221 at 62,002 n.26 (2001). The regulation applies not only to capacity release transaction, but also to any and all special details pertaining to a pipeline transportation contract, and requires reporting of all special details pertaining to a pipeline transportation contract.

a negotiated rate or discounted rate agreement with a term of twelve consecutive months or greater, to enter into an agreement that grants the shipper ROFR rights where previously TransColorado's tariff only allowed shippers paying the recourse, or maximum, tariff rate to exercise a Right of First Refusal. The Commission finds that this tariff provision is reasonable and uncontested.

Measurement Provisions

14. TransColorado has revised section 10.16 of its tariff to provide for TransColorado and a shipper to mutually agree to a specific delivery pressure, or range of delivery pressures, for a stated period at any delivery point or points on a non-discriminatory basis, provided that system integrity is not threatened and there is no adverse impact on TransColorado's ability to meet its firm service obligations. Our review indicates that these proposed tariff revisions are reasonable, and no party to this proceeding has taken issue with these tariff revisions.

The Commission orders:

(A) The tariff sheets referenced in footnote 1 are accepted for filing, effective November 1, 2004, subject to the conditions in this order and the ordering paragraphs below.

(B) TransColorado is directed to file, within 30 days of the date of this order, to revise section 7.4 of its tariff, consistent with the discussion in the body of this order.

(C) TransColorado shall post on its web site, pursuant to section 284.13(b)(viii) (2004) of the Commission's regulations, "special detail" information concerning the contracts with negotiated rate or discount rate shippers that contain a negotiated ROFR or rollover provision.

By the Commission.

(S E A L)

Linda Mitry
Acting Secretary