UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Gas Transmission, LLC	Docket No. CP05-407-000
Texas Eastern Transmission, LP	Docket No. CP05-408-000

ORDER GRANTING ABANDONMENT AND ISSUING CERTIFICATE

(Issued November 21, 2005)

1. On September 1, 2005, Texas Eastern Transmission, LP (Texas Eastern), filed an application, in Docket No. CP05-408-000, pursuant to section 7 of the Natural Gas Act (NGA), requesting authority to lease to Texas Gas Transmission, LLC (Texas Gas) 103,500 dekatherms per day (Dth/d) of capacity located in the East Texas Access Area (ETX) Zone of Texas Eastern's interstate natural gas transmission system.[1] Also on September 1, 2005, Texas Gas filed a companion application, in Docket No. CP05-407-000, pursuant to section 7(c) of the NGA, requesting authority to lease the subject capacity from Texas Eastern. The capacity Texas Gas proposes to lease is currently unsubscribed capacity on Texas Eastern's system. The proposal does not require construction of any facilities. Texas Eastern will incur no capital expenditures associated with the proposal and there will be no subsidization by either applicant's current customers.

[1] Capacity lease arrangements are construed as an abandonment pursuant to NGA section 7(b) by the lessor and an acquisition pursuant to NGA section 7(c) by the lessee. *See e.g., Midwestern Gas Transmission Corporation and Trunkline Gas Company*, 73 FERC ¶ 61,210 (1995).

2. As discussed below, the requested authorizations are required in the public convenience and necessity and are granted, subject to certain conditions.

Background and Proposal

3. Texas Eastern owns and operates an interstate natural gas pipeline system, a portion of which, the ETX Zone, is located in Texas, Louisiana and Arkansas. Similarly, Texas Gas owns and operates a natural gas pipeline system which transports natural gas primarily from sources in Texas and Louisiana to various delivery points throughout its system in the States of Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, Indiana, Illinois and Ohio. Texas Eastern and Texas Gas have entered into a five-year capacity lease agreement which provides that Texas Eastern will lease to Texas Gas, and Texas Gas will lease from Texas Eastern, 103,500 Dth/d of existing capacity (Lease Capacity) in the ETX Zone on a firm basis between a primary receipt point near Beckville, Texas and a primary delivery point near Sharon, Louisiana. This agreement will allow Texas Gas to transport up to 100,000 MMBtu/day of natural gas on a firm basis for Devon Gas Services, L.P. (Devon) from Beckville, Texas to Lebanon, Ohio. In effect, the leased capacity will serve as an upstream extension of the Texas Gas system to enable receipt of Devon's Gas.

Interventions and Protests

4. Notice of Texas Gas' application in Docket No. CP05-407-000 was published in the *Federal Register* on September 16, 2005 (70 Fed. Reg. 54731). Timely, unopposed motions to intervene were filed by Memphis Light, Gas and Water Division, City of Memphis, Tennessee, NJR Energy Services Company, New Jersey Natural Gas Company, Atmos Energy Corporation, Louisville Gas and Electric Company, PSEG Energy Resources and Trade LLC, the Western Tennessee Municipal Group, Jackson Energy Authority, City of Jackson, Tennessee, and the Kentucky Cities.[2] Notice of Texas Eastern's application in Docket No. CP05-408-000 was published in the *Federal Register* on September 16, 2005 (70 Fed. Reg. 54730). Timely, unopposed motions to intervene were filed by New Jersey Natural Gas Company, NJR Energy Services Company, Atmos Energy Corporation, and the New England Local Distributing Companies.

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[2] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2005).

5. The East Ohio Gas Company, d/b/a Dominion East Ohio, The Peoples Natural Gas Company, d/b/a Dominion Peoples, and Hope Gas, Inc., d/b/a Dominion Hope filed untimely motions to intervene in both Texas Eastern's and Texas Gas' applications. We will grant the motions, since to do so at this stage of the proceeding will not delay, disrupt, or otherwise prejudice the proceeding or other parties.[3]

6. The Municipal Defense Group (MDG), made up of municipalities who own and/or operate gas distribution systems serving their respective communities and purchase transportation, and in some cases, storage services from Texas Eastern, filed comments regarding the incremental charge under the Lease Agreement between Texas Eastern and Texas Gas. These comments will be addressed below.

7. Ohio Intrastate Energy, LLC (OIE) an intrastate pipeline, protests Texas Eastern's proposed rates and several proposed conditions of service. Texas Eastern filed a response to OIE's protest, and OIE filed a reply to Texas Eastern's response. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protests or answers unless otherwise ordered by the decisional authority.[4] We will accept these responses and replies because they have provided information that assisted us in our decision-making process. The issues raised by OIE are addressed below.

Discussion

8. Since Texas Eastern and Texas Gas propose a lease agreement for the transportation capacity of natural gas in interstate commerce subject to the jurisdiction of the Commission, Texas Eastern's and Texas Gas' proposals are subject to the requirements of subsections (b), (c) and (e) of section 7 of the NGA.

The Certificate Policy Statement

9. The Certificate Policy Statement provides guidance as to how we will evaluate proposals for certificating new construction by establishing criteria for determining whether there is a need for a proposed project and whether the proposed project will

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[3] 18 C.F.R. § 385.214(d) (2005).

[4] 18 CFR § 385.213(a)(2) (2005).

serve the public interest.[5] A proposal to lease capacity with no related construction of facilities such as Texas Eastern's and Texas Gas' proposal in this proceeding eliminates the Policy Statement's concerns with overbuilding, disruptions of the environment and the exercise of eminent domain. However, the threshold requirement under the Policy Statement, that a pipeline must be prepared to financially support the project without relying on subsidization from its existing customers, is equally applicable to leases of capacity. Similarly, whether the applicant has made efforts to eliminate or minimize any adverse effects the proposed lease might have on the applicant's existing customers and existing pipelines in the market and their captive customers is also relevant to our evaluation of the proposal.

10. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.[6] To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee in essence, owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity. The Commission's practice has been to approve a lease if it finds that: (1) there are benefits for using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers.[7]

11. The proposed lease of capacity will enable Texas Gas to provide markets served by its system with increased access to natural gas supplies from East Texas, allowing Devon to transport gas to its customers for use in meeting winter 2005-2006 heating demands. Texas Gas' existing customers will not subsidize the leased capacity since

[5] *Certification of New Interstate Natural Gas Pipeline Facilities* (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), *order clarifying statement of policy*, 90 FERC ¶ 61,128, *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000).

[6] *Texas Eastern Gas Transmission Corp.*, 94 FERC ¶ 61,139 at 61,530 (2001).

[7] *Columbia Gas Transmission Corporation*, 79 FERC ¶ 61,160, at 61,755-59 (1997); *Midwestern Gas Transmission Co*., 73 FERC ¶ 61,320, at 61,888 (1995); and *Mobile Bay Pipeline Projects*, 55 FERC ¶ 61,358, at 62,078 (1991).

Texas Gas has designed an incremental rate to recover the costs of the leased capacity based on the lease payment it will make to Texas Eastern. No capital expenditures are associated with this proposal. The monthly lease charge was mutually agreed upon through negotiation between Texas Eastern and Texas Gas and as discussed fully below, the monthly lease charge fully compensates Texas Eastern for capacity leased to Texas Gas. Additionally, as described in the Lease Agreement, Texas Gas will be responsible for fuel gas, including lost and unaccounted for gas, associated with the Lease Capacity. Texas Eastern will track actual fuel usage for the Lease Capacity and will adjust the fuel percentage for which Texas Gas is responsible on an annual basis. In view of these provisions, Texas Eastern's existing customers will not subsidize the incremental fuel costs associated with the project.

12. The proposed lease of capacity uses available unsubscribed capacity and does not affect the rates of existing customers. Therefore, the project will not result in adverse operational or economic impacts on existing Texas Eastern customers or on any other pipelines or its customers. Moreover, the lease agreement between Texas Eastern and Texas Gas does not propose any facility construction, and therefore will not impact any landowners economically or environmentally. Based on the benefits the proposed project will provide to the market and the lack of adverse effects on existing customers, other pipelines, landowners, or communities, we find that the public convenience and necessity requires approval of Texas Eastern's and Texas Gas' proposals.

Lease Agreement

13. The Commission will grant approval of Texas Eastern's abandonment by lease of firm capacity to Texas Gas and issue a certificate to Texas Gas authorizing the acquisition of firm capacity by lease on Texas Eastern. The lease agreement utilizes otherwise unsubscribed capacity on Texas Eastern's system. The facilities subject to the lease agreement were, prior to unbundling, used to deliver substantial volumes of gas from the Texas Eastern system into the Texas Gas system at Sharon, Louisiana for use by Texas Gas in fulfilling its merchant function. Following unbundling, volumes delivered through the ETX portion of Texas Eastern's system declined substantially and the firm capacity has remained undersubscribed since then.

14. As noted, the lease agreement provides that Texas Eastern will lease to Texas Gas, and Texas Gas will lease from Texas Eastern, 103,500 (Dth/d) of existing capacity in the ETX Zone on a firm basis. The lease agreement has a primary term of five years and continues year to year thereafter unless terminated by either Texas Eastern or Texas Gas by providing the other no less than three hundred sixty five (365) days prior written notice. The commencement date will be after any and all necessary approvals are received.

15. Under the lease agreement, Texas Gas has a right to use the leased capacity on a firm basis, subject to Texas Eastern's physical ability to receive such deliveries. If the leased capacity becomes unavailable due to operational circumstances, the lease capacity will be reduced in the same proportion as the capacity for all of Texas Eastern's other firm customers. Further, Texas Gas has the right to use the leased capacity for transportation as if it were Texas Gas' own capacity, subject to Texas Gas' own transportation rate schedules. Additionally, Texas Eastern will operate and maintain the leased facilities consistent with its FERC Gas Tariff. Texas Eastern and Texas Gas will cooperate on operational matters related to the leased capacity.

16. OIE filed a protest and additional comments stating that it has attempted through negotiation with Texas Eastern to obtain what it characterizes as service from Texas Eastern comparable to that offered Texas Gas for intrazonal transportation in a portion of Texas Eastern's Market Zone M2. OIE considers itself similarly situated to Texas Gas but because its request for service has been denied, opposes this service to Texas Gas on the basis that it is discriminatory, and grants a preference to Texas Gas that violates Commission policy. Texas Eastern responds that OIE has never been denied service on Texas Eastern, and in fact has never requested service pursuant to the terms of Texas Eastern's FERC Gas Tariff. OIE also states that, in its opinion, Texas Eastern's zone rate structure is unfair.

17. OIE has not presented evidence of discriminatory or preferential treatment that would cause us to deny or condition these authorizations. The service OIE seeks from Texas Eastern is not comparable to the lease contracted with Texas Gas in the subject agreement. The subject proposal involves a lease of capacity by Texas Gas in Texas Eastern's ETX Zone in Eastern Texas and Western Louisiana; whereas OIE appears interested in obtaining transportation service from Texas Eastern on a different segment of Texas Eastern's system -- Market Zone M2, in Eastern Indiana and Western Ohio. In addition, the lease involves unsubscribed capacity in Texas Eastern's ETX Zone. There currently is no unsubscribed capacity on the Market Zone M2 path sought by OIE. Further, OIE seeks service with fuel charges and rates that are structured differently from any rate schedule in Texas Eastern's FERC Gas Tariff. A request for a determination that Texas Eastern's zone rate structure is unfair is not appropriate in this proceeding and should be addressed in a section 4 or 5 proceeding.

Rate Proposals

1. Texas Eastern

18. Texas Eastern proposes a monthly lease charge of $1.825 per Dth per month and a charge of $0.015 per Dth for all gas quantities delivered at the primary delivery point.

Texas Eastern contends that the monthly lease payments of $188,887.50 ($1.825 x 103,500) will recover the costs associated with Texas Gas' utilization of the Lease Capacity and that the rates were mutually agreed upon through negotiations with Texas Gas. Texas Gas is further responsible for providing the fuel gas associated with the Lease Capacity, including lost and unaccounted for gas, based on a fuel percentage that is adjusted annually to reflect actual fuel usage. The initial fuel percentage is 0.65 percent for the first year of the Lease Agreement. Texas Eastern explains that the monthly lease payment is less than its firm part 284 transportation tariff rates over the same transportation path and therefore less than Texas Gas would pay at Texas Eastern's maximum rate.[8] Texas Eastern claims that the proposal will protect is existing customers from subsidizing the Lease Capacity because the monthly lease payment will recover the costs associated with the lease capacity and Texas Gas will provide the fuel gas for such service.[9]

19. MDG filed comments requesting that the Commission require Texas Eastern to explain its contention that the incremental monthly lease charge is less than the maximum rate for comparable service on Texas Eastern's system yet at the same time fully compensates Texas Eastern for the costs of the Lease Capacity.

20. In its answer to MDG, Texas Eastern argues that it is not proposing that its existing customers subsidize the costs of the proposed lease arrangement and that it is not incurring any capital expenditures to provide the proposed service. Texas Eastern emphasizes that since Texas Gas will be responsible for all fuel gas, including lost and unaccounted for gas, no existing customers will subsidize the incremental fuel costs associated with the proposed lease arrangement. In any case, Texas Eastern also points out that it will maintain the records associated with the proposed lease arrangement in accordance with section 154.309 of the Commission's regulations,[10] which will permit its existing shippers to ensure that subsidization is not occurring.

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[8] Texas Eastern's Zone ELA to Zone ELA rate for Rate Schedule FT-1 service is $2.600 per Dth as compared to the proposed rate of $1.825 per Dth. *See* Texas Eastern's FERC Gas Tariff, Seventh Revised Volume No. 1, Fifteenth Revised Sheet No. 30.

[9] The Commission generally does not permit pipelines to make discount type adjustments for negotiated rates in Section 4 rate cases. Enbridge Pipelines, 103 FERC ¶ 61,305 at P17 (2003). Thus, Texas Eastern would be responsible for any underrecovery of costs.

[10] 18 C.F.R. § 154.309 (2005).

21. Since there are no capital costs associated with the lease transaction and Texas Eastern will be fully reimbursed for all the fuel, the only cost which will result from the lease, we find that Texas Eastern's customers will not subsidize the transaction. For these reasons, we will approve Texas Eastern's proposed rate and fuel charge for the Lease Capacity service for Texas Gas.

2. Texas Gas

22. Texas Gas proposes firm transportation service for Devon utilizing the leased capacity on Texas Eastern in conjunction with a corresponding amount of unsubscribed long haul capacity on its Texas Gas mainline system.[11] Texas Gas proposes to charge a negotiated demand charge rate of $0.19 per MMBtu, for deliveries to a primary point at Lebanon, Ohio with secondary delivery points at various points on its system. The firm transportation agreement provides for a minimum commodity revenue charge of $3 million annually and an Interruptible Transportation (IT) rate of $0.0375 per MMBtu. The firm transportation agreement also provides for a revenue credit, such that up to $900,000 of IT revenue may be credited in each annual period towards Devon's $3 million Minimum Annual Commodity Revenue (MACR) commitment. Amounts of IT revenue in excess of the $900,000 annual amount will not be credited towards the MACR commitment. Further, the negotiated rate agreement also requires Devon to pay for the fuel associated with its use of the capacity leased from Texas Eastern, currently 0.65%, which ensures that Texas Gas' other customers will not subsidize the fuel costs.

23. In the event that Devon does not fully utilize its capacity, Texas Gas also proposes incremental recourse rates which would apply to any other shipper that utilizes the Lease Capacity on Texas Eastern. The other shippers could utilize the Lease Capacity on secondary or interruptible basis. The proposed incremental recourse rate is based on the costs to recover the leased capacity, specifying a demand charge of $0.0621 per MMBtu, a commodity charge of $0.0155 per MMBtu, resulting in an overrun and interruptible rate of $0.0776 per MMBtu. Texas Gas further proposes to charge the fuel retention charge rate of 0.65% which is applicable to the transportation on the Lease Capacity. Texas Gas filed *pro forma* tariff sheets reflecting the incremental recourse rate applicable to any shipper who utilizes capacity that Devon does not fully utilize. Texas Gas explains that only shippers using the Lease Capacity will be subject to the proposed incremental rates to ensure that there is no subsidy from other shippers.

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[11] Based on an open season, Devon contracted for the full Lease Capacity on Texas Eastern.

24. We will approve Texas Gas' proposed negotiated rates for service to Devon over the Leased Capacity on Texas Eastern's mainline subject to conditions. Specifically, Texas Gas must make a filing consistent with the Commission's Alternative Rate Policy Statement, as revised in the Commission's Modification of Negotiated Rate Policy.[12] Texas Gas must either file its executed negotiated rate contracts, in conformance with the Alternative Rate Policy Statement, as modified, or file numbered tariff sheets, within 30 days prior to the commencement of service. If Texas Gas chooses to submit tariff sheets where this option is permitted under the Alternative Rate Policy Statement, as modified, it must state for each shipper paying a negotiated rate the following information: (1) the exact legal name of the shipper; (2) the total charges (the negotiated rate and all applicable charges); (3) the receipt and delivery points; (4) the volumes of gas to be transported; (5) the applicable rate schedule for the service; (6) any formula upon which the negotiated rate is designed; and (7) a statement affirming that the negotiated rate contract does not deviate in any material aspect from the form of the service agreements in its tariff.

25. Texas Gas must also disclose all considerations linked to the agreements. In addition, Texas Gas is required to maintain separate and identifiable accounts for volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates in sufficient detail so that they can be identified in Statements G, I and J in any future NGA section 4 or 5 rate proceedings. Texas Gas is required to file the negotiated rate tariff sheets and tariff sheets consistent with its *pro forma* tariff sheets under section 4 of the NGA.

Environmental Analysis

26. Since neither proposal requires construction of facilities, they both qualify as categorical exclusions under section 380.4(a)(27) of the Commission's regulations and therefore no environmental assessment is required.[13]

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[12] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996); *petition for review denied, Burlington Resources Oil & Gas Co. v. FERC,* Nos. 96-1160, *et al.*, U.S. App. Lexis 20697 (D.C. Cir. July 20, 1998). *Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *reh'g pending*.

[13] 18 C.F.R. § 380.4 (a)(27)(2005).

27. The Commission on its own motion, received and made a part of the record all evidence, including the application, amendment, and exhibits thereto, submitted in this proceeding, and upon consideration of the record,

The Commission orders:

(A) Authority is granted to Texas Eastern, in Docket No. CP05-408-000, to abandon by lease the subject capacity to Texas Gas.

(B) A certificate of public convenience and necessity is issued to Texas Gas, in Docket No. CP05-407-000, authorizing it to lease the subject capacity from Texas Eastern, as described and conditioned herein.

(C) Texas Gas' proposed incremental rates for shippers using the Lease Capacity in the event Texas Gas does not fully utilize the Lease Capacity under Rate Schedules NNS, SGT, SNS, FT, STF, and STFX, IT and ITX, are approved.

(D) Texas Gas shall file tariff sheets 30 days prior to commencing service under this certificate consistent with its *pro forma* tariff sheets.

(E) Texas Gas shall comply with the Commission's Alternative Rates Policy Statement, as modified by the Modification of Negotiated Rate Policy, to the extent it proposes to charge its customers for this project negotiated rates, as more particularly discussed herein.

(F) OIE's protest is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.