UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company Docket No. RP06-289-000

ORDER ACCEPTING TARIFF SHEETS, SUBJECT TO CONDITION

(Issued April 27, 2006)

1. On March 31, 2006, Tennessee Gas Pipeline Company (Tennessee) filed tariff sheets[1] to include in its tariff a mechanism to address contract extension rights for contracts that rely on off-system capacity acquired by Tennessee. Tennessee proposes an effective date of May 1, 2006. As discussed below, the Commission accepts the proposed tariff sheets, subject to condition, to be effective May 1, 2006.

Instant Filing

2. Tennessee states that, on July 11, 2001, the Commission approved Article XIX of the General Terms and Conditions (GT&C) of its tariff that provides a waiver of the "shipper must have title" policy pursuant to its existing tariff and rates.[2] Tennessee states that Article XIX provides in part, that from time to time, Tennessee may enter into transportation and/or storage agreements with other interstate and intrastate pipeline and storage companies, and in the event that Tennessee acquires such off-system capacity, Tennessee will use such capacity for operational reasons or to render service for its shippers.

3. Tennessee contends that while Article XIX makes clear that Tennessee can use the off-system capacity to provide service to its shippers, such service must be pursuant to the rates, terms and conditions of its tariff. However, Tennessee states that its current tariff does not address how limitations imposed by the third-party provider of the off-

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[1] Eighth Revised Sheet No. 324 and Third Revised Sheet No. 368 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

[2] *Tennessee Gas Pipeline Co.,* 96 FERC ¶ 61,045 (2001).

system capacity may affect Tennessee’s service to its shippers. Therefore, Tennessee proposes to add the following language to Article XIX:

> In the event that off-system capacity used to render service to Transporter's Shippers is subject to renewal limitations, Transporter will indicate in any posting of capacity available for service any limitation to extension rights that will apply as a result of limitations on the off-system capacity.

4. Tennessee states that such revisions are necessary to accommodate situations where the third party provider of off-system capacity sells Tennessee a contract with limitations on term or other renewal rights. Tennessee states that its current tariff is silent as to whether it can correspondingly limit the term or renewal rights of the service rendered in reliance on that limited term off-system capacity where the Tennessee shipper may otherwise be entitled to a right of first refusal (ROFR).

5. Moreover, Tennessee states that if it were to make that limited term off-system capacity available for sale, and a shipper were to bid on that capacity for a 12-month term or longer at maximum rates, it would have to sell the capacity to the shipper. Further, it states, the shipper could conceivably exercise its ROFR rights to extend its contract past the limited term of the off-system capacity, even if Tennessee no longer has access to the off-system contract that allowed it to post the capacity for sale in the first place.

6. For these reasons, Tennessee contends that it is proposing to modify Article XIX of the GT&C to provide that in the event that off-system capacity used to render service is subject to renewal limitations, it will indicate, in any posting of the capacity used to render service, any limitation to extension rights that will apply as a result of limitations on the off-system capacity. In addition, Tennessee proposes to modify Article III, Section 10.4.2(e) of the GT&C to provide additional clarification of this ROFR limitation in the ROFR provision of its tariff.

7. Tennessee also asserts that this proposed modification is substantially similar to several recent tariff filings where the Commission addressed the issue of how pipelines may limit ROFR rights in light of service agreement commitments. While those cases dealt with limiting ROFR rights of contracts sold on an interim basis prior to reserved capacity being used for an expansion project, Tennessee asserts that the inherent logic is the same, *i.e.*, not to continue ROFR rights when the capacity is no longer available. In addition, as in those cases, Tennessee asserts that its shipper will know at the time it acquires the capacity that such capacity does not include ROFR rights since Tennessee will so indicate in any posting of the capacity made available as a result of the off-system capacity contracts. Tennessee further states that the purpose of the Commission’s ROFR policy, *i.e.*, to protect captive long-term customers from the pipelines’ exercise of

monopoly power, is not implicated in this case. Tennessee asserts that the type of customer that voluntarily and knowingly buys existing available capacity with limited extension rights is not a captive, long-term customer, but a customer who has other options for its long-term needs, assuming such long-term needs exist.

Notice, Interventions and Protests

8. Public notice of the filing was issued on April 5, 2006. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2005)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2005)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late interventions at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On April 12, 2006, KeySpan Corporation (KeySpan)[3] filed comments.

9. KeySpan states that it does not oppose Tennessee's proposed tariff sheets. However, it requests that the Commission require Tennessee to clarify that the proposed changes do not affect existing contracts where Tennessee or any other pipeline has already agreed to provide service using off-system capacity. KeySpan asserts that the Commission cannot permit Tennessee or any other pipeline to unilaterally modify its contractual obligations. KeySpan maintains that under the existing contracts, Tennessee has voluntarily assumed the risk of contracting for off-system service, and it must be held to its obligation. Therefore, KeySpan argues that the Commission must require that Tennessee's proposed tariff revisions be revised to reflect that they are applicable only to prospective services which Tennessee may offer in the future, and that ROFR rights under existing services using off-system capacity remain unaffected.

Discussion

10. As discussed below, the Commission's accepts Tennessee's proposed revisions to the tariff sheets, subject to condition, to be effective May 1, 2006.

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[3] KeySpan Corporation includes the following subsidiaries: the Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI; and Boston Gas Company, Colonial Gas Company, EnergyNorth Natural Gas, Inc., and Essex Gas Company.

11. The Commission has previously explained that under the *Texas Eastern* policy,[4] the acquired capacity is subject to the Commission's open access rules at all times. This means that, although it is no longer necessary for an interstate pipeline to obtain approval before acquiring off-system capacity, the pipeline must treat the acquired capacity as though it were part of the acquiring pipeline's own system, and the acquiring pipeline must bear the risk for any unrecovered costs associated with the off-system capacity. The Commission further clarified that, the Commission granted such a waiver in situations where the off-system capacity acquired by such a pipeline would continue to be offered under a tariff that fully complies with the requirements of Order Nos. 636 and 637.[5] Such a requirement includes the regulatory ROFR.[6]

12. Therefore, in rendering off-system capacity to its shippers, Tennessee must treat the acquired capacity as if it were an extension of its own facilities, and thus subject to its tariff. Under its own tariff, Tennessee is required to offer the regulatory ROFR to long-term customers paying the maximum rate for the service. To limit any of the requirements under Order Nos. 636[7] and 637[8] would be contrary to existing Commission policy.

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[4] *Texas Eastern Transmission Corp.*, 93 FERC ¶ 61,273 (2000) (*Texas Eastern*).

[5] *Unocal Keystone Gas Storage, LLC*, 113 FERC ¶ 61,266 at P 12 (2005).

[6] 18 C.F.R. § 284.221(d)(2) (2005).

[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636**,** 57 Fed. Reg. 13,267 (Apr. 16, 1992), FERC Stats. and Regs. ¶ 30,939 (1992); *order on reh'g*, Order No. 636-A**,** 57 Fed. Reg. 36,128 (Aug. 12, 1992), FERC Stats. and Regs. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[8] 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 (2000), clarifying, Order No. 637-A, 65 Fed. Reg. 35,705 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099 (2000), denying *reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000).

13. However, the Commission has previously allowed limitations on the ROFR requirements in certain circumstances. For example, the ROFR requirement has been allowed to be eliminated in the context of capacity reservation cases, where the Commission permits pipelines to reserve existing unsubscribed capacity for a temporary period so that the capacity can be included as part of future expansion projects.[9] In such instances, pipelines are permitted to eliminate the ROFR requirement so long as they have the tariff authority to do so. Therefore, Tennessee may only restrict its own shippers' ROFR rights relative to third-party pipeline capacity if the third-party pipeline's tariff imposes a limitation on ROFR rights. Likewise, if Tennessee wishes to impose such limitations relative to its own expansion projects it may do so only pursuant to limitations permitted by its own tariff.

14. In light of the above, the Commission accepts the proposed revised tariff sheets, subject to the condition that Tennessee clarify the language so that it is applicable only to the instances where the renewal limitations are set forth in the third party pipeline's tariff or in Tennessee's tariff.

15. In regard to the concern raised by Keyspan, the Commission finds that Tennessee's proposal provides for a prospective effect of the tariff language and need not be revised. The proposed tariff language already contemplates that Tennessee will indicate "in any posting of capacity available for service" any limitation to extension rights that will apply as a result of limitations on the off-system capacity. Accordingly, the provision applies only to future postings of capacity and, therefore, a shipper's ROFR rights under existing service agreements using off-system capacity remain unaffected by Tennessee's proposal.

<u>The Commission orders</u>:

(A) Tennessee's proposed tariff sheets are hereby accepted, to be effective May 1, 2006, subject to Tennessee's compliance with the condition set forth in the body of this order.

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[9] *See, e.g., Texas Gas Transmission, LLC,* 111 FERC ¶ 61,480 at P 6 (2005); *Iroquois Gas Transmission System*, 100 FERC ¶ 61,279 at P 5 (2002).

(B) Tennessee must file revised tariff sheets to reflect the changes required by this order within 30 days of the issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.