

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Gulf South Pipeline Company, LP

Docket No. RP06-355-000

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued June 8, 2006)

1. On May 9, 2006, Gulf South Pipeline Company, LP (Gulf South) filed tariff sheets to implement new Right of First Refusal (ROFR) procedures for its firm transportation shippers under Rate Schedules NNS, NNS-SCO, FTS, FTS-SCO, and FTS-SSO, and its storage service customers under Rate Schedules FSS-B and FSS-M.<sup>1</sup>
2. Gulf South proposes to update and modify certain provisions in section 30 of its General Terms and Conditions (GT&C). Gulf South states that these changes will streamline its ROFR procedures, improve certainty to both shippers and Gulf South, and insure that the new provisions reflect the current market environment. As discussed below, the Commission will accept the proposed tariff sheets, subject to conditions to be effective June 9, 2006, as proposed.

**Notice, Interventions, and Protests**

3. Public notice of Gulf South's filing was issued on May 12, 2006, with interventions and protests 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 date of issuance 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. CenterPoint Energy Entex (Entex), Merrill Lynch Commodities, Inc. (MLCI) and BP America Production Company, BP Energy Company, and Chevron Natural Gas, A Division of Chevron U.S.A. Inc. (collectively referred to as Indicated Shippers) filed motions to intervene and protest. On May 26, 2006, Gulf South filed an

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<sup>1</sup> See Appendix.

Answer to the protests. Generally, the Commission does not permit answers to protests, however, the Commission will accept Gulf South's Answer as it aids in the Commission's review of the instant proposal.

### **Discussion**

4. The Commission accepts the proposed tariff sheets, effective June 9, 2006, subject to Gulf South filing revised tariff sheets within 15 days of the date of issuance of this order as discussed below.

#### Section 30.2 – Timing of ROFR Notification

### **Proposal**

5. Gulf South proposes to modify the ROFR timelines contained in section 30.2 of its tariff to shorten the minimum time in which it is required to provide notice to a customer that a service agreement is expiring to 90 days from the current 120 days and to eliminate the maximum notice period of 150 days. However, Gulf South states that it and the customer will have the flexibility to agree to begin the ROFR process more than 90 days before the agreement expires. Gulf South also proposes to reduce the time in which a customer must notify Gulf South of the intent to exercise its ROFR ("ROFR Response") from 30 days to 10 days.<sup>2</sup> Gulf South avers that this change recognizes the realities of today's market place where long auction periods are no longer required. Further, Gulf South is reducing the time for posting a contract for bid from 30 business days to 5 business days. In addition, Gulf South states that it is reducing the time for executing a service agreement from 30 days to 5 business days, if the existing shipper wishes to continue service or 10 business days for a new winning bidder to receive a

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<sup>2</sup> Specifically, proposed Section 30.2(b) provides in part:

For service agreements with a ROFR, Gulf South shall provide written notice to the Customer at least 90 days prior to the expiration of the existing service agreement, unless Gulf South and Customer otherwise agree. To exercise the ROFR, the customer must provide Gulf south with written notice of its intent within 10 business days after the date of Gulf South's notice ("ROFR Response").

service agreement.<sup>3</sup> Gulf South states that each of these changes reflects the current electronic-based business environment, and are consistent with the shortened time frames currently applicable to its ROFR process for firm storage.

### **Comments**

6. MLCI/Indicated Shippers assert that Gulf South should not be allowed to provide the ROFR notice to the existing shipper any sooner than 150 days prior to the existing agreement's expiration date, if no mutual agreement has been made. They argue that under the current proposal, Gulf South could send the customer a notice of its intent to start the ROFR process the day after the contract becomes effective. MLCI/Indicated Shippers aver that Gulf South's timeline should allow bidding to occur sufficiently close in time to the capacity's availability in order to allow both the existing shipper and prospective shippers to determine the value of the capacity. MLCI/Indicated Shippers state that existing shippers, as well as prospective shippers, must be provided the opportunity to assess the value of capacity, particularly in view of the many changes occurring on the Gulf South system.

7. Entex asserts that the ROFR timeline for Rate Schedule NNS or FTS in Gulf South's proposal should be modified. Entex argues that in Gulf South's proposed ROFR timeline it has allowed 38 days after it has been notified of a customer's notification of its intent to match the Best Bid (under proposed section 30.2(f)) until it is required to provide a customer with a service agreement 10 days before the expiration of the existing contract (under proposed section 30.2(g)). Entex asserts that Gulf South is only extending the term of an existing service agreement and that the process is no different than that envisioned by section 30.3(e) of Gulf South's tariff where Gulf South commits to providing a new service agreement for Firm Storage Service "before the close of the next business day after the capacity has been awarded."

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<sup>3</sup> Proposed Section 30.2(g) provides in part:

If the original Customer declines to match the Best Bid, Gulf South shall prepare a service agreement setting forth the terms and conditions of the Best Bid for the Bidder with the Best Bid ("Winning Customer"), to be effective on the date the existing service agreement expires. Gulf South shall submit such service agreement to the Winning Customer at least 10 (ten) days prior to the expiration of the existing service agreement.

8. Entex argues that there is too long of a time period between awarding of the bid and executing a service agreement and that the service agreement production time should be shortened to five (5) business days after the Customer agrees to match the Best Bid pursuant to 30.2 (f) or, in the event of no bids being received or accepted by Gulf South, the date upon which Customer and Gulf South agree to terms and conditions of a new service agreement pursuant to 30.2(h). Entex proposes that the last sentence of the second paragraph of section 30.2(f)<sup>4</sup> should be restated as follows:

Gulf South shall submit such service agreement to the Customer within 5 (five) business days after Customer timely matches the Best Bid.

**Answer**

9. Gulf South asserts that the concerns of MLCI/Indicated Shippers are not valid in that both the customers and Gulf South have an interest in determining the true market value of transportation capacity. Gulf South argues that having the flexibility to commence the ROFR process based on market conditions, rather than a calendar, provides greater opportunity that the capacity will be sold at the just and responsible rate. Gulf South states that it has no incentive to start the ROFR process during unfavorable market conditions because if no one, including the ROFR customer, wants the capacity at a reasonable rate, then Gulf South would bear the risk of re-marketing the capacity.

10. In regard to Entex, Gulf South argues that it has experienced situations where over 100 transportation service agreements containing ROFRs were set to expire on the same day. Gulf South states that processing all of the requests within a 5 business day window is impractical. Gulf South states that the proposed language provides Gulf South the flexibility to process each of the requests in a timely fashion, while still providing customers ample time to execute the agreements. Finally, Gulf South argues that many of the service agreements are not mere contract extensions as suggested by Entex,

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<sup>4</sup> Proposed section 30.2 (f) provides in part:

If the original Customer timely matches the Best Bid, Gulf South shall prepare a service agreement, to be effective on the date the existing service agreement expires, setting forth the terms and conditions of the Best Bid. Gulf South shall submit such service agreement to the Customer at least 10 (ten) business days prior to the expiration of the existing service agreement.

because customers often make contract MDQ and/or primary point pair MDQ changes. Gulf South points out that some service agreements, such as Entex's Rate Schedule NNS agreement, contain hundreds of points. Gulf South states that processing these types of agreements involves more of an administrative challenge than merely extending an existing contract.

### **Commission Ruling**

11. The Commission finds that Gulf South's ROFR timeline should allow bidding to occur sufficiently close in time to the availability of the capacity in order to allow both the existing shipper and prospective shippers to determine the value of the capacity. As stated by the Indicated Shippers, the Commission has recognized that the ROFR bidding period should be "relatively close to the time the contract would expire."<sup>5</sup> Moreover, the Commission has stated that "[u]nder the ROFR, a reasonable period before a contract ends, normally six months to a year, a shipper would provide notice to the pipeline stating whether or not it was interested in renewing its contract."<sup>6</sup>

12. In Gulf South's proposal, all dates in the ROFR process are tied to its initial notification and the shipper must make its final ROFR decision 42 days after the initial notification by Gulf South. In the Commission's view, a proposal that does not provide a limit on how far in advance a pipeline may initiate the ROFR process does not adequately permit shippers an opportunity to properly plan for their capacity needs in that it does not necessarily permit the ROFR process to take place relatively close to the time the contract terminates so that existing shippers, as well as prospective shippers, are provided a timely opportunity to assess the value of capacity. Such a mechanism provides too much discretion in the initiation of the ROFR process.

13. In its Answer, Gulf South states that if the Commission believes that an outside timeframe is necessary, Gulf South suggests that it utilize a limit of six months for contracts with terms shorter than two years and one year for contracts with terms of two years or longer. Accordingly, Gulf South is directed to file revised tariff sheets,

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<sup>5</sup> Indicated Shippers Protest at 3, *citing, Texas Eastern Transmission*, 103 FERC ¶ 61,135, P18 (2003).

<sup>6</sup> *Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,295, at p. 62,152 (2003).

consistent with its Answer, to include a maximum ROFR notice period of six months for contracts with terms shorter than two years, and one year for contracts with terms of two years or longer.

14. Further, the Commission does not find Gulf South's ROFR timeline proposal for executing service agreements unreasonable and declines to require Gulf South to adopt the timeframes suggested by Entex. Gulf South has presented reasonable business reasons as an explanation for the adoption of its proposed timeline and the Commission will not require it to modify its ROFR timeline further as Entex has not shown that it is necessary for the Commission to require Gulf South to adopt a shorter timeframe.

#### Section 30.2(b) – ROFR Response

##### **Proposal**

15. Gulf South proposes to require the existing shipper to include in its initial ROFR response the shipper's desired term of service, desired total MDQ, and desired MDQ for each point pair. Specifically, section 30.2(b) states in part:

For FTS Services, the ROFR Response must specify a desired term of service, the desired total MDQ, and the desired MDQ for each point pair. For NNS Services, the ROFR Response must specify a desired term of service, the desired total MDQ, and the desired MDQ at each primary receipt and primary delivery point.

##### **Comments**

16. MLCI/Indicated Shippers contend that at this early stage in the ROFR proceeding there is no reason to require the existing shipper to provide any information other than whether or not the existing shipper is interested in retaining its ROFR rights or, instead, will make a binding statement that it is no longer interested in the capacity.

17. The Indicated Shippers assert that, in addition, the existing shipper's desired term should not be posted in Gulf South's posting regarding the available capacity. Gulf South should post for bid the available capacity, the applicable primary points, the expiration date of the service agreement, the applicable maximum recourse rate, and the minimum rate that Gulf South is willing to accept for the capacity. The existing shipper's decision regarding term as well as the shipper's desired MDQ should not occur until the existing shipper receives notice from Gulf South of the best bid for the capacity of the terminating contract.

18. However, if the Commission deems it appropriate for the existing shipper to be required to specify its desired term in the ROFR response, they argue that the existing

shipper should not be required to commit to that term if there are no third party bids on the capacity or if Gulf South does not accept any of the third party bids. The existing shipper should be able to specify the term of the new service agreement after Gulf South notifies the existing shipper that there is no best bid to match. At that time, Gulf South and the existing shipper can negotiate a new contract, or the existing shipper can require Gulf South to provide service at the maximum rate for any term desired by the shipper.<sup>7</sup> For that reason, Indicated Shippers assert that Gulf South's proposed tariff provisions should be amended to allow the existing shipper to specify the term of the new service agreement after the bidding period ends and before the new service agreement becomes effective.

### **Answer**

19. Gulf South asserts that its proposal promotes overall market transparency for all ROFR participants. Gulf South states that virtually all requests for new firm transportation service are posted for bid pursuant to section 7.4 of its tariff. Postings under section 7.4 include the term of the agreement, the MDQ for the contract, and the MDQ for the primary point pair(s). Gulf South states that the proposed change to the ROFR process brings the ROFR posting requirements in line with the posting requirements of section 7.4 and will enhance market transparency for the ROFR process.

### **Commission Ruling**

20. The Commission finds Gulf South's provision comparable to language currently in Gulf South's section 30.2. Currently, Gulf South's section 30.2(b) states, "[t]he Customer's notice must specify a desired term of service and the desired MDQ in total and at each primary point." The proposed language is similar to the current language and maintains a certain transparency by ensuring that the transportation capacity offered during the ROFR process is specifically identified and that any capacity on which the customer does not exercise its ROFR is offered to the market. Therefore, the Commission accepts the proposed language.

21. However, the Commission agrees that the existing shipper should not be required to commit to the indicated term. The existing shipper need not commit to any term or

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<sup>7</sup> Indicated Shipper Protest at 6, *citing, Columbia Gas Transmission Corp.*, 107 FERC ¶ 61,078 (2004) and *Northern Border Pipeline Co.*, 102 FERC ¶ 61,158 (2003).

volume amount prior to the submission of third party bids. If there are no third party bids on the capacity, or if Gulf South does not accept any of the third party bids, the proposal set forth by Gulf South states at proposed section 30.2(h) that:

If Gulf South does not receive bids during the bidding period, or does not accept any bids, Gulf South and the original Customer may negotiate the rate and term under which service will continue.

### Section 30.2 – Posting Requirements

#### Comments

22. MLCI/Indicated Shippers state that Gulf South should specifically state the primary delivery point(s) and zone(s) in the existing agreement and the primary receipt point(s) and zone(s). Further, MLCI/Indicated Shippers contend that the posting should indicate any restrictions on bidding shippers, such as whether there are any restrictions that would prohibit the prospective shippers from submitting bids with different primary points within the same zones. MLCI/Indicated Shippers also argue that Gulf South should be required to state in its posting regarding the available capacity whether there are any restrictions on bids including the primary points located more downstream or upstream than the primary points in the existing agreement, even though the existing shipper would not be required to match or accept any alternative primary points included in the best bid and can match the best bid by matching the bid's term and rate.

#### Answer

23. Gulf South argues that it cannot provide the type of information requested by MLCI/Indicated Shippers. Gulf South states that the Commission found in its Order No. 637 proceedings, that Gulf South is a reticulated pipeline.<sup>8</sup> Gulf South contends, in that proceeding, the Commission determined that Gulf South awards capacity on a point-to-point basis and that its system is not capable of being pathed.<sup>9</sup> Gulf South states that the only way it can determine whether firm transportation capacity exists at a primary receipt point pair is to evaluate a request for service by using its firm model.

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<sup>8</sup> *Gulf South Pipeline Co. LP*, 98 FERC ¶ 61,278 at p. 62,165 (2002) (*Gulf South*).

<sup>9</sup> *Id.* at p. 62,164.

### **Commission Ruling**

24. Consistent with the Commission's findings in Gulf South's Order No. 637 proceedings, Gulf South's operations require it to award primary firm transportation capacity on a point-pair basis. Accordingly, the Commission will not require Gulf South to modify its proposal in the manner proposed in the MLCI/Indicated Shippers' protest.

#### Section 30.2(b) – Limited Restriction on Changing Primary Points

### **Proposal**

25. Under section 30.2(b), Gulf South proposes to limit the ability of an existing customer to submit a service request change to a contract that is subject to ROFR bidding, until after the new ROFR service agreement becomes effective. Gulf South claims that this proposal is designed to protect the ROFR process by eliminating the ability of existing customers to commence the ROFR process using one set of primary point pairs, and then immediately changing the primary points to different points once the existing shipper has been awarded the capacity. Specifically, Gulf South's section 30.2(b) provides:

After Gulf South receives a Customer's ROFR Response, the Customer may not submit any service request changes to the existing service agreement subject to the ROFR process of this section until the ROFR service agreement becomes effective. Furthermore, Gulf South will not process any additional amendments to the new service agreement prior to the effective date of the new service agreement.

### **Comments**

26. MLCI/Indicated Shippers and Entex state that an existing shipper should not be barred from changing its primary points before the effective date of the new agreement. MLCI/Indicated Shippers argue that under section 7 of Gulf South's tariff, the shipper is free to change its primary points once the ROFR contract has been renewed. Further, Entex states that there could be situations when events beyond the control of either customer or Gulf South occur that would create the need to change to an alternate point either temporarily or permanently.

27. MLCI/Indicated Shippers argue that this situation is exacerbated by Gulf South's proposal to forgo a cap on the ROFR notice period, because within 10 business days after Gulf South provides the ROFR notice, the existing shipper would not be able to change its existing primary points of the new agreement, irrespective of the availability of capacity. Further, MLCI/Indicated Shippers argue that the Commission's policy in *Northwest Pipeline Corporation*, 66 FERC ¶ 61,304 (1994) regarding the prohibition of

shippers, not including the existing shipper, to change their primary points to the primary points under the existing contract before the ROFR bidding process is complete was aimed at ensuring that the existing contract's points are available to bidding shippers or the ROFR holder matching the best bid. MLCI/Indicated Shippers argue that Gulf South's proposal would go beyond this limited restriction by preventing the existing shipper from exercising his right to change primary points during the remaining term of the existing agreement even though all of the bids have been received for the posted capacity.

28. In addition, Entex proposes the following modifications to the last two sentences of proposed section 30.2(b):

After Gulf South receives a Customer's ROFR Response, the Customer may not submit any service request changes to the existing service agreement subject to the ROFR process of this section until the ROFR service agreement is executed. Furthermore, Gulf South will not process any additional amendments to the new service agreement prior to the execution date of the new service agreement.

### **Answer**

29. Upon consideration of these comments, Gulf South proposes to modify its proposed language to permit changes to be made to the currently effective service agreement after the close of the ROFR bidding process and prior to the service agreement's termination date. Specifically, Gulf South proposes the following language for section 30.2(b):

After Gulf South receives a Customer's ROFR Response, the Customer may not submit any service request changes to the existing service agreement subject to the ROFR process of this section until the ROFR capacity has been awarded; provided however, that any changes made after the ROFR capacity has been awarded will be effective only for the remaining term of the existing service agreement.

30. However, Gulf South contends that the Commission should reject the protests raised by MLCI/Indicated Shippers concerning limits on a winning bidder's ability to amend the ROFR contract prior to its effective date. Gulf South states that the proposed language mirrors section 7.4 which provides, "Gulf South will, not however, process any amendments prior to a service agreement's effective date."<sup>10</sup> Gulf South contends that

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<sup>10</sup> Third Revised Sheet No. 1408. See *Gulf South*, 108 FERC ¶ 61,065 (2004).

the language in section 30.2(b) will ensure that all new firm transportation service agreements are treated the same and that ROFR customers receive no competitive advantage over existing customers.

### **Commission Ruling**

31. The modified language proposed by Gulf South in its Answer is reasonable and appears to address the major concerns raised in the protests. This language would permit firm ROFR shippers to change primary points on the existing contract during the time period between the date the ROFR capacity is awarded and the end of the service agreement, a period of approximately 76 days. Accordingly, the Commission directs Gulf South to so modify its tariff.

#### Section 30.2(f) – Best Bid

### **Proposal**

32. Section 30.2(f) of Gulf South's proposal provides that:

The original Customer shall have the right to continue to receive service by notifying Gulf South, in writing, within five (5) business days of receiving Gulf South's notice of the Best Bid that the original Customer agrees to match the Best Bid. If the Best Bid is only for a portion of the service, the original Customer must match the amount of capacity to which the Best Bid applies. To match the Best Bid, the original Customer must agree to all terms and conditions of the Best Bid except as otherwise provided in section 23.

### **Comments**

33. MLCI/Indicated Shippers disagree with Gulf South's proposal to require that the existing shipper "agree to all terms and conditions of the Best Bid except as otherwise provided in section 23." MLCI/Indicated Shippers argue that this language is unreasonable and ambiguous and that the existing shipper should need to only match the rate and term of the best bid. MLCI/Indicated Shippers state that Gulf South should clarify that the existing shipper is only required to match the applicable rate and term for the amount of capacity and primary points included in the existing agreement.

MLCI/Indicated Shippers contend that an existing shipper must match the rate, up to the maximum rate, and does not need to match a bid to the extent that the bid is a negotiated rate that exceeds the maximum recourse rate.<sup>11</sup>

34. Further, MLCI/Indicated Shippers contend that Gulf South should clarify the procedure for determining the rate and term for the portion of the capacity requested by the existing shipper for which no bid was submitted. MLCI/Indicated Shippers state that Gulf South proposes that if the best bid is for only a portion of the capacity sought by the existing shipper, the existing shipper need only match the rate for that portion of the capacity to retain that portion. MLCI/Indicated Shippers contend that renewal of this capacity should be based on negotiations between the existing shipper and Gulf South, with the caveat that if the existing shipper is willing to pay the recourse rate, Gulf South must agree to renew the contract for the term and MDQ chosen by the existing shipper.<sup>12</sup>

### **Answer**

35. Gulf South states that the bidding requirements of section 30.2(f) when read in context with section 30.2(e) are neither ambiguous nor unreasonable. Gulf South states that the “Best Bid,” as defined in section 30.2(e), includes only the term and rate bid for the primary point pairs identified in the ROFR posting. Therefore, the best bid a ROFR customer must meet under Gulf South’s proposed procedures is determined by rate. Gulf South states that the reference in section 30.2(f) to section 23 is intended to clarify that the maximum rate that the ROFR customer must match, including negotiated rate transactions, is the maximum applicable tariff rate.

### **Commission Ruling**

36. As pointed out by Gulf South, the reference in section 30.2(f) to section 23 clarifies that the maximum rate a ROFR customer must match, including negotiated rate transactions, is the maximum rate. Specifically, section 23.2 of Gulf South’s tariff states, “[u]nder section 30, the highest rate the original Customer must match if it wishes to continue its firm service is the maximum tariff rate.”

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<sup>11</sup> *Citing Tennessee Gas Pipeline Co.*, 82 FERC ¶ 61,011, *order on reh’g*, 83 FERC ¶61,002 (1998).

<sup>12</sup> *Citing, Dominion Transmission, Inc.*, 111 FERC ¶ 61,135 (2005) (*DTI*).

37. Secondly, Gulf South's proposal is clear that the best bid is determined by the highest rate and term.<sup>13</sup> Further, Gulf South's tariff provides for negotiations of the unbid portion of capacity.<sup>14</sup> In particular, Gulf South states that when Gulf South does not receive a bid on a portion of the capacity, section 30.2(h) sets forth the procedures that would be followed. Included in these procedures is a condition that states that if Gulf South and the original Customer are unable to reach an agreement the original Customer may require Gulf South to provide service based upon the applicable maximum rate, if it is a cost based service or a rate negotiated by the Customer and Gulf South if it concerns a market based service. The new service will be for a term specified by the original Customer when exercising its ROFR and commence on the date the existing service agreement expires. Accordingly, the Commission will not require Gulf South to further modify this proposal and will accept the proposal as reasonable.

Section 30.2(g) – Failed Execution of Service Agreement

**Proposal**

38. Gulf South proposes to incorporate a provision that it states already exists in its tariff regarding ROFR provisions pertaining to storage in section 30.3(g). Specifically, Gulf South proposes that if the "winning customer" fails to execute a service agreement, and the ROFR customer has agreed to give up its rights to the capacity, Gulf South shall have the right to re-sell the capacity, and the winning customer is responsible for any difference between the new contract rate and the best bid submitted during the ROFR process. Proposed section 30.2(g) provides that:

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<sup>13</sup> Proposed Section 30.2(e) provides that:

Within five (5) business days after the end of the posting period, Gulf South shall provide the original Customer with the terms (rate and term) of the "Best Bid" which Gulf South is willing to accept. Gulf South

shall determine the "Best Bid" based on the highest rate bid. If Gulf South receives valid bids of equal rate, the Best Bid shall be the bid with the longest term.

<sup>14</sup> Section 30.2(h) sets forth the procedures to be followed when Gulf South does not receive a bid on a portion of capacity. In part, this section clarifies that:

If Gulf South does not receive bids during the bidding period, or does not accept any bids, Gulf South and the original Customer may negotiate the rate and term under which service will continue.

If the original Customer declines to match the Best Bid, Gulf South shall prepare a service agreement setting forth the terms and conditions of the Best Bid for the Bidder with the Best Bid (“Winning Customer”), to be effective on the date the existing service agreement expires. Gulf South shall submit such service agreement to the Winning Customer at least 10 (ten) business days prior to the expiration of the existing service agreement. If the Winning Customer fails to execute the new service agreement within ten (10) business days of Gulf South’s tender, the Winning Customer will forfeit all right and entitlement to the subject capacity. Gulf South shall have the ability to re-sell the capacity, and the Winning Customer, which failed to timely execute the service agreement, will be required to pay the difference between the contract rate (as established by the Best Bid) and the price received for the capacity when it is re-sold multiplied by the volumes of the Winning Bid.

### **Comments**

39. MLCI/Indicated Shippers argue that the tariff language proposed by Gulf South is flawed because it fails to state that the existing shipper’s ROFR rights for the capacity should be immediately reinstated upon the failure to execute a contract by the winning bidder. MLCI/Indicated Shippers contend that protections to guard against gaming should apply to the existing shipper as well as to Gulf South. MLCI/Indicated Shippers argue that the Commission’s policy concerning this matter is that “if the winning third party bidder fails to ultimately execute a contract for the capacity, existing shippers generally would have ‘a renewed opportunity for exercise of any applicable ROFR.’”<sup>15</sup>

40. In addition, MLCI/Indicated Shippers state that Gulf South has proposed to require a winning bidder that agreed to match the best bid to execute a service agreement (transportation or storage), or if the winning bidder fails to execute such agreement that it “pay the difference between the contract rate (as established by the Best Bid) and the price received for the capacity when it was re-sold multiplied by the volumes of the Winning Bid.” MLCI/Indicated Shippers state that damages are an issue of contract law and are addressed in civil litigation, and consequently, a tariff should not establish the standard for determining damages.

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<sup>15</sup> Indicated Shippers at 12, *citing*, *DTI*, 111 FERC ¶61,135 at P 31.

**Answer**

41. Gulf South states that the language proposed in section 30.2(g) is virtually identical to language the Commission approved for Gulf South's Storage ROFR (section 30.3(e)). Gulf South states that once a shipper elects to forgo its ROFR rights by electing not to match the best bid, those rights should not be reinstated upon a default by another customer. Gulf South argues that if the ROFR customer determines that it does not want to pay the price for capacity it selected and allegedly needs for its business, the shipper should not be granted a free option to take another pass at the capacity and potentially be able to secure the capacity at a lower rate.

**Commission Ruling**

42. The Commission accepts Gulf South's proposal. The Commission will not require Gulf South to reinstate an existing shipper's ROFR rights for the capacity should the winning bidder refuse to execute a service agreement as suggested by the protests.

43. MLCI/Indicated Shippers argue that the Commission's policy concerning this matter is that "if the winning third party bidder fails to ultimately execute a contract for the capacity, existing shippers generally would have a renewed opportunity for exercise of any applicable ROFR." This statement, however, was not a finding of Commission policy; it was merely a repetition of the intent of the pipeline in that proceeding. In *DTI*, the pipeline originally filed to implement a tariff provision that would, in a situation where a winning bidder did not execute a service agreement for capacity subject to a ROFR, permit the pipeline to either offer the capacity to the next highest bidder or repost the capacity for third party bids.<sup>16</sup> After a technical conference, the pipeline agreed to clarify its proposed tariff sheets to state that this action would now be subject to a renewed opportunity for the existing shipper to exercise any applicable ROFR. Comments to the proceeding argued that the language proposed by the pipeline after the technical conference did not adequately set forth its agreed-to condition that the existing shipper action would now receive a renewed opportunity to exercise its ROFR in the event a winning bidder failed to execute a service agreement. The language referred to by the protesters was a finding by the Commission that *DTI* had adequately set forth its agreed-to provision in the tariff sheets it filed after the technical conference and does not

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<sup>16</sup> *DTI*, 111 FERC ¶ 61,135 at P 28-31

constitute a Commission policy that an existing ROFR shippers must receive a renewed opportunity to exercise its ROFR after a winning bidder failed to execute a service agreement.<sup>17</sup>

44. Secondly, parties protest language that permits Gulf South to re-sell the capacity after the winning bidder fails to execute a service agreement and require such bidder to pay the difference between the contract rate it bid and the price received for the capacity when it was re-sold.

45. The Commission finds that the language Gulf South proposes in section 30.2(g) is virtually identical to the language the Commission approved in several previous proceedings on the Gulf South system.<sup>18</sup> The Commission will not require Gulf South to modify the proposed language as it is reasonable and it protects the integrity of the auction process. Moreover, this type of provision is no different than other tariff provisions which establish the terms and conditions of the contract between the pipeline and its customers. This provision sets forth terms and conditions that entities participating in the ROFR process will establish as a part of their service contract. Therefore, an entity will be aware of the cost of defaulting prior to entering the bidding process and if an entity should default, based upon these terms, the pipeline may enforce the terms of this contract in court.

#### Section 30.2(b) – Increasing MDQ

#### **Proposal**

46. Gulf South proposes to revise section 30.2(b) to permit a customer with a contract subject to the ROFR process to increase its MDQ by submitting a service request under section 7 of Gulf South's GT&C, and requesting additional capacity with its ROFR

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<sup>17</sup> This is clear in the context of the full finding on this matter in *DTI*:

The Commission finds the language proposed by DTI in both sections 24.2.F.5 and 43.4.H to be adequate to clarify that if the winning third party bidder fails to ultimately execute a contract for the capacity, existing shippers generally would have “a renewed opportunity for exercise of any applicable ROFR.” Accordingly, the Commission accepts the proposed language. *Id. at P31*.

<sup>18</sup> See *Gulf South Pipeline Co., LP*, 100 FERC ¶ 61,180 (2002) and *Gulf South Pipeline Co., LP*, 103 FERC ¶ 61,127 (2003).

Response. Gulf South states that if such capacity is available, it would incorporate the additional MDQ into the new service agreement without the administrative burden of managing multiple contracts.

### **Comments**

47. MLCI/Indicated Shippers contend that Gulf South's tariff should be amended so that the existing shipper does not have a preferential right to capacity in excess of the shipper's existing capacity. MLCI/Indicated Shippers argue that a pipeline cannot grant a class of shippers a preferential right to acquire capacity, and that granting that right would be unduly discriminatory.

### **Commission Ruling**

48. The Commission finds that Gulf South's proposal does not grant these ROFR customers an undue preference with respect to securing additional transportation capacity. Under section 30.2(b), Gulf South requires customers to submit a service request pursuant to section 7 of the tariff, and those requests are subject to the posting and bidding requirements of section 7.4. Thus, these requests will be treated no differently than any other request for new firm service. The only difference is that, if a customer is successful in securing additional capacity and matches any bids on the ROFR capacity, the customer can combine the two capacity packages into a single transportation contract. According the Commission accepts the proposed language.

#### Section 30.3 – ROFR for Firm Storage Service

### **Proposal**

49. Gulf South proposes a number of modifications to section 30.3 regarding the ROFR process for firm storage service. Gulf South proposes to reduce the time under which Gulf South must provide advance written notice to an FSS customer that its service agreement will expire to 90 days.

50. Gulf South also proposes that prior to each interactive auction for firm storage capacity, it will provide notice of all steps necessary to participate in the auction. Gulf South states that specific bidding requirements have been removed from the tariff to allow for modifications to the auction process and the type of auction software it uses; however, the bidding methodology will always be provided in its internet posting. Gulf South asserts that this change will provide it with the flexibility to design its auctions in a manner that is best suited to meet current market conditions. Gulf South also proposes to eliminate the term of service as a means of evaluating firm storage capacity bids since term is a fixed variable in the bidding model. Gulf South states that its other proposed changes to section 30.3 are designed to provide non-substantive clarifying modifications.

**Comments**

51. MLCI/Indicated Shippers aver that Gulf South's firm storage ROFR procedures should be amended to the extent that its transportation ROFR procedures have been amended. Particularly, MLCI/Indicated Shippers state that Gulf South should, among other things: (1) include a maximum ROFR notice period in the storage ROFR procedures; (2) reinstate ROFR rights for the existing shipper if the Winning Shipper does not execute a service agreement for the terminating contract's capacity, and (3) amend the provision that requires the existing shipper to match all terms and conditions of the best bid. Additionally, MLCI/Indicated Shippers state that the existing storage customer is not required to accept any alternative primary points designated by the winning bidder.

52. Furthermore, Indicated Shippers state that the existing shipper should have 5 business days, not a mere 15 minutes (as advocated by Gulf South), to provide notice of its intent to match the winning bid. Indicated Shippers argue that Gulf South should amend its ROFR provisions for storage to be consistent with its ROFR tariff provisions for transportation (Proposed GT&C section 30.3(d)(5), Third Revised Sheet No. 3707).

**Answer**

53. Gulf South states that section 30.3(d)(5) has remained unchanged since 1999.<sup>19</sup> Gulf South contends that the reason Gulf South proposes differing time frames for transportation and storage ROFR customers to match the best bids is because the transportation and storage markets are entirely different. The market price for storage is driven by the natural gas futures markets and a customer's ability to lock in a price spread to support its physical position. Gulf South states that if a ROFR customer is given 5 days to make the decision regarding a storage transaction, the market conditions could be substantially different, and the capacity could no longer be worth as much as when the auction was held.

**Commission Ruling**

54. The Commission will accept Gulf South's proposed section 30.3(d)(5) as it provides an adequate amount of time for the original customer to notify Gulf South of its intent to match the best bid. As Gulf South states, "[t]his provision of Gulf South's tariff has remained unchanged since 1999." The protests do not compel the Commission to make a finding that this provision is unjust and unreasonable. However, to the extent that

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<sup>19</sup> See *Koch Gateway Company*, 88 FERC ¶ 61,204 (1999).

Gulf South is required to amend its firm transportation ROFR procedures as proposed in this order, Gulf South should similarly amend the firm storage ROFR procedures. In particular, Gulf South is directed to file revised tariff sheets implementing a maximum notice period similar to the notice proposed for its firm transportation service.

The Commission orders:

(A) The tariff sheets listed in Appendix A are accepted, subject to the discussion in the body of the instant order, to be effective June 9, 2006.

(B) Within 15 days of the issuance of the instant order, Gulf South is directed to file revised tariff sheets consistent with the discussion in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

**Appendix A**

**Gulf South Pipeline Company, LP  
FERC Gas Tariff, Sixth Revised Volume No. 1**

*Tariff Sheets Effective June 9, 2006*

Second Revised Sheet No. 3700

First Revised Sheet No. 3701

Fourth Revised Sheet No. 3702

Second Revised Sheet No. 3703

Second Revised Sheet No. 3704

Third Revised Sheet No. 3705

Seventh Revised Sheet No. 3706

Third Revised Sheet No. 3707

Second Revised Sheet No. 3708

Second Revised Sheet No. 370

Sheet Nos. 3710 - 3799