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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 3, 2008

In Reply Refer To:
Gulf South Pipeline Company, LP
Docket No. RP08-603-000

Gulf South Pipeline Company, LP
9 Greenway Plaza, Suite 2800
Houston, Texas 77046

Attention: J. Kyle Stephens

Reference: Revisions to ROFR Provisions

Ladies and Gentlemen:

1. On September 3, 2008, Gulf South Pipeline Company, LP, (Gulf South) filed revised tariff sheets[1] to modify its right-of-first-refusal (ROFR) provisions set forth in section 30 of its General Terms and Conditions (GT&C). As discussed below, the Commission will accept the tariff sheets proposed by Gulf South to be effective October 3, 2008, as proposed.

2. Under its existing tariff, for service agreements that include a ROFR, Gulf South provides shippers at least 90 days written notice prior to the expiration of the service agreement, unless otherwise agreed. To exercise a ROFR provision in a contract, a shipper must provide Gulf South with written notice of its intent within 10 business days of the expiration notice. Gulf South then posts the capacity for third parties to submit bids, and notifies the original shipper of the best third-party bid within five business days. The original shipper has five business days to match the best bid. If the original shipper agrees to match the best bid, Gulf South must provide the original shipper with a service agreement at least 10 business days prior to the expiration of the existing service agreement setting forth the terms and conditions of the best bid. If Gulf South does not

[1] Third Revised Sheet No. 3703 and Third Revised Sheet No. 3704 to its FERC Gas Tariff, Sixth Revised Volume No. 1.

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

3. Gulf South proposes several changes to its ROFR provisions. First, under the existing tariff, when a customer elects to match the best third-party bid, there is no deadline for the customer to execute the new service agreement provided by Gulf South. Gulf South proposes to require a shipper who has agreed to match the best bid to execute a new service agreement within 10 days of the date it receives the agreement from Gulf South. Gulf South asserts this provision is necessary so it can re-market the capacity in a timely fashion, instead of being forced to wait until the original agreement has expired.

4. Additionally, Gulf South's existing tariff does not impose any liability on an original shipper who agrees to match the best third-party bid, but fails to execute a new service agreement. Gulf South proposes tariff language that would require the original shipper, who has agreed to match the best bid but failed to execute a new service agreement, to pay the difference between the contract rate agreed to in the matching bid and the price Gulf South receives for the capacity when re-sold, multiplied by the volumes of the winning bid. Gulf South states this language is consistent with the general bidding provisions set forth in section 7 of its GT&C.

5. Finally, Gulf South proposes a ROFR change that applies only to Rate Schedule FTS, under which it provides firm transportation service. Under its current tariff, an original shipper has five days to decide whether to match a best bid. Gulf South proposes to reduce this period to two days for Rate Schedule FTS shippers. Gulf South states this revision addresses concerns from third party bidders who want the ability to enter into hedging arrangements. Gulf South asserts that natural gas prices can change a great deal over the course of a full week, and therefore the two business-day proposal would provide bidding parties the opportunity to hedge more effectively. Gulf South states it is not proposing a similar time period for Rate Schedule NNS capacity which controls its no-notice service because NNS capacity does not present the hedging concerns that are prevalent with FTS services.

6. The Commission noticed Gulf South's filing on September 8, 2008, allowing for protests to be filed as provided by section 154.210 of the Commission's regulations. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2008), 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 intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Protests were filed by Atmos Energy Corporation (Atmos), Indicated Shippers, Tenaska Marketing Ventures (Tenaska), United Municipal Distributors Group (UMDG), and Chevron Natural Gas (Chevron). Gulf South filed answers to protests and comments on September 22, 2008, and September 23, 2008. Generally, the Commission does not permit answers to protests

(18 C.F.R. § 385.213 (2008)). However, the Commission will accept Gulf South's answer in order to fully consider the proposal.

7. Gulf South's proposed tariff sheets conform to Commission policy and are just and reasonable. Accordingly, we accept Gulf South's revised tariff sheets effective October 3, 2008, as proposed. We address concerns raised by the protesters below.

8. Atmos, Chevron, Indicated Shippers, and Tenaska oppose Gulf South's proposal to reduce, from five business days to two, the amount of time a Rate Schedule FTS shipper with ROFR rights has to notify Gulf South of its willingness to match the best bid. Shippers generally assert the proposal is unreasonable and could cause shippers with ROFR rights to lose capacity on Gulf South's system. Atmos contends the proposed deadline will not allow shippers adequate time to pursue the analysis and management approval processes necessary for a shipper to determine whether to match the best third-party bid. Indicated Shippers note that 75-percent of throughput on Gulf South's system goes to off-system downstream markets, and therefore a shipper may need more than two days to determine availability of downstream capacity. It adds that executing a hedge requires negotiating with financial institutions that typically requires more than two days, especially for long-term contracts. Indicated Shippers notes that the two-day time limitation is also inconsistent with other pipelines' tariffs, which allow shippers more time to match the best third-party bid.

9. In its answer, Gulf South asserts the ROFR process set forth in section 30.2(b) of its GT&C provides a shipper ample time to analyze the market conditions and the level of bids it would be willing to match. Gulf South argues that parties protesting this provision routinely engage in large transactions daily and expecting them to make a decision on a ROFR contract in two days is not burdensome. Gulf South adds that assertions that its proposed two-day deadline to match the best bid is inconsistent with other pipeline tariffs is irrelevant, since its proposal conforms to section 7.4(b)(vii) of its currently effective tariff, which governs the procedures for shippers to bid on requests for firm transportation service, and permits the requesting shipper two business days to match a competing bid for requested capacity.

10. We accept Gulf South's proposal to reduce, from five business days to two, the amount of time an FTS shipper with ROFR capacity has to decide whether or not to match the best third-party bid. Gulf South's overall ROFR process extends over a significant period of time. As described above, Gulf South initiates the process through a notice to its existing shipper, which gives the shipper 10 days to inform Gulf South whether it is interested in exercising its ROFR. As Gulf South states, it is reasonable to expect that during this period the existing shipper will have considered its need for the capacity, the likely market value of the capacity, and the level of bids it will be willing to match. Assuming the existing shipper determines that it is interested in exercising its ROFR rights, Gulf South is then required to post the capacity for third-party bids for a

period of five days and provide the existing shipper the terms of the best third-party bid within another five days. In these circumstances, it is reasonable to require the existing shipper to decide whether to match the third-party bid within two business days. Moreover, the two-day deadline for ROFR capacity is consistent with sections 7.4(b)(v) and (vii) of Gulf South's GT&C concerning the bidding procedures for Gulf South's sale of unsubscribed capacity. Those provisions permit the shipper which submitted the original request for service using the unsubscribed capacity two business days to match the best third party bid for the requested capacity.

11. The Indicated Shippers assert that Gulf South's current tariff states that if there are no bids for capacity by prospective shippers as part of the ROFR procedures, the existing shipper can retain the capacity by offering to pay the maximum rate for whatever term specified by the shipper.[2] The Indicated Shippers argue that Gulf South proposes to restrict this right by requiring the shipper, in a situation where there is no bid for ROFR capacity, to renew its contract for a term of one year or more.

12. The Indicated Shippers argue if there are no bids for the ROFR capacity, the existing shipper should be able to renew its contract at the maximum rate for any term the shipper desires. The Indicated Shippers argue that Gulf South's proposal would allow Gulf South to exercise market power by requiring a shipper to contract for capacity for a longer term than the shipper might want. The Indicated Shippers assert this provision would violate the underlying principle of the Commission's open access transportation program, which holds that a pipeline may not withhold capacity that is available for service. The Indicated Shippers also assert that other pipelines recognize that a minimum term is improper for a ROFR contract renewal in a no-bid situation.[3]

13. In its answer, Gulf South contends that its proposed tariff language ensures that the original shipper can protect its long-term historical service and continue to be eligible for the benefits conferred by the ROFR. It states that if a shipper desires capacity for a term that is shorter than one year, it may submit a service request pursuant to section 7.4 of Gulf South's tariff.

14. Section 30.2(h) of Gulf South's GT&C, which incorporates its proposed tariff changes, provides that:

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[2] Indicated Shippers Protest at 2, citing, Gulf South General Terms and Conditions §30.2(h)(ii), Second Revised Sheet No. 3704.

[3] Indicated Shippers Protest at 4. The Indicated Shippers state that the tariffs of other pipelines permit the shipper to state its own desired term in a no bid ROFR situation, citing National Fuel Gas Supply Corporation, Texas Gas Transmission, LLC, Questar Pipeline Company, and Kinder Morgan Interstate Gas Transmission, LLC.

> Gulf South shall provide the original Customer notice if Gulf South does not receive bids during the bidding period, or does not accept any bids. Following such notice, Gulf South and the original Customer may negotiate the rate and term under which service will continue. No discount or other special terms shall apply to the new service agreement unless Gulf South and the original Customer mutually agree. The original Customer may require Gulf South to enter into a service agreement for a cost-based service at the applicable maximum rate and for the term of at least one (1) year. Such service contract shall commence on the date the existing agreement expires.

15. The Commission finds such language reasonable. First, the language contemplates that in a no-bid situation, Gulf South and the ROFR shipper may negotiate the rate and term under which service will continue. Second, failing an agreement, the tariff language provides that the ROFR shipper may compel Gulf South to enter into an agreement at the maximum rate and for a term of at least one year. This permits the shipper to obtain a new contract which will also include ROFR rights at the expiration of the term of the new contract. If the new contract was for less than the maximum rate or for a term of less than one year, the new contract would not include ROFR rights, since Gulf South's tariff, consistent with Commission policy, only provides ROFR rights to maximum rate contracts with terms of a year or more. Permitting the shipper to preserve its ROFR rights, regardless of pipeline action, is consistent with the Commission's intent in formulating the ROFR protections for long term shippers. The Commission created ROFR rights to protect current long-term firm captive shippers from losing their capacity upon the expiration of the contracts without eliminating a pipeline's ability to seek the most it can for the capacity. Therefore, Gulf South's proposed revision to its section 30.2 ROFR procedures, which would grant such a shipper the right to compel Gulf South to enter into a new agreement with ROFR rights, is in keeping with the Commission's intent to protect captive long term shippers.

16. To the extent Indicated Shippers is concerned that Gulf South's proposed revisions to section 30.2(h) of its tariff will permit it to withhold capacity unless the original shipper agrees to a term of at least one year, that concern is misplaced. If Gulf South receives no acceptable third-party bids and the existing shipper is unwilling to enter into a new contract at the maximum rate for a term of at least one year pursuant to section 30.2(h), then Gulf South must post that capacity as available unsubscribed capacity pursuant to the procedures in section 7 of its GT&C governing Gulf South's sale of unsubscribed capacity not subject to a ROFR. That section requires Gulf South to accept a maximum rate bid for available capacity for any term. Thus, assuming no other shipper is willing to bid a longer term, the existing shipper would be able to renew its contract for a term of less than one year pursuant to section 7 of the GT&C. When an existing shipper is unwilling to enter into a new long-term contract which would qualify for a ROFR under section 30.2 of Gulf South's tariff, it is reasonable for Gulf South to require

that shipper to seek a new short-term contract without ROFR rights under section 7 procedures governing the sale of unsubscribed capacity not subject to a ROFR.

17. Gulf South states that under its existing tariff language, when a shipper elects to exercise its ROFR rights, there is no deadline for the customer to execute a new service agreement. Gulf South states that, in order to provide it more opportunity to re-market capacity subject to a ROFR in a timely manner, it proposes a new tariff provision to require that an original shipper that has agreed to match the best bid and has been tendered a new service agreement must execute that agreement within 10 business days of the tender date.

18. Gulf South further states that the existing tariff language does not impose any liability on an original customer for failing to execute the new service agreement. Accordingly, Gulf South proposes tariff language that would require the original customer, who agreed to match the Best Bid but failed to execute a new service agreement within 10 business days, to pay the difference between the contract rate agreed to in the matching bid and the price received for the capacity when it is re-sold, multiplied by the volumes of the winning bid.[4] Gulf South states that this language is consistent with provisions set forth in Section 7 of its tariff, which govern general bidding procedures.

19. Tenaska argues that Gulf South's proposal is unsupported because Gulf South does not provide any information regarding the total number of contracts and matching awards, the number of "non-execution" incidents and an explanation for each, and the price, term, and conditions of each associated remarketed contract. Therefore, Tenaska argues that it is impossible to tell whether Gulf South's proposal addresses a real problem. Tenaska states that it does not object to the idea of penalizing those who simply walk away from their commitments but asserts that Gulf South's proposed tariff language is too broad, because it would penalize those who did not execute contracts for entirely

[4] Specifically, the proposed language states that: "If the original Customer declines to match the Best Bid, Gulf South shall prepare a new service agreement setting forth the terms and conditions of the Best Bid for the Bidder with the Best Bid ("Winning Customer"), for execution. 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) [sic] and the price received for the capacity when it is re-sold multiplied by the volumes of the Winning Bid."(Proposed Third Revised Sheet No. 3704.)

legitimate or at least excusable reasons (if, for example, the contract presented by Gulf South were materially different than the terms of the bid or match acceptance or if the 10-day deadline were missed by inadvertence or by fault of Gulf South itself). Tenaska argues that the penalty provision eliminates the incentive for Gulf South to promptly remarket the capacity and that it may create a gaming hazard in all subsequent open-seasons, because bidders will know that the original shipper will effectively backstop any below-maximum-rate bid and, therefore, will have an incentive to adjust their bids accordingly.

20. Atmos protests that Gulf South seeks to eliminate a customer's ROFR rights despite there being no valid bid consummated. Atmos argues that an original customer's ROFR rights are not extinguished until a valid bid is consummated and that if the winning customer fails to execute a new service agreement within 10 business days, then the process by which the original customer's capacity rights may be superseded has not been consummated. Atmos argues that any other interpretation undermines the Commission's rationale in adopting the ROFR process as a substitute for the requirement to obtain specific abandonment authorization under Part 284 of its regulations.

21. UMDG agrees that Gulf South requires a tool in its tariff to give a disincentive to gaming by certain shippers when they exercise their ROFR rights. However, UMDG argues that the proposed tariff language creates problems for municipal and governmental utilities whose structure and governing law dictate a review process and/or require council or board approval of contracts prior to execution, and therefore may not be able to execute an agreement within 10 business days. UMDG states that Gulf South has indicated in discussions that it will work with municipal and publicly owned utilities to assist in the execution of contracts in a timely fashion and that it is not opposed to some degree of flexibility in light of the governmental approval process for service agreements. UMDG asserts that a 20 business day period for contract execution would be sufficient for municipal and governmental utilities to complete the required review and approval processes.

22. In its answer, Gulf South argues that this tariff revision is consistent with language that appears in section 7.4(b)(viii) of its GT&C (requests for firm transportation service), section 7.10(i) (requests for firm storage service), and section 30.3(e) (firm storage service ROFR procedures). Gulf South states that it has a long-standing practice of working with municipal customers and publicly owned utilities to accommodate their internal approval processes, and its proposed tariff revision will not change the flexibility it provides to these customers. Further, Gulf South asserts that it would not object to allowing customers like UMDG members to request a waiver of the ROFR provision's 10-business-day requirement when necessary to accommodate their approval process, as long as the affected entities provide advance written notification to Gulf South of the delay and need for more time. Gulf South states that it should receive such notification prior to the end of the 10th business day.

23. The Commission will accept the tariff sheets proposed by Gulf South. First, Tenaska states it does not object to the idea of "penalizing those who simply walk away from their commitments" and UMDG states it "does not dispute Gulf South's contention that it requires a tool in its tariff to give a disincentive to gaming by certain shippers when they exercise their ROFR rights." The Commission finds that the proposal to penalize a shipper for failing to execute a service agreement within 10 days is reasonable. Gulf South's tariff includes a pro forma service agreement containing terms and conditions of service applicable to all agreements. Thus, an existing shipper choosing to match the best third party bid knows at that time the terms of the contract it will be required to execute.[5] Therefore, the actual execution of a service agreement containing the terms of the shipper's bid is largely a ministerial matter. In these circumstances, shippers, including government agencies, should be able to order their affairs in such a manner as to effectively meet these requirements, particularly given Gulf South's statement that it would be flexible in meeting the needs of governmental entities. The Commission expects Gulf South to entertain requests for waiver of the 10-business-day requirement as it explains in its answer to UMDG.

24. Further, concerning general bids for unsubscribed capacity, the Commission has previously found that language providing a penalty for the non-execution of a contract consistent with what Gulf South proposes in the instant case is just and reasonable for the allocation of unsubscribed capacity.[6] The parties herein have raised no issue which

[5] Tenaska argues that the shipper might be presented with a contract containing materially different terms and conditions than those of the bid or match acceptance. However, the shipper may always insist on a contract identical to the pro forma service agreement contained in the pipeline's tariff, and presumably would be able to execute such a contract within 10 days. Moreover, as to Tenaska's speculation that the deadline may be missed for it to execute a contract because of some action or inaction of Gulf South, the Commission finds that if such is the case, it may be easily remedied at that time through a complaint to the Commission.

[6] Section 7.4(b)(iii) of Gulf South's tariff currently states:

> The Customer awarded capacity in (v) or (vii) above has to execute a service agreement within two (2) business days of its tender by Gulf South if the service agreement term is two (2) years or less or within five (5) business days if the service agreement term is greater than two (2) years. If the Customer fails or refuses to execute the service agreement within the applicable time period, the Customer shall forfeit all rights and entitlement to the subject capacity. The capacity will be offered to the bidder with the next highest bid (as defined herein) and such bidder, if they accept the offer, will be required to execute a service agreement as provided in this

(continued…)

would compel the Commission to find otherwise for its application to the pipeline's ROFR procedures.

25. Lastly, while Atmos argues that the original customer's ROFR rights can not be superseded because no valid or winning bid has been consummated, the Commission finds that its intent in protecting the capacity rights of a long term captive customer is not undermined by a pipeline requiring that a shipper must execute a new agreement with the pipeline within a reasonable timeframe. As stated above, the Commission created ROFR rights to protect the current shipper from losing its capacity upon the expiration of the contract without eliminating the pipeline's ability to earn the most it can for the capacity. The provision proposed here balances the shipper's right to the continued capacity with the pipeline's right to continue to receive revenues from the sale of the capacity without interruption.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All Parties

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section. Any Customer who fails to timely execute a service agreement will be required to pay Gulf South an amount equal to the price difference between the best bid when the capacity is resold and the price established in Customer's best bid multiplied times the MDQ provided in Customer's best bid.

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