

132 FERC ¶ 61,167  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Texican N. La. Transport, LLC  
Complainant

v.

Docket No. RP09-1086-001

Southern Natural Gas Company,  
Respondent

ORDER DENYING REHEARING

(Issued August 24, 2010)

1. On December 28, 2009, the Commission issued an order in this proceeding dismissing Texican N. La. Transport, LLC's (Texican) complaint (Complaint) against Southern Natural Gas Company (Southern).<sup>1</sup> On January 27, 2010, Texican filed for rehearing of the December 28 Order. For the reasons set forth below, the Commission denies rehearing.

**Background**

**A. Summary of Events**

2. On May 12, 2009, Southern posted a notice of available capacity and an open season Preview for capacity on Southern's system west of its Bienville compressor station (WOB).<sup>2</sup> The WOB open season Preview stated that Southern had incremental

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<sup>1</sup> *Texican N. La. Transport, LLC, v. Southern Natural Gas Company*, 129 FERC ¶ 61, 270 (2009) (December 28 Order).

<sup>2</sup> A copy of Southern's open season Preview, which includes a map of Southern's system and a schematic of the WOB system, is attached as Appendix B to the Complaint.

firm capacity available from several receipt points on its Carthage Line in Panola County, Texas to a new interconnect with Tennessee Gas Pipeline Company (Tennessee) at Bienville Parish, Louisiana. According to the open season Preview, this incremental capacity on Southern's WOB system included up to 230 MMcf/day delivered to Hall Summit, up to 65 MMcf/day delivered to Bienville and up to 45 MMcf/day delivered to Carthage.

3. On June 8, 2009, Southern posted the WOB open season, which offered incremental firm capacity consistent with that noticed in the open season Preview, that is, including up to 230 MMcf/day delivered to Hall Summit, up to 65 MMcf/day delivered to Bienville and up to 45 MMcf/day delivered to Carthage. Six existing receipt points were listed: DeSoto Gas Plant, Logansport-Cotton Valley, Lucky Field, Spider, Logansport, and JW Gathering. The WOB open season posting stated that:

Southern will award the capacity from bids received during the open season on the basis of net present value determined with reference to rate, volume, term, the date the service is to commence and the cost to Southern of any related facilities, if applicable. Southern will use a discounted cash flow factor of 10.24%. Southern will have the right to aggregate bids that generate the highest net present value to Southern.

4. The configuration and hydraulics of the Southern system made the WOB open season more complex because capacity bid at certain points would affect the capacity bid at other points. The open season notice stated:

Capacities at Hall Summit and Bienville are mutually exclusive. For instance, if 75,000 Mcf/d is awarded at Hall Summit, only 50,000 Mcf/d is available at Bienville. Available capacities listed above may vary with each receipt/delivery point combination.

Comparable bids that cannot be awarded in full will be awarded on a pro rata basis. Shippers should indicate in their bids the minimum volume of capacity they are willing to take in the event Southern must prorate the bids. Shippers should also indicate in their bids if their bid is contingent upon being awarded the full contract quantity of the bid or if they will accept a partial quantity. Shippers should indicate in their

bids if their bid is contingent upon being awarded the full term of the bid or if they will accept a partial term.<sup>3</sup>

The notice further specified that “the capacity available to be awarded may vary with specific receipt and delivery point combinations.”<sup>4</sup>

5. Given the effect of system hydraulics on the capacity available for bids, on August 4, 2009, Southern found it necessary to post an update to the WOB open season that included a table depicting meter capacities and maximum available capacities at various locations in the WOB system. The posting also included an updated request form indicating that there were nine potential existing receipt points (up from the original six) on which shippers could bid.<sup>5</sup>

6. As shown below, the supplemental posting indicated that the amount of existing and incremental capacity available differed depending on the receipt point(s) chosen. It appeared evident from Southern’s postings that receipt capacity further downstream would be more valuable, and more available, than receipt capacity further upstream.<sup>6</sup>

Location Name	Operator Name	Loc/Qty(1) Type	Existing Location FT (Mcf/d)	Existing Location Capacity (Mcf/d)	Available Incremental FT (Mcf/d) *
Lucky Field	Hunt Petroleum Corporation	Receipt	0	27,959	Appx. 125,000
JW Gathering-Desoto Parish, La.	J-W Pipeline Company	Receipt	15,068	64,221	Appx. 65,000
Logansport-Cotton Valley	Cokinos Energy Corporation	Receipt	0	17,324	Appx. 65,000
Desoto Gas Plant R/S #1 - Hs Resources	Questar Exploration And Production	Receipt	0	8,750	Appx. 65,000

<sup>3</sup> Complaint at Appendix C.

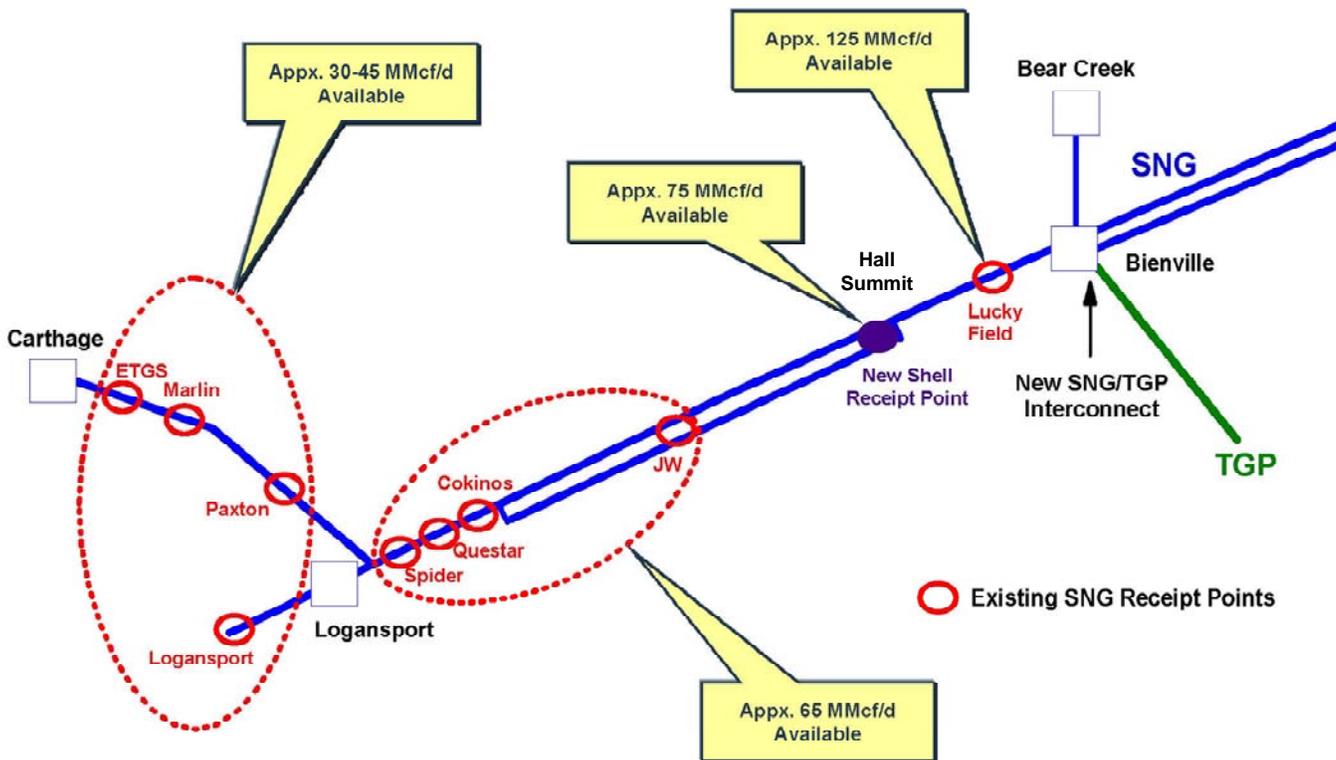
<sup>4</sup> *Id.*

<sup>5</sup> The original request form for the WOB open season contained six receipt point options. The additional points were Paxton R/S, Carthage Marlin Midstream, and Carthage ETGS.

<sup>6</sup> See Exhibit B to Southern’s October 20, 2009 answer to the Complaint (Southern Answer).

Spider Meter Station	Regency Field Services Llc	Receipt	2,616	39,819	Appx. 65,000
Logansport Meter Station	Regency Field Services Llc	Receipt	27,208	56,053	Appx. 40,000
Paxton R/S	Maximus Operating, Ltd.	Receipt	0	6,484	Appx. 45,000
Carthage Marlin Midstream	Carthage Marlin Midstream	Receipt	0	40,432	Appx. 35,000
Carthage - ETGS	East Texas Gas Systems	Receipt	23,467	40,432	Appx. 30,000

7. The following graphic shows the variation in the receipt point quantities in the open season.



8. In response to the WOB open season, Southern received seven bids ranging from 5,000 Mcf/day to 75,000 Mcf/day and 13 months to 35 years and seven months. Texican submitted a maximum rate bid for 66,000 Mcf/day delivered to Bienville for a term of

35 years 7 months from a variety of receipt points, mostly in the upstream area of Southern.<sup>7</sup> Shell submitted a maximum rate bid of 65,000 Mcf/day for 30 years to Bienville from a new receipt point near Hall Summit that it would pay to construct if it obtained the capacity. Hall Summit is downstream of all the receipt points included in Texican's bid, except for the 2,000 Mcf/day Texican bid at Lucky Field.

9. Southern calculated Texican's individual NPV for the full 66,000 Mcf/day as \$50.7 million (although Southern found that in light of the receipt points Texican bid Texican could only receive 63,000 Mcf/day at Bienville) and Shell's NPV as \$48.8. Southern determined that the highest NPV could be obtained by aggregating the Shell and Texican bids and awarding 10,000 Mcf/day to Texican and 63,000 Mcf/day to Shell. By aggregating bids, Southern not only produced the highest NPV, but provided for the ability to move the largest amount of natural gas (73,000 Mcf compared to 63,000 Mcf had it awarded the capacity to the highest individual NPV bidder - Texican).

10. After the award of capacity, Texican notified Southern that it was disputing the award. Southern met with both parties to try to resolve the dispute and a Southern representative contacted both Texican and Shell independently and offered to re-run the auction if it would resolve the dispute. Texican and Shell both declined.<sup>8</sup> Texican elected to sign the service agreement for the 10,000 Mcf/day. Had Texican declined to accept the partial award of the amount, four other bid combinations would have produced an NPV greater than Texican's stand-alone NPV of \$50.7 million.<sup>9</sup> Based on the auction results awarding the capacity to Shell, Southern is currently proceeding with the construction of the new receipt point at Hall Summit, for which Shell is required to reimburse it, and for modifications to be made at the new interconnection with Tennessee Gas Pipeline.<sup>10</sup>

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<sup>7</sup> 2,000 Mcf/day at Lucky Field, 11,500 Mcf/day at Spider, 29,000 Mcf/day at Logansport, 6,500 Mcf/day at Paxton R/S, and 17,000 Mcf/day at Carthage Marlin Midstream.

<sup>8</sup> See Affidavit of Jay Dickerson, attached to Southern's November 20, 2009 answer (Dickerson affidavit).

<sup>9</sup> See Southern's "Aggregated Bid Summary" attached as Exhibit E to the Complaint.

<sup>10</sup> Southern's October 20, 2009 Answer, at 4.

**B. Pleadings**

11. On September 30, 2009, Texican filed a complaint against Southern alleging that Southern violated the Natural Gas Act (NGA), Southern's FERC Gas Tariff and Commission precedent by awarding capacity in the WOB open season pursuant to a purportedly new methodology that Texican claimed was fundamentally flawed and that Southern did not properly describe or timely reveal to potential bidders.

12. Texican claimed in the Complaint that it had conversations with Southern prior to submitting its bid in which Southern allegedly confirmed that available capacity would be awarded first to the bidder that produced the highest net present value (NPV), unless two or more other bids, when aggregated, produced a higher NPV than any single bid or combination of smaller bids.<sup>11</sup>

13. According to the Complaint, after the close of the open season but prior to the posting of capacity awards, Southern contacted Texican to inform Texican that Southern had determined that it could achieve the highest NPV from the bids received by awarding Texican a portion of the capacity it had requested and awarding another bidder a portion of the capacity it had requested.<sup>12</sup> According to Texican, as a result of its NPV calculation, Southern intended to award Texican 10,000 Mcf/day. Texican claims that when Texican challenged this "new" methodology, Southern represented to Texican that Southern acted in conformance with its tariff and realized that the bids by Texican and Shell allowed Southern the opportunity to increase the NPV to Southern if it aggregated portions of Southern's and Shell's bids.<sup>13</sup>

14. In its Complaint, Texican challenged the validity of Southern's capacity awards under the WOB open season. Texican asserted that by piecing together portions of multiple bids to arrive at the highest NPV for Southern, Southern adopted a new, previously unused aggregation methodology without informing prospective bidders in a manner that was contrary to Commission precedent and Southern's tariff. Texican argued that previously the only acceptable form of "aggregation" was "a combination of smaller bids that taken together, yield a higher NPV than one large bid" and that the aggregation methodology that Southern used for the WOB open season ran afoul of the Commission's accepted definition, resulting in the least amount of capacity being

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<sup>11</sup> *Id.* at 7.

<sup>12</sup> Complaint at 9 (citing Affidavit of Robert Blevins, attached as Exhibit F to the Complaint).

<sup>13</sup> *Id.*

awarded to the bidder with the highest individual NPV. According to Texican, allowing the WOB open season capacity awards to stand would violate the Commission's policy that capacity should go to the one that values it the most.

15. Texican also claimed that Southern's aggregation methodology was at odds with what it contends is the primary policy objective of aggregation, namely allowing a combination of smaller bids to trump larger bids as a means for small customers to compete for available capacity. According to Texican, Southern's aggregation approach would provide too much discretion to pipelines in awarding capacity.

16. Texican also argued in the Complaint that, even if the Commission found Southern's aggregation methodology acceptable, Southern was precluded by its tariff from using that methodology in the WOB open season because Southern did not provide adequate notice of the "new" methodology before the close of the open season. Texican claimed that if it had known that Southern was going to use the "new" aggregation methodology then it could have tailored its bid to ensure it received all the capacity it wanted. Texican also asserted that Southern's aggregation methodology would have detrimental effects on Southern's WOB system and that it would harm producers and end users that had historically made use of capacity on that system.

### **C. The December 28 Order**

17. As noted above, the Commission in the December 28 Order dismissed Texican's complaint. The Commission found that contrary to Texican's assertions, Southern acted in accordance with its tariff with regard to the WOB open season posting and the award of capacity thereunder. The Commission noted that Southern's tariff provided it the authority to aggregate bids and that the WOB open season clearly stated that Southern retained the right to aggregate bids in a manner that would generate the highest NPV to Southern. The Commission also noted that the WOB open season posting stated that shippers should indicate whether their bids were contingent upon being awarded the full contract quantity of the bid or whether they would accept a partial quantity. The Commission found that the fact that Southern had not previously used the particular methodology it did for the WOB open season awards did not preclude it from using it in the WOB open season. The Commission also found that in response to the WOB open season posting, Texican had indicated on its bid form that it was willing to accept a partial award of its bid amount.

18. The Commission also found that the aggregation methodology used by Southern was just and reasonable and consistent with Commission policy. The Commission rejected the assertion that it had previously found that pipelines may only aggregate whole bids and that the sole purpose of allowing aggregation was to allow smaller customers to compete. The Commission noted that in several orders it had approved NPV analyses based on several different factors, including how different bid

combinations would maximize the use of capacity and result in the highest NPV to the pipeline.<sup>14</sup>

19. The Commission also rejected Texican's assertion that based on the policy for allocating capacity to the party that values it the most Texican should have received all the capacity on which it bid because Texican had the highest individual NPV. The Commission explained that in allowing pipelines to aggregate bids, it had by definition indicated that capacity need not be awarded to the individual shipper who bids the highest individual NPV. The Commission also stated that there are other policy goals that maximize the value of the system to all users and thus may dictate that capacity not be awarded to an individual bidder with the highest individual NPV.<sup>15</sup>

20. Finally the Commission noted that it was not compelled to find differently based on claims of market disruption or harm to existing shippers as there was no showing by any of the entities making these claims that they held firm capacity rights on Southern. The Commission found that Southern had no obligation to withhold firm capacity in order to protect existing interruptible customers.

### **Request for Rehearing**

21. In its rehearing request, Texican makes essentially the same arguments that it made in its complaint. Texican asserts that: (1) the Commission erred in finding that Southern's tariff permitted it to use the aggregation methodology it used; and (2) the Commission erred in finding that Southern's actions were consistent with Commission policy and precedent. The details of Texican's arguments are discussed more fully below.

### **Discussion**

#### **A. Failure to Comply with Commission Filing Requirements**

22. Texican submitted its rehearing request in the form of an electronic filing. However, this filing fails to comply with the Commission's requirements regarding text-

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<sup>14</sup> December 28 Order, 129 FERC ¶ 61,270 at P 66.

<sup>15</sup> Those goals include maximizing incremental revenue to the pipeline, attracting new shippers to the system and maximizing the capacity made available to market. *See* December 28 Order, 129 FERC ¶ 61,270 at P 67-70.

searchable formats.<sup>16</sup> While we will not reject Texican's rehearing request this time, we remind all parties, and particularly the law firms representing these parties, that they must comply with the Commission's regulations designed to ensure that electronic filings are user-friendly for both the Commission, Commission staff, and other parties to a proceeding.<sup>17</sup>

## **B. Commission Determination**

23. For the reasons discussed below, we deny rehearing. In this complaint proceeding, the burden is on Texican to demonstrate that Southern violated a clear Commission policy or its tariff in making partial awards based on the highest NPV that the combined bids would produce or that the open season failed to provide adequate notice to bidders of the method for aggregating bids. Texican has not met that burden with respect to Southern's award of capacity under the WOB open season. We affirm our finding in the December 28 Order that aggregating capacity to produce the highest NPV is not contrary to any prior stated Commission policy and is, in fact, consistent with the overall Commission policy to award capacity to the highest valued use in order to maximize the efficient use of the pipeline system to bring the largest amount of gas to market. Moreover, the allocation made by Southern not only increases the total volume of firm capacity available to the market, but will reduce rates to all the remaining shippers on the Southern system in Southern's next rate case by producing \$790,800 more per year in revenue. In fact, existing shippers will see these benefits within three years as Southern is obligated to file such a rate case on or before September 1, 2013. We also find that Southern did not violate its tariff, that the open season notice was sufficient, and that the award of capacity was not otherwise unjust and unreasonable or unduly discriminatory. We further find that based on the facts here, a retroactive reallocation of capacity or the voiding of the auction would not be warranted even assuming that Southern failed to adequately post the aggregation terms for the auction.

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<sup>16</sup> See *Filing Via the Internet*, Order No. 703, FERC Stats. & Regs. ¶ 31,259, at P 8, 23-24, 26, (2007); see also <http://www.ferc.gov/docs-filing/efiling.asp>.

<sup>17</sup> *Id.* ("[Non-scanned electronic filings provide] access to tools that permit faster searches, increased accuracy, and enhanced analytical and processing capabilities[.]"); see *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 21 (2009); *Virginia Electric & Power Co.*, 128 FERC ¶ 61,026, at P 18 (2009); *Maritimes & Northeast Pipeline, L.L.C.*, 126 FERC ¶ 61,119, at P 1 n.3 (2009).

## 1. Commission Policy

24. Texican argues that the December 28 Order represents a major shift away from the established policy that “an NPV analysis awards capacity to a customer that is willing to guarantee the most revenue to the pipeline.”<sup>18</sup> Texican claims that the Commission’s reference in the December 28 Order to other policy goals fails to justify the alleged shift away from the policy that capacity should be allocated to the bidder that values it the most, which according to Texican means the highest bidder.

25. Texican fails to cite Commission precedent for its claim that the Commission has established a clear policy that aggregation must be for whole bids only. Nor does the December 28 Order conflict with Commission policy. Indeed, permitting partial awards to the combination of bids that produces the highest NPV and firm capacity is consistent with Commission policy.

26. As explained in the December 28 Order, the Commission’s overriding policy for allocating pipeline capacity is to have capacity awarded to the highest valued use, that is, to those that value the capacity the most. The Commission’s capacity allocation policy also is meant to promote the most efficient overall use of the pipeline system in a manner that maximizes benefits to the natural gas market. In furtherance of these goals, the Commission favors the use of open seasons to allocate capacity and NPV evaluations as a tool for determining the highest valued use. As in this case, the use of NPV is not simply to benefit the pipeline, but to most efficiently allocate capacity such that there is the least amount of unsubscribed capacity and the greatest benefit to the rates of other customers. In *Tennessee*, the Commission recognized the need to allocate capacity in a way that would produce the least unsubscribed capacity as well as the greatest benefit to other shippers. The Commission found that the NPV evaluation method proposed by Tennessee:

allocates capacity to the shipper who will produce the greatest revenue and the least unsubscribed capacity. As such it is an efficient way of allocating capacity and is consistent with Commission policy.<sup>19</sup>

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<sup>18</sup> *Id.*, at 15 (citing *Texas Eastern Transmission Corp.*, 80 FERC ¶ 61,270 (1997)).

<sup>19</sup> *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,101, at 61,522 (1996), *order on reh’g*, 94 FERC ¶ 61,097 (2001), *aff’d*, *Process Gas Consumers Group, et al, v. FERC*, 292 F.3d 831 (2002) (*Tennessee*).

While we recognize that Tennessee may not file a new rate case in the near future, an allocation method that maximizes throughput on the system will mean that at such time as Tennessee does file a new rate case, there will be a greater number of units of service over which to spread Tennessee's fixed costs. As discussed in the April 2000 Order, this benefits all Tennessee's shippers by allowing Tennessee's rates to be lower than they otherwise would be.... [The] NPV process places all shippers on a level playing field because it grants capacity and associated primary receipt and delivery points to the shipper whose bid creates the greatest economic benefit to the pipeline, and by extension benefits all customers, including existing customers.<sup>20</sup>

27. Texican contends the Commission cited to *Tennessee* “for the proposition that a pipeline may give greater weight to bids from new shippers desiring access to the system than to existing shippers.”<sup>21</sup> Texican, however, misses the Commission’s point in citing to *Tennessee*. The Commission was not establishing a preference for new bidders. Rather, as cited above, the Commission was citing *Tennessee* as support for Southern’s use of an NPV allocation policy that maximizes the amount of capacity to be awarded and thereby reduces to the largest extent possible the rates of existing shippers.

28. Texican argues that these benefits to other shippers are too speculative and that the only true beneficiary of the higher value is Southern. First, in *Tennessee*, we found that any uncertainty as to when a rate case will be filed does not justify ignoring these benefits. In any event, as noted previously, Southern is obligated to file its next rate case by September 1, 2013, just over 3 years from now. Second, Texican ignores the immediate benefits to shippers and consumers of the additional 10,000 Mcf of firm capacity being made available to the market resulting from Southern’s allocation.

29. In *Natural Gas Pipeline Co.*, the Commission recognized that aggregation of bids would not be unfair to individual bidders, because it “is consistent with ensuring that the capacity is awarded based on the highest economic value and, further, that such aggregation is an important means to allow small customers to compete for available capacity.”<sup>22</sup> The Commission did not expressly limit aggregation to whole bids only.

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<sup>20</sup> *Tennessee*, 94 FERC ¶ 61,097 at 61,402-403.

<sup>21</sup> Rehearing Request at 16-17.

<sup>22</sup> 82 FERC ¶ 61,036, at 61,140 (1998).

Texican maintains that “the only policy rationale given in Natural for supporting aggregation was to allow small customers to compete” to support its contention that aggregation must be for whole bids only.<sup>23</sup> In fact, however, limiting bid aggregation to whole bids is not necessary to allow small shippers to benefit from the aggregation of bids (which Texican touts as the benefits of such a policy) and in fact may make the acquisition of capacity by small bidders more difficult. If partial bids could not be accepted, it might only occur by happenstance that whole bids of small shippers could be aggregated successfully in such a way without exceeding the total capacity available.

30. As a simple example, suppose a pipeline is conducting an auction for 50,000 Mcf of capacity, and receives three bids, all at maximum rate:

Shipper 1 --50,000 Mcf for 10 years;  
Shipper 2 -- 30,000 Mcf for 13 years;  
Shipper 3 -- 25,000 Mcf for 15 years.

Using the same 10.24 percent interest rate and \$6.59/month reservation rate as used by Southern, the NPVs for these bids would be as follows:

NPV

Shipper 1 -- \$24,743,120.70;  
Shipper 2 -- \$19,887,903.40;  
Shipper 3 -- \$12,120,142.38.

Because Texican’s approach would not permit partial awards of capacity, the bids of the two smaller shippers could not be combined because the total capacity of their bids exceeds the amount of available capacity. However, if partial awards are permitted and Shipper 2’s bid was reduced to 25,000 Mcf, the NPV of the combined bids of Shippers 2 and 3 would be \$29,166,916.73 as compared with the \$24,743,120.70 from Shipper 1. Thus, Texican’s approach would result in the capacity being awarded to Shipper 1 alone to the detriment of smaller shippers whose joint bids produced a higher NPV.

31. Moreover, Texican’s underlying assumption is that the auction mechanism needs to be simple enough so that each shipper can try to calculate whether its bid will produce the highest individual NPV.<sup>24</sup> But, as pointed out above, the basis of the Commission’s

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<sup>23</sup> Rehearing Request at 13.

<sup>24</sup> See Rehearing Request at 13 (acceptable bid combinations should result in capacity being allocated first to the shipper that valued it most highly). For instance,

(continued...)

policy is not to make determining a winning bid strategy easier for bidders, but instead to produce an allocation of the maximum amount of capacity at the highest value to the pipeline and existing shippers. Unlike in a right of first refusal (ROFR) situation (in which the existing shipper has a right to continue an existing contract entitlement), shippers bidding for new capacity have no *a priori* entitlement or expectation of being able to obtain the capacity being auctioned. As in *Tennessee*, in such a situation, the Commission looks for the allocation that produces the most net benefits to the pipeline system.<sup>25</sup>

32. In a complaint case with similarities to this case,<sup>26</sup> one shipper, National Energy and Trade, LP (NET), filed a complaint arguing that the pipeline (Texas Gas) improperly aggregated bids and deprived it of capacity. NET argued that the pipeline had treated its bid differently than that of another bidder (Sequent). Like this case, the operational and hydraulic characteristics of the pipeline had an important influence on the amount of available capacity and the overall value of that capacity. As in this case, Texas Gas stated that its determination of NPV depended on “a number of factors, including how awarding capacity at one point would affect Texas Gas' ability to award capacity at other points, i.e., how different bid combinations would maximize capacity utilization, considering operational requirements, constraints based on the volumes and receipt and delivery points specified in the bids, bidder-imposed conditions, and whether shippers were willing to be pro-rated.”<sup>27</sup> While *NET* did not involve aggregation of partial bids, the Commission recognized that in such complicated operational auctions, the pipeline would be permitted to allocate capacity to the most valuable combination of bids:

However, NET ignores the fact that Sequent was the only bidder for the FGT capacity, and if Texas Gas had not awarded the Transco-Thibodaux capacity to Sequent, it would not have been able to award the FGT capacity to any shipper, thereby depriving itself of an additional \$1,048,489 in annual

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Texican maintains its strategy was to bid 66,000 Mcf at Bienville because it thought that would help protect its individual bid from others submitting identical bids.

<sup>25</sup> *Tennessee*, 94 FERC ¶61,097 at 61,402 (finding that existing shippers have no rights to alternate receipt or delivery points such that allocating these points to those providing the greatest incremental revenue is just and reasonable).

<sup>26</sup> *National Energy & Trade, LP v. Texas Gas Transmission, LLC*, 121 FERC ¶ 61,064, at P 40 (2007) (*NET*).

<sup>27</sup> *Id. NET*, 121 FERC ¶ 61,064 at P 40.

revenue. While neither Sequent's nor NET's bids to Transco-Thibodaux were determined to be "best bids" under the NPV evaluation methodology described in section 25 of Texas Gas' Tariff, we do not find that Texas Gas treated Sequent and NET differently with respect to the contingency of their respective bids.<sup>28</sup>

33. Texican argues that *NET* does not support the partial aggregation in this case because the capacity was allocated based on whole bids. In the December 28 Order, we cited to *NET*, not because it involved a partial allocation, but because it illustrated the point that capacity can be awarded to the combination of bids that yield the highest NPV even if neither successful bidder individually submits the highest valued bid. Moreover, *NET* illustrates that the pipeline has the ability to respond to complicated auction scenarios by allocating capacity to shippers even if they do not have the individually highest NPV bid and by recognizing in its allocation methodology the effect of hydraulics and pipeline configuration on the value of different bids.

34. Accordingly, we find that Texican has failed to show any Commission precedent on which it can rely for an expectation that a partial aggregation of capacity violates Commission policy. Moreover, as discussed above, we find that in appropriate circumstances, a partial aggregation of capacity maximizes the efficient use of the pipeline system, increases the amount of gas that is transported to the market for consumers, and creates the ultimate benefit to the existing shippers on the pipeline through lower rates.

## **2. Violation of Tariff**

35. We affirm our determination that Texican failed to demonstrate that Southern violated the specific terms of its tariff in adopting the partial bid allocation methodology. Section 2.1(b)(i) of Southern's tariff states "For purposes of its NPV evaluation, COMPANY may consider the aggregate NPVs of two or more bids." Nothing in the tariff precludes the use of a partial allocation of capacity in appropriate circumstances. Section 2.1(b) also recognizes that Southern can take into account a variety of factors in calculating NPV, including factors that arise based on the requests for service received by the company:

Such criteria may include, without limitation, the Transportation Demand requested, the duration of the service requested, the date on which the requested service would

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<sup>28</sup> *Id.* at P 53.

commence, the applicable Reservation Charge, and such other factors available based on the requests for service received by COMPANY, including the cost(s) or cost of service attributable to facilities required by COMPANY to provide the service.

36. The WOB open season notice also stated that “Southern will have the right to aggregate bids that generate the highest net present value to Southern.”<sup>29</sup> The notice did not exclude any means of aggregation so long as the aggregation produced the highest NPV. The notice further stated: “Shippers should also indicate in their bids if their bid is contingent upon being awarded the full contract quantity of the bid or if they will accept a partial quantity.” Thus, adopting a partial bid allocation methodology to produce the highest NPV is not at odds either with the tariff or the open season notice.

37. The purpose of the open season notice is to provide shippers with a basic idea of how the auction will be conducted, not to envision and specify every possible contingency that might arise from the bidding. As Southern points out, in this case, it had to deal with facts based on the hydraulics of its system. For example, based on these factors, Southern would not have been able to honor the full amount of capacity bid by Texican (66,000 Mcf) and instead Southern could only deliver 63,000 Mcf from the points Texican specified.<sup>30</sup> Southern did post information informing bidders of the complexity of the hydraulics and that bids at different receipt and delivery points would affect the overall amount of capacity and the value of bids.<sup>31</sup>

38. Pipelines need to take into account operational factors such as constraints based on the volumes and receipt and delivery points specified in the bids, how awarding capacity at one point would affect their ability to award capacity at other points, and how different bid combinations would maximize capacity utilization, considering operational requirements. The purpose of the open season is to provide a general understanding of the capacity being sold such that the ultimate allocation is made fairly.

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<sup>29</sup> See *NET*, 121 FERC ¶ 61,064, at P 50-51 (recognizing that aggregation can be specified in the notice even if not specifically referenced in the tariff).

<sup>30</sup> Southern Answer at 9 n.11. Basing Texican’s individual NPV on the lower amount of capacity would not have yielded the highest NPV of all the bids.

<sup>31</sup> Indeed, Texican appeared to understand the significance of these facts, since it submitted a bid for 2000 Mcf at Lucky Field which Southern indicated had the greatest potential capacity although all of its other bids were farther upstream.

39. Texican asserts that the December 28 Order departs from the long held practice of requiring pipelines to disclose, prior to bidding, precisely how capacity will be allocated. According to Texican that obligation is contained in Section 2.1(b)(iii) of the General Terms and Conditions (GT&C) of Southern's tariff, which states, "At the time of posting, COMPANY will identify the criteria to be used in calculating the Net Present Value, including, but not limited to, the weighing of each criteria, the method of calculating Net Present Value, and the discount factor to be used."<sup>32</sup> Southern complied with this tariff provision by posting the method of calculating NPV, stating that it would be "determined with reference to the rate, volume, term, the date the service is to commence and the cost of service to Southern of any related facilities." And Southern calculated the NPV according to the methodology posted in its open season notice. While Texican asserts that the notice needed to state explicitly that Southern might aggregate partial bids, the tariff did not require that level of specificity. Rather, the tariff requirements were satisfied by notice that "Southern will have the right to aggregate bids that generate the highest net present value." The tariff nowhere requires that every possible means of aggregation be listed. Moreover, as discussed above, Southern's partial aggregation is consistent with Commission policy, and the open season provided notice that Southern had the right to aggregate bids and did not exclude any means of doing so as long as the aggregation produced the highest NPV. Further, the tariff also contemplates that the pipeline can take into account other factors in determining NPV, including those revealed by the requests for service.

40. We therefore affirm our finding that the notice Southern provided to bidders in the WOB open season was sufficient for bidders to be able to structure bids for the capacity they valued. The posting identified the pertinent criteria that Southern would use for evaluating the NPVs of the various bids. Moreover, Southern put potential bidders on notice that it might aggregate bids so as to produce the highest NPV to Southern.

41. Texican contends that the December 28 Order is at odds with the Commission's policy as reflected in *Natural*,<sup>33</sup> which Texican argues requires pipelines to "specify each factor, weighting parameter and formula in sufficient detail and clarity so that an independent party would arrive at the same determination and only that determination of the winning bid."<sup>34</sup> Texican's reliance on the *Natural* decision, however, as a standard

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<sup>32</sup> Rehearing Request at 8.

<sup>33</sup> 82 FERC ¶ 61,036 (1998) (*Natural*).

<sup>34</sup> Rehearing Request at 8 and n.8 (*quoting Natural* 82 FERC ¶ 61,036 at pp. 61,139-40).

for the disclosure requirements of open season postings, is misplaced. The *Natural* order does not establish detailed requirements applicable to all pipelines. That order was specific to a complaint case alleging that Natural had violated the Commission's regulations in order to favor affiliates.<sup>35</sup> The purpose of the tariff revisions in that case was to help prevent future violations and the Commission specifically recognized "that because of Natural's past practices, the specificity of the tariff revisions [required] here goes beyond what has been required in tariffs of other interstate pipelines."<sup>36</sup> In the instant case, there is no suggestion or evidence that Southern sought to favor an affiliate or otherwise had an interest in manipulating the auction specifically to favor Shell.

42. Texican challenges the Commission's finding that Texican had in fact agreed to accept a partial award of capacity in its bid submission by agreeing to accept a partial award on the open season form. Texican states that the line on the open season form states that it would accept a partial award only "if prorated." Texican contends if it had been asked about accepting a partial capacity award relating to the bid aggregation process, then it would have prompted further discussions with Southern and Texican could have adjusted its bidding strategy.

43. The reason for inquiring if shippers are willing to accept a partial award is that in some cases, a smaller award of capacity may not be useful to the shipper. In this case, that apparently was not the case because Texican not only indicated it was willing to accept a partial award on the form, but elected to sign the service agreement for the partial award. Moreover, the open season notice also did not limit a partial allocation only to pro rata situations, but indicated that a partial allocation might be possible in other situations as well:

Shippers should indicate in their bids the minimum volume of capacity they are willing to take in the event Southern must prorate the bids. Shippers should also indicate in their bids if

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<sup>35</sup> *Natural*, 82 FERC ¶ 61,036 at p. 61,136 ("the Commission has reviewed the proposed tariff sheets in light of the record set forth in *Amoco v. Natural* that Natural engaged in significant violations of the Commission's marketing affiliate rules, and that Natural's existing tariff provisions governing its marketing of capacity are unduly vague and led to an atmosphere of perceived favoritism toward its affiliate in the awarding of capacity").

<sup>36</sup> *Id.*

their bid is contingent upon being awarded the full contract quantity of the bid or if they will accept a partial quantity.<sup>37</sup>

Indeed, Texican concedes that the notice did not limit partial awards only to pro rata allocations. It recognizes that if the bid of the highest valued NPV is insufficient to clear the market, such a bid could be combined with a partial award to the second highest NPV.<sup>38</sup> The only time Texican seems to find partial awards inappropriate is if the greatest value and firm throughput can be achieved through allocating more of the capacity to the second highest bidder, rather than the first. But, as discussed above, it cites no Commission precedent for this assumption, and the notice did not so limit the use of partial awards.

44. Furthermore, even if Texican had not agreed to the partial award, Texican would not have been awarded the full amount of capacity. At least four bid combinations among other shippers had higher NPVs than Texican's stand-alone bid.

45. Finally, Southern asked Texican if it would like to re-run the auction, and Texican refused.<sup>39</sup> The issue of notice, therefore, seems not particularly important to Texican because it could have re-run the auction with explicit knowledge that partial bids could be aggregated.

46. Texican argues that Southern had not previously applied its aggregation methodology in the manner it did in the WOB open season, and that aggregation connotes a combining of whole amounts. Texican therefore argues aggregation must only be defined as the combination of two or more "whole" bids. Texican has not provided any indication as to whether other auctions on Southern involved situations as operationally complex as the one faced here.<sup>40</sup> Moreover, whether Southern had applied

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<sup>37</sup> To read the notice as applying only to pro rata allocations would render the second sentence in this section of the notice redundant and unnecessary.

<sup>38</sup> Texican Complaint, at 2 n.1.

<sup>39</sup> Dickerson Affidavit, at 1. Shell also declined, but neither party knew of the other's response.

<sup>40</sup> As Shell points out, "given the peculiar characteristics of Southern's WOB open season, i.e., few other open seasons are likely to have the same characteristics as the WOB open season...Texican's argument ignores the difficulty any bidder had in formulating a winning strategy given the many variables associated with the bidding in the open season: e.g., the location of, quantities at, and combination(s) of various receipt

such an approach previously does not render its application of the approach here either unreasonable or violative of Southern's tariff. The WOB open season notice provided that Southern could aggregate bids "that generate the highest net present value to Southern." Nor does the definition of aggregation limit its meaning to the combination of whole bids (as Texican alleges). For example, Webster's Ninth New Collegiate dictionary provides as the first definition of aggregate: "formed by the collection of units or particles into a body, mass, or amount;"<sup>41</sup> taking units or parts from each of two or more bids therefore is not inconsistent with the meaning of aggregation. As noted in the December 28 Order, nothing in our *Natural* decision states or implies that aggregation is limited to the combination of whole bids. In approving Natural's tariff provisions to allow the pipeline to aggregate bids, the Commission stated that "such aggregation is consistent with ensuring that the capacity is awarded based on the highest economic value..."<sup>42</sup> By aggregating partial bids Southern did award capacity in a manner that provided the highest economic value.<sup>43</sup> Whatever assumptions Texican may have made about the methods of aggregation therefore is not supported by the words of the tariff or the notice.

47. Texican contends that in light of past practice, it was reasonable for it to assume that aggregation would be only whole bids, because one of its representatives asked how the aggregation would be done and the Southern representative purportedly only gave examples of combining whole bids in response to questions as to how aggregation would work (Tujague affidavit). However, in response, Southern filed an affidavit rebutting Texican's affidavit and stating that the conversations in question did not pertain to aggregation but to the NPV award process and that the Southern representative never discussed a definitive aggregation methodology or tried to define aggregation. (Outlaw affidavit). The Outlaw affidavit stated that the examples discussed were for illustrative purposes only and that Southern could not discuss specifics of the awards process with Texican for fear of disclosing proprietary information to which other bidders were not privy. Also, it is interesting to note that in the Tujague affidavit's report of the conversation, the Texican representative, in answering a question about the delivery of

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and delivery points; rate; term; and start date, etc. Shell's November 19, 2009 Answer, at 7.

<sup>41</sup> Webster's Ninth New Collegiate Dictionary (1990). *Accord* Merriam-Webster's On-line Dictionary (<http://www.merriam-webster.com/dictionary/aggregate>).

<sup>42</sup> *Natural*, 82 FERC ¶ 61,036 at p. 61,140.

<sup>43</sup> *See* December 28 Order, 129 FERC ¶ 61,270, P 69-70.

possible volumes to Hall Summit is purported to have stated that in the event of large volumes bid to Hall Summit, “the Hall Summit bidder would receive their requested capacity and the remainder of any available capacity would be awarded to the bidder with the highest NPV to Bienville.”<sup>44</sup> This would appear to indicate the possibility of a less than a whole bid award to the shipper seeking capacity at Bienville, and is inconsistent with Texican’s assumption that only whole bids would be eligible for award. Mr. Tujague recognizes in the next sentence that the different available volumes would be difficult for Texican to mitigate. “This situation created a business risk that would be difficult to mitigate by a bidder desiring the Bienville delivery point because a significantly larger amount of capacity was being offered to Hall Summit than to Bienville.”<sup>45</sup>

48. We find that these disputed conversations are insufficient to establish that Southern had committed itself to evaluating whole bids only or to overturn the allocation of capacity. Given the tenor of these conversations, we cannot find that the Southern representative should have understood that Texican was inquiring about partial allocations or that he intentionally provided misleading information. The fact that simple examples were used does not indicate that Southern had committed to evaluating whole bids only.

**3. Assuming Arguendo That Southern Failed to Provide Sufficient Notice of the Use of Partial Allocations, a Retroactive Remedy Is Not Appropriate**

49. Finally, even if we had found that Southern’s WOB open season notice was required to state explicitly that Southern might aggregate partial bids, we would exercise our remedial authority to apply a prospective remedy and not require Southern either to allocate the capacity to Texican or re-run the auction. Allocating the capacity to Texican would not be appropriate, because, as discussed above, we find that aggregation of partial quantities does not violate Commission policy and re-allocating all the capacity to Texican would result in harm to the market since less than the optimum capacity would be allocated. With respect to re-running the auction, Texican does not ask for such action, and, in fact, as explained above declined Southern’s offer to re-run the auction. In its Complaint, Texican stated it “is not requesting that the open season be invalidated.... only that Southern be directed to award capacity in accordance with its

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<sup>44</sup> Tujague Affidavit at 4.

<sup>45</sup> *Id.*

tariff and Commission precedent.”<sup>46</sup> As discussed above, a partial allocation does not violate Commission policy or Southern’s tariff. But even if Texican had sought to re-run the auction, we find such a remedy is not warranted here.

50. Texican maintains that if it had known of the possibility of partial allocation, it might have pursued a different bidding strategy. But we do not find that this possibility warrants re-running the auction, particularly since Southern did not seek to favor an affiliate or consciously favor one shipper over another. It merely sought to allocate the capacity in a way that produced the highest NPV.

51. As noted in the December 28 Order, choosing a prospective only remedy is consistent with other cases in which the Commission exercised its remedial authority not to overturn awards of capacity.<sup>47</sup> Overturning capacity awards is disruptive to the market and upsets expectations. For example, Shell needed to build a new receipt point and other facilities to use the capacity it was awarded. It therefore would face the untenable choice of either having to pay for capacity it could not use effectively while it waited for a final resolution or making investments the value of which it ultimately could lose.<sup>48</sup>

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<sup>46</sup> Complaint at p. 2.

<sup>47</sup> December 29 Order, 129 FERC ¶ 61,270 at P 60 and n.55 (“Even when the Commission has found that errors in capacity allocation have been made, the Commission, in exercising its remedial authority, has not re-allocated the capacity. See *PPL EnergyPlus v. N.Y. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,383, at P 30 (2006) (even when tariff violation occurred, Commission would not reallocate rights when the customer receiving those rights relied on them in good faith); *Pacific Gas Transmission Co.*, 82 FERC ¶ 61,227 (1998) (despite a finding of violation, concluding that the public interest in market stability outweighs the need for reposting the five releases for bid); *Pan-Alberta Gas (U.S.) Inc.*, 72 FERC ¶ 61,092 (1995), *reh'g denied*, 75 FERC ¶ 61,049 (1996) (despite violation in capacity allocation, Commission found it would not set aside the already consummated transaction, because it is a settled transaction and to do so would cause a disruption in the market”).

<sup>48</sup> “Shell Energy and SWEPI have moved forward and taken binding actions in reliance on Southern’s award of capacity to Shell Energy. Shell Energy and Southern have executed a long-term firm transportation agreement for the capacity awarded to Shell Energy in the open season. In reliance on this contract, SWEPI has invested significant funds in facilities to interconnect its gas production to Southern’s system.” Shell’s October 20, 2009 Answer at 18.

52. Texican maintains that the cases cited by the Commission should be distinguished because it notified Southern immediately of its concern with the auction and Shell was aware of its concerns. But Texican's approach would require Shell and Southern to delay needed investment for at least months (if only the Commission's first order is considered) or years (if the rehearing and appeal were taken into account). In the *Natural* case in which the Commission found numerous violations of our regulations and affiliate preference, the remedies were prospective only.<sup>49</sup>

53. As discussed earlier, before the parties had solidified their positions, Southern offered to re-run the auction to resolve the dispute and both Texican and Shell declined.<sup>50</sup> We therefore find no basis to grant retroactive relief here. We also do not find sufficient distinction between this case and the other cases we cited. In these other cases, parties also raised their concerns expeditiously. In *Pan-Alberta Gas (U.S.) Inc*, the complainant filed its complaint within 14 days of being denied capacity, but the Commission found that setting aside a settled transaction on which an innocent party relied would be disruptive to the market.<sup>51</sup> Similarly in *PPL EnergyPlus v. New York Independent System Operator Corp.*, the complainant attempted to resolve its dispute informally using dispute resolution services, and the Commission found that it would not exercise its remedial discretion to overturn the award because the party who received the capacity had made arrangements based on that award and would be harmed financially. Similarly, here, Shell would not only be harmed financially but would lose the value of the investments it has already made based on the award of capacity.

54. Our determination that a retroactive remedy would not be appropriate is reinforced because it does not appear that, even assuming for the sake of argument that Southern's notice was insufficient, that failure would be sufficiently material. Texican argues that if Southern had provided adequate notice of its aggregation methodology or had been more clear on its bid form regarding partial quantity awards, then Texican would "no doubt" have inquired further from Southern and had the opportunity to adjust its bidding

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<sup>49</sup> *Amoco Production Company v. Natural Gas Pipeline Company of America*, 82 FERC ¶ 61,038, *on reh'g*, 82 FERC ¶ 61,300 (1998) (denying requests to expand remedies to require cash out refunds).

<sup>50</sup> Dickerson Affidavit, at 1.

<sup>51</sup> *See* Complaint of Pan-Alberta Gas (US), Docket No. RP95-166-000, at 5 (filed Feb. 16, 1995) (indicating that it was informed of the capacity allocation on February 2, 1995).

strategy.<sup>52</sup> Texican does not provide any examples or make any suggestions as to what exactly it would have changed in its bid.

55. As indicated above, even if Texican chose not to agree to accept a partial award, the record indicates that there were four other bid combinations that resulted in NPVs higher than that of Texican's individual bid NPV.<sup>53</sup> Thus, even if Texican had conditioned its bid on receiving the full bid quantity, Texican would not have been awarded the full amount of capacity on which it bid.

56. Moreover, Texican had very limited options to increase the value of its bid and could not have increased its bids substantially from the receipt points in the traditional production area that it desired. Because Texican bid the maximum rate, the only way it could increase the NPV of its bid was to increase the term or volume of its bid. Since Texican's initial bid was for 35 years and seven months, mathematically it would be impossible for Texican to increase its bid by the \$4.7 million needed to beat the next highest aggregated bid of \$54.7 million.<sup>54</sup> As to volume, Texican could not increase its

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<sup>52</sup> Texican Rehearing Request at 10.

<sup>53</sup> Southern's Answer at Exhibit D (indicating that four combinations of bids by Shipper D (Shell) would have exceeded the value of the individual bid by Shipper C (Texican).

<sup>54</sup> The present value formula is: Present Value =  $((1 - (1+i)^{-n}) / i) \times R \times Q$  [note: "n" is an exponent]

Where:  $i$  = the interest rate per day to be used in discounting

$n$  = the number of days

$Q$  = the Quantity (e.g. number of Dth)

$R$  = the dollar Rate per unit of capacity (e.g. \$/Dth)

North American Energy Standards Board Interpretation (version 1.9) 7.3.14.

A negative exponent is a reciprocal so  $(1+i)^{-n}$  is equivalent to  $1/(1+i)^n$ . As  $n$  increases, the denominator constantly grows larger, making this component of the expression smaller and smaller until the expression essentially becomes 1/infinity or 0. Therefore, the expression  $1-(1+i)^n$  would become 1-0 or 1. At that point, the formula simplifies to  $(1/i) \times R \times Q$  or  $(R \times Q)/i$ , which is the maximum Present Value that can be achieved. Using this formula, the highest NPV for Texican's bid would be \$ 50,969,531.25 -- 0.021650924 (monthly rate of \$6.59/(365.25/12)) x 66,000 Mcf/ .000280356 (10.24%

(continued...)

volume at the receipt points for which it wanted capacity (in the Logansport and Carthage area). In fact, as pointed out earlier, there was insufficient capacity from Texican's chosen receipt points even to provide the 66,000 Mcf that Texican bid. Texican could have increased its bid value only by choosing much larger volumes from receipt points from which it did not want to inject gas.<sup>55</sup> Accordingly, even assuming that Texican had sought to adjust its bidding strategy, it would not have prevailed in obtaining all the capacity upon which it bid in the WOB open season.

### **Conclusion**

57. The Commission denies rehearing of the December 28 Order. The crux of this complaint is that Southern's partial capacity allocation violates Commission policy and precedent as well as Southern's tariff. As discussed above, we find that allocating capacity quantities to maximize NPV does not violate Commission policy, and is in fact consistent with that policy. We further find that Southern did not violate its tariff during the WOB open season process. Finally, we find that even if there were inadequacies with Southern's WOB open season notice or process, we would not order a retroactive remedy of reallocating capacity. Based on those findings, we conclude that Texican has not met its burden to justify overturning the capacity award at issue.

#### **The Commission orders:**

Texican's request for rehearing is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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discount rate divided by 365.25). *See* <http://www.wfu.edu/~palmitar/Law&Valuation/chapter%201/1-3-5.htm> (present value of an annuity eventually reaches a limit).

<sup>55</sup> *See* Texican Complaint at 5, 20 (indicating that it desired to inject gas at the traditional core production area).