135 FERC ¶ 61,119
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.

Gulf South Pipeline Company, LP Docket No. RP11-1980-000

ORDER ACCEPTING TARIFF RECORD

(Issued May 6, 2011)

1. On April 6, 2011, Gulf South Pipeline Company, LP (Gulf South) filed a tariff record[1] to modify certain parts of Section 6.8 of its tariff regarding requests for service. Gulf South requests that the Commission approve the revised tariff record to become effective May 6, 2011. As more fully discussed below, we grant waiver of the 30-day notice requirement[2] and accept the proposed tariff record, to be effective May 6, 2011, as proposed.

I. **Details of Filing**

2. Gulf South states specifically that it is proposing to (1) close a loophole in its 90-Day Rule for requesting future capacity by eliminating partial awards of capacity when there is no capacity available at some period during the requested term;[3] (2) add tariff language to ensure that all capacity awarded through a partial award of capacity will have a constant Maximum Daily Quantity (MDQ) for the term of the agreement, unless the capacity is awarded under a rate schedule that allows for seasonal MDQs; and

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[1] Section 6.8, General Terms & Conditions (GT&C) - Requests for Service, 2.0.0 to Tariffs, FERC NGA Gas Tariff.

[2] Gulf South requested a May 6, 2011 effective date, which provided the Commission one day less than the 30-day notice required by section 4(d) of the Natural Gas Act and the Commission's regulations. 18 C.F.R. § 154.207 (2010). Absent Commission waiver of the 30-day notice requirement, the earliest the tariff change could become effective is May 7, 2011.

[3] Section 6.8(2) of Gulf South's tariff includes a prohibition against requesting service more than 90 days prior to the commencement of service (90-Day Rule).

(3) create an additional exception to the 90-Day Rule to take into consideration the construction and/or modification of Gulf South and third-party facilities.

A. Elimination of Partial Capacity Awards

3. Gulf South states the purpose of the 90-Day Rule is to prevent customers from cherry-picking future capacity by requesting valuable capacity months, or even years, in advance. According to Gulf South, the 90-Day Rule applies to customers contracting for new capacity as well as to customers requesting to change primary points under existing contracts. Gulf South also states and provides an example showing that under its current tariff, when evaluating a customer's request to move a primary point, Gulf South will grant the customer a partial award of capacity if capacity is not immediately available at the commencement date of the request but capacity is available for a time period that is more than 90 days after the date of the request.[4] Gulf South states this ability of a customer to obtain a partial award of capacity in this instance creates a loophole to the 90-Day Rule, allowing customers to "troll for valuable, future market capacity" beyond 90 days into the future.[5] According to Gulf South, existing customers who are aware that the most valuable capacity on Gulf South's system may not be available within the next 90 days or even longer still submit service requests in hopes of receiving a partial award of such capacity that may become available far into the future. According to Gulf South, this loophole ties up firm transportation service to the detriment of new customers, who may place higher value on the capacity when it is needed to meet their future market needs but want to avoid the cost risks associated with requesting capacity earlier than needed. Gulf South notes that existing customers currently face no cost risk for requesting a change in primary points.

4. Accordingly, Gulf South is proposing to modify its tariff to eliminate partial awards of capacity so that if zero capacity is available on any day during the term of a request, the request for service will be rejected. Gulf South states this will ensure that firm transportation capacity is available to the customers that value it the most and restore the effectiveness of the 90-Day Rule while maintaining existing customers' right to change primary points.

B. Constant MDQ for Partial Awards

5. Gulf South is also proposing to revise Section 6.8(4) to address the situation where there is insufficient available capacity to fully satisfy a service request but some level of capacity is available on each day of the request. Under Gulf South's proposal, it would

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[4] Gulf South Filing at 3.

[5] *Id.*

offer a partial award of capacity with a constant MDQ, unless the capacity is awarded under a rate schedule that specifically allows for seasonal MDQs. Gulf South states this change will ensure that the method for awarding capacity is consistent with the intent of Gulf South's rate schedules, for example, Gulf South's Rate Schedule FTS, which states that firm transportation service will consist of "a stated MDQ that will be in effect for the term of the contract."[6]

C. Exception to 90-Day Rule

6. Gulf South's tariff currently provides for exceptions to the 90-Day Rule for requests associated with an "open season, new supply being attached to Gulf South's system, termination of an existing contract on another pipeline, construction of new facilities is required to serve a new receipt or delivery point or the modification of facilities that will result in a material increase in gas usage or production."[7] Gulf South is proposing to modify the last exception in Section 6.8(2), "the modification of facilities that will result in a material increase in gas usage or production" to include "both the modification *and construction* of facilities (whether directly attached to Gulf South or not)."[8] Gulf South states this clarification is needed to ensure that, like modifications to facilities, requests for service associated with the construction of facilities that would materially increase gas usage or production could be excepted from the 90-Day Rule.

II. Notice, Intervention, Protest and Answer

7. Notice of Gulf South's filing was issued on April 8, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2010). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2010), all timely filed motions to intervene and any unopposed 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. BP America Production Company and BP Energy Company (BP) filed a protest.

8. On April 21, 2011, Gulf South filed an answer to BP's protest. On May 3, 2011, BP filed an answer to Gulf South's answer, essentially reiterating the arguments made in its protest. On May 4, 2011, Gulf South filed an answer to BP's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010),

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[6] Gulf South Filing at 4.

[7] Gulf South Filing at 5 (*quoting* Gulf South tariff section 6.8(2).

[8] *Id*.

prohibits answers to protests or answers unless otherwise permitted by the decisional authority. We will accept Gulf South and BP's answers as they aid in the disposition of the issues raised by the protest.

9. On the subject of Gulf South's proposal to eliminate partial capacity awards for requests when zero capacity is available for some part of the requested term, BP protests that the 90-Day Rule was never intended or applied by Gulf South as a limitation on requests of existing shippers to change primary points. BP states that due to the fact that Gulf South is a reticulated system that has no defined transportation paths the ability to change primary points under long term contracts is more of a necessity on Gulf South than would be the case on another pipeline and that Gulf South's proposed tariff revisions would eliminate existing flexibility upon which shippers rely. BP states in its answer the importance of being able to change primary points under Gulf South's tariff cannot be overstated and without this right the ability of shippers to compete with Gulf South for transportation services will be severely limited.

10. Gulf South states in its initial answer to BP's protest that its proposal does not eliminate existing shippers' flexibility to change points and that existing shippers will continue to have the right to request changes to primary points under Section 6.6 of Gulf South's tariff. Gulf South notes that in addition, existing shippers have the right to nominate non-primary points on any day, subject to available capacity. Gulf South states its proposal only limits shippers' ability to request point changes when that request would violate the long-standing 90-Day Rule.

11. BP also challenges Gulf South's proposal to limit partial awards of capacity to a constant MDQ for the term of the request. BP states that Gulf South's proposal is unduly discriminatory and preferential and would result in Gulf South withholding available capacity because of its desire to only offer capacity at constant MDQ levels. BP states that pipelines cannot limit their awards of partial capacity only to uniform blocks of capacity available for the term of the request any more than they can schedule or curtail capacity in uniform blocks and that awards of capacity for new service at non-uniform MDQ levels under a single contract is a practical administrative convenience for the pipeline versus requiring new shippers to enter into separate contracts for separate constant MDQ levels. BP notes that Gulf South's proposal, as applied to existing shippers, could conceivably deprive them of existing rights to change primary points.

12. In response to BP's argument that Gulf South is attempting to withhold capacity by proposing to award partial capacity on a constant-MDQ basis, Gulf South asserts that BP's argument is nothing more than an impermissible collateral attack on the design of Gulf South's Commission-approved, long-standing FTS Rate Schedule. Gulf South states that a constant MDQ is an integral aspect of its FTS Rate Schedule and while other pipelines may allow varying MDQs in their rate schedules, Gulf South does not. Gulf South states BP is incorrect in stating that Commission policy requires a pipeline to offer

varying MDQs and that pipelines are free to design their services according to the pipeline's unique circumstances, as contemplated under Section 4 of the Natural Gas Act (NGA).

13. BP states that Gulf South's attempt to ban a variable MDQ would also violate what it claims is the Commission's policy of maximizing the amount of capacity awarded. BP contends that the Commission recently cited this policy in its order in *Texican/N La. Transport, LLC v. Southern Natural Gas Co*.[9] That order approved a request by Southern Natural Gas Company for authority to aggregate partial bids in a manner that generated the highest Net Present Value to the pipeline. Consistent with this policy, BP notes that numerous pipelines allow a shipper to designate different MDQs for different periods covered by the contract, even in situations unlike this one where the maximum amount of capacity requested by the shipper for any portion of the contract term is available for the entire term. In addition, BP states that some pipelines also allow a shipper to establish a different MDQ for different portions of the year.

14. Gulf South states BP's argument that Gulf South's proposal violates the Commission's policy of maximizing the amount of awarded capacity is misplaced and unsupported. Gulf South states the Commission's decision in *Southern* does not reflect a policy requiring a pipeline to maximize the amount of capacity awarded, but approves an award methodology that "award[ed] 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." Gulf South states the decision emphasizes the many factors that a pipeline can consider when allocating capacity during an open season to ensure efficient use of the system and its proposal to require that partial awards of capacity reflect a uniform MDQ is entirely consistent with the discretion afforded pipelines when evaluating requests for capacity.

15. BP also states that the need for and intended purpose of Gulf South's proposal to modify Section 6.8(2) to expand an existing exemption to the 90-Day Rule is unclear. BP states that Gulf South's proposal to expand the exception from "modifications" to "construction and/or modification" so that the language would read "construction and/or modification of facilities that will result in a material increase in usage or production" is overly broad. BP states the entire exemption in Section 6.8(2) already provides for an exemption related to construction but Gulf South's proposed language is significantly broader than this and Gulf South states this change would apply to the construction of facilities by third parties in addition to Gulf South. Therefore, it appears the proposed change would significantly expand the scope of the 90-Day Rule exemptions. BP states

[9] BP Protest at 5 (*citing Texican/ N La. Transport, LLC v. Southern Natural Gas Co.*, 132 FERC ¶ 61,167 (2010) (*Southern*)).

Gulf South should not be permitted to extend this exemption to the construction of facilities of third parties where it does not involve new or expanded receipt or delivery points on Gulf South, otherwise Gulf South would have the ability to grant a preference to certain shippers and that shippers using new capacity on upstream or downstream pipelines should not be entitled to special rights to capacity on Gulf South's system.

16. Gulf South answers that its proposal is appropriate in scope and is consistent with Commission policy recognizing that a shipper must be assured of firm capacity earlier than 90 days in advance in order to make required capital expenditures for new facilities.[10] Gulf South also claims that it is irrelevant whether a customer's facilities are directly connected to Gulf South for purposes of the exception because of Gulf South's historical function as a gathering system for the interstate grid and the resulting fact that many customers that use Gulf South as a supply source are not directly connected to Gulf South's system. Gulf South argues that the fact the facilities of an ultimate consumer of gas sourced on Gulf South are not directly connected to Gulf South should have no impact on such a customer's ability to secure firm transportation capacity in advance of the 90-Day Rule if the customer is relying on that capacity for its capital project.

17. Gulf South also notes that the existing exceptions to the 90-Day Rule for construction of new receipt and delivery points do not provide the flexibility that would be afforded under its proposal, and that the proposal is designed to address Gulf South's unique role in the interstate grid. Gulf South states that the proposal would not give it the ability to provide a preference to any particular shipper, recognizing that NGA requires it to treat all customers in a not unduly discriminatory manner.

18. BP notes in its answer that Gulf South's proposal to expand the exceptions to the 90-Day Rule should specifically exclude any construction for which the Commission has already refused to allow a reservation of capacity under Section 6.10 of Gulf South's tariff.[11]

III. <u>Discussion</u>

19. For the reasons discussed below, the Commission finds that Gulf South's proposed tariff changes are just and reasonable and therefore we accept them to be effective on May 6, 2011 as requested.

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[10] Gulf South Answer at 12 & n. 27 (*citing Northern Natural Gas Co.*, 52 FERC ¶ 61,047 at 61,212 (1990) (*Northern Natural))*.

[11] BP Answer at 11 (*citing Gulf South Pipeline Co.*, 132 FERC ¶ 61,145 (2010) (*Gulf South*)).

20. As Gulf South states, the 90-Day Rule in Gulf South's tariff is consistent with the Commission's policy permitting pipelines to require that service commence within 90 days after the shipper submits a request for service. The Commission has held that the 90-Day Rule addresses concerns that permitting shippers to reserve firm capacity at a future date without requiring the shipper to begin paying reservation charges upon execution of a service agreement could allow those shippers to unreasonably tie up long term firm transportation capacity at the expense of other shippers that may place a higher value on that capacity.[12] The Commission reasoned that 90 days was an appropriate time frame to avoid tying up future capacity while also allowing the pipeline sufficient time to process the request and execute an agreement with the shipper. As noted by Gulf South, the purpose of the policy and Gulf South's 90-Day Rule is to prevent customers from cherry picking future capacity by requesting it months or years in advance.

21. As discussed, Gulf South asserts in its filing that it is seeking to revise its tariff to eliminate partial awards of capacity for requests for future capacity more than 90 days in advance for which there is no capacity available during part of the requested term. Gulf South states that the purpose of the proposed revision is to prevent circumvention of the Commission's policy by shippers that request primary point change requests beyond 90 days into the future. The Commission finds that Gulf South is not required to make partial capacity awards for primary point change requests that would occur more than 90 days into the future and for which no capacity is available for at least part of the 90 day window. Such shipper requests are contrary to the Commission's policy on requests for future capacity.

22. BP's argument that the proposal would eliminate existing flexibility upon which Gulf South's shippers rely is unavailing. Gulf South states that existing shippers will continue to have the right to request primary point changes so long as the request does not violate the 90-Day Rule. Moreover, contrary to BP's assertions, Gulf South states that it has always applied the 90-Day Rule to an existing customers' request to change primary points, and Gulf South's tariff supports this assertion.[13] Gulf South's proposal

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[12] *Trailblazer Pipeline Co.*, 103 FERC ¶ 61,225, at P 78 (2003). *See also Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141 (2004), and *Northern Natural Gas Co.*, 109 FERC ¶ 61,388 (2004), for a discussion of Commission policy concerning exceptions to the 90-Day Rule and the requirement that the pipeline sell any capacity reserved for a future contract during the interim period before the future contract takes effect.

[13] Gulf South's tariff section 6.6.1 states that "Only customers receiving firm service may add or delete primary receipt point(s) and request changes in primary receipt point MDQ's in accordance with the provisions of Sections 6.5 and 6.8." Section 6.8 of Gulf South's tariff concerns requests for service and includes the 90-Day Rule.

appears to be a just and reasonable means to address the issue of cherry picking of future capacity on Gulf South's system that our policy is meant to prevent.

23. We also reject BP's argument that by proposing to limit partial awards of capacity to a constant MDQ for the term of the agreement Gulf South is withholding capacity. Contrary to BP's assertions, Gulf South's proposal to limit partial awards of capacity to constant MDQ levels does not violate the Commission's policy against withholding capacity. Gulf South is willing to continue to make partial awards of capacity but will do so only when some level of capacity is available on each day of the request and at a constant MDQ throughout the entire term of the request.[14] Moreover, Commission policy allows, but does not require, pipelines to offer varying MDQs. Gulf South's tariff does contain rate schedules that allow for seasonal MDQs,[15] though the changes sought by Gulf South are not addressing those rate schedules.[16] Gulf South is required to offer and sell available capacity at the maximum rate pursuant to the governing rate schedules and the terms and conditions of its tariff. There is nothing in BP's protest to indicate that Gulf South's proposal would avoid that obligation. Moreover, as Gulf South points out, a change in a shipper's primary point does not result in a change in contract MDQ but merely trades the shipper's contract MDQ at one point for available capacity at a different point.

24. Further, BP's reliance on our decision in *Southern*[17] is misplaced. Nothing in the *Southern* order requires a pipeline to maximize the amount of capacity awarded. Rather, there we approved a contested capacity allocation methodology that evaluated certain aggregated bids and awarded capacity based on an aggregation of bids that provided the highest net present value to the pipeline. We found the approved methodology was consistent with, and supported by, our policy to award capacity to the highest valued use

[14] Gulf South will also continue to offer seasonal MDQs pursuant to its current applicable Rate Schedules.

[15] For example, Rate Schedule NSS.

[16] Section 2(d) of Gulf South's FTS Rate Schedule states that the service provided will include "a stated MDQ that will be in effect for the term of the contract" and Gulf South's revised definition of awarding partial capacity is consistent with this contracting practice. Although additional capacity may be available above the MDQ awarded for isolated periods in the future that Gulf South will not award to an existing shipper changing points, existing shippers will be able to bid for that capacity with other shippers when it becomes available under the 90-Day Rule

[17] *Southern*, 132 FERC ¶ 61,167 (2010).

in order to maximize the efficient use of the pipeline system to bring the largest amount of gas to the market.

25. The Commission also finds just and reasonable Gulf South's proposal to add an exception from the 90-Day Rule for construction of facilities that will result in a material increase in gas usage or production. The Commission has allowed exceptions to the 90-Day Rule in instances when the pipeline or a prospective shipper may need to construct substantial facilities that will not be completed prior to the end of the ninety day period, finding it reasonable that a shipper be assured of firm capacity earlier than the ninety day rule would permit in order to make the required capital expenditures for new facilities. Such an exception appropriately encourages new facilities and the development of new supply sources.[18] The intent of Gulf South's exception in Section 6.8(2) is to allow parties to align the timing of their transportation agreements on Gulf South with additional construction occurring that will have a material effect on the timing of the commencement date of the shipper's contract with Gulf South.[19] The Commission finds that adding the phrase "construction and/or" to Section 8.6(2) is consistent with Commission policy and is accepted as proposed.

[18] *See Northern Natural*, 52 FERC ¶ 61,047.

[19] Section 6.20 of Gulf South's GT&C, as modified pursuant to the Commission's 2010 order in Docket No. RP10-978-000, permits Gulf South to reserve capacity for an expansion up to twelve months in advance of filing an application for a certificate under NGA section 7. While Gulf South is required to make the reserved capacity available on an interim basis before the expansion is placed in service, Section 6.10 provides that a right of first refusal will not be applicable to such limited-term firm service agreements. As noted by BP, the Commission limited the waiver of the ROFR to capacity reserved pursuant to the section 6.20 of the GT&C. *See Gulf South*, 132 FERC ¶ 61,145 at P 15, holding that Gulf South had not explained why capacity reservation and loss of ROFR for interim shippers is necessary for smaller construction projects not requiring individual section 7 certificates. Therefore, to the extent that Gulf South enters into a contract for service to commence more than a year in the future using capacity not eligible for reservation pursuant to section 6.20, Gulf South is required to make that capacity available in the interim with a right of first refusal.

The Commission orders:

Section 6.8, GT&C - Requests for Service, 2.0.0 is accepted, to be effective May 6, 2011.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.