

137 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tallulah Gas Storage, LLC

Docket No. CP10-494-001

ORDER GRANTING REHEARING AND
ACCEPTING TARIFF PROVISION

(Issued November 4, 2011)

1. On March 18, 2011, the Commission authorized Tallulah Gas Storage, LLC (Tallulah) to construct and operate a salt dome natural gas storage facility and associated pipeline facilities in Madison Parish, Louisiana (the Tallulah Gas Storage Project).¹ The March 18 order (Certificate Order), among other things, required Tallulah to remove the gross negligence liability standard from section 27 of the proposed General Terms and Conditions (GT&C) of Tallulah's *pro forma* tariff, and to remove or fully support a form of Consent and Agreement proposed for inclusion in Tallulah's tariff.
2. On April 15, 2011, Tallulah filed a request for clarification or, in the alternative, rehearing of that portion of the Certificate Order requiring it to remove the gross negligence liability standard. Tallulah also filed additional documentation supporting the need for the form of Consent and Agreement in its proposed tariff.
3. As discussed below, the Commission grants rehearing and accepts Tallulah's form of Consent and Agreement, subject to conditions.

I. Background

4. In the Certificate Order, the Commission authorized Tallulah, among other things, to construct and operate a high-deliverability, multi-cycle salt cavern natural gas storage facility on the Tallulah Salt Dome in Madison Parish, Louisiana, approximately 5.5 miles

¹ *Tallulah Gas Storage, LLC*, 134 FERC ¶ 61,221 (2011).

south of Tallulah, Louisiana.² The Commission also authorized Tallulah to provide a variety of open-access firm and interruptible storage and hub services under a Part 284, Subpart G blanket certificate. The Commission authorized Tallulah to charge market-based rates for its proposed services.

5. Further, the Commission found that Tallulah's *pro forma* tariff generally complied with Part 284 of the Commission's regulations, but required, among other things, that Tallulah remove from its tariff two provisions: section 27 (Limitation of Liability) of the GT&C and the form of Consent and Agreement. Specifically, the Commission found that GT&C section 27 established a gross negligence liability standard that is inconsistent with Commission policy, and directed Tallulah to replace it with a simple negligence standard. With respect to the form of Consent and Agreement, which Tallulah's customers would be required to execute and which would grant project finance lenders a collateral security interest in the underlying service agreements, the Commission found that it deviated materially from Tallulah's *pro forma* service agreements. The Commission required that Tallulah either remove the form of Consent and Agreement from its tariff or submit additional information to justify the need for, and effect of, its inclusion in the tariff.

6. Tallulah requests clarification or, in the alternative, rehearing of the Commission's requirement that it remove GT&C section 27. Tallulah also provides additional information to support its proposed form of Consent and Agreement. Tallulah's request for clarification and the information submitted in support of its form of Consent and Agreement are discussed below.

II. Discussion

A. Limitation of Liability in GT&C Section 27

7. GT&C section 27 provides as follows (capitalization and bold in original):

Notwithstanding any provision of the Service Agreement or this FERC Gas Tariff, no Party, its affiliates and their respective directors, officers and employees shall be liable to another Party or its affiliates or any director, officer or employee of such Party or its affiliates, for any punitive, special, or exemplary damages or consequential, indirect, or incidental damages or lost profits that arise out of, relate to or are otherwise attributable to the

² The project's three storage caverns will be constructed in stages, with proposed in-service dates of September 2013, September 2014, and September 2015, and once fully operational will provide 24 Bcf of storage working gas capacity.

Service Agreement, **THIS SECTION 27 SPECIFICALLY PROTECTS EACH PARTY, ITS AFFILIATES AND THEIR RESPECTIVE DIRECTORS, OFFICERS AND EMPLOYEES AGAINST SUCH DAMAGES OR LOST PROFITS EVEN IF WITH RESPECT TO THE NEGLIGENCE, STRICT LIABILITY, OR OTHER FAULT OR RESPONSIBILITY OF SUCH PARTY, ITS AFFILIATES, AND THEIR RESPECTIVE DIRECTORS, OFFICERS AND EMPLOYEES; AND ALL RIGHTS TO RECOVER SUCH DAMAGES OR PROFITS ARE HEREBY WAIVED AND RELEASED.** Nothing contained in the foregoing shall limit the liability of either party to the other Party, if any, for direct damages. Notwithstanding the foregoing, nothing in this Section 27 shall limit the liability of either Party to the other Party, if any arising out of gross negligence, willful misconduct, or bad faith actions.³

8. In the Certificate Order, the Commission quoted the last sentence of section 27, and held that “Tallulah’s proposed gross negligence liability standard is inconsistent with Commission policy that a simple negligence standard is appropriate for the liability and indemnification provisions of open-access tariffs on the grounds that all parties, including the pipeline, should be liable for their negligent acts.”⁴ The Commission required Tallulah to remove the “gross negligence liability standard proposed in GT&C section 27,” when it submits its actual tariff filing, and replace it with a simple negligence standard to “prevent Tallulah from being insulated from loss or damages attributable to its own simple negligence.”⁵

9. Tallulah contends that section 27, read in its entirety, does not establish a general gross negligence liability standard under the *pro forma* tariff but, rather, establishes a gross negligence standard solely in the context of liability for any punitive, special, or exemplary damages or consequential, indirect, or incidental damages or lost profits. Tallulah asserts that section 27 does not limit any party’s liability for direct damages, and

³ Tallulah’s August 31, 2010 Certificate Application, Exhibit P, *Pro Forma* FERC Gas Tariff, Original Volume No. 1, Part 6, General Terms and Conditions, Section 27.

⁴ Certificate Order, 134 FERC ¶ 61,221 at P 62. The Commission cited *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009) (citing *Port Arthur LNG*, 115 FERC ¶ 61,344, at P 37 (2006); *Cameron LNG, LLC*, 115 FERC ¶ 61,229, at P 37 (2006); and *Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,107, at P 18 (2002)).

⁵ Certificate Order, 134 FERC ¶ 61,221 at P 62.

that this is clearly indicated by the language, “[n]othing contained in the foregoing shall limit the liability of either Party to the other Party, if any, for direct damages.”

10. Acknowledging that the simple negligence standard is the Commission’s policy regarding liability and indemnification for direct damages, Tallulah states that the Commission has previously “‘allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, and incidental or punitive damages where there is gross negligence, willful misconduct, or bad faith.’”⁶ Tallulah states that the last sentence of section 27 merely refers to that aspect of the Commission’s policy by providing that section 27 does not limit a party’s liability for indirect damages “arising out of gross negligence, willful misconduct, or bad faith actions.

11. In conclusion, Tallulah contends that section 27, when read as a whole, complies with the Commission’s policy requiring that parties be liable for any direct damages arising out of their negligence, but allowing a limitation on liability that permits parties to be liable for indirect damages only if they arise out of gross negligence. Tallulah further asserts that section 27 is identical to the limitation of liability provision in Caledonia Energy Partners, LLC’s currently effective tariff, which was described in the letter order accepting the tariff provision as “clarify[ing] that neither the customer nor Caledonia may be liable to the other for any special, indirect, consequential, or punitive damages except in cases of gross negligence, willful misconduct, or bad faith.”⁷ Tallulah also states that section 27 is identical to section 27 of the GT&C of Blue Sky Gas Storage, LLC’s *pro forma* tariff, which was accepted by the Commission.⁸

12. The Commission has consistently held that a simple negligence standard is appropriate for the liability and indemnification provisions of open access tariffs on the

⁶ Tallulah’s April 15, 2011 Pleading at 4-5, quoting *Bison Pipeline LLC*, 131 FERC ¶ 61,013, at P 37 (2010) (*Bison*) and citing *El Paso Natural Gas Co.*, 130 FERC ¶ 61,096, at P 4-5 (2010) (*El Paso*) and *Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,107, at P 18 (2002).

⁷ *Caledonia Energy Partners, L.L.C.*, Docket No. RP07-444-000 (June 5, 2007) (delegated letter order).

⁸ *Blue Sky Gas Storage, LLC*, 129 FERC ¶ 61,210 (2009).

ground that all parties, including the pipeline, should be liable for their negligent acts.⁹ The Commission, however, has allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, incidental or punitive damages where there is gross negligence, willful misconduct, or bad faith.¹⁰

13. Tallulah's proposed GT&C section 27 requires that parties be liable for direct damages arising out of their negligence, but limits the liability of Tallulah and its customers for indirect damages only to instances of gross negligence, willful misconduct, or bad faith actions. Therefore, the Commission grants rehearing, finds that Tallulah's proposed gross negligence liability standard in GT&C section 27 is consistent with Commission policy and, accordingly, will not require Tallulah to remove it.

B. Form of Consent and Agreement

14. In its certificate application, Tallulah proposed to include a form of Consent and Agreement in its *pro forma* tariff¹¹ because (1) it intends to seek project financing; (2) project financing would likely require Tallulah to grant the lenders a collateral security interest in the service agreements that support the project's financial viability; and (3) granting a security interest in a customer's service agreement would require that the customer execute a "Consent and Agreement" to acknowledge the lender's security interest and the lender's rights to step in and cure any borrower defaults. Tallulah explained that since each Consent and Agreement may be treated as a non-conforming service agreement, it was proposing to include a form of Consent and Agreement in its tariff in order to avoid filing with the Commission the multiple non-conforming agreements that would be necessary to obtain project financing. Tallulah also proposed to include provisions in the tariff that would require a customer to execute a Consent and Agreement upon request.

⁹ *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006) (citing *Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 62,182 & n.56 (2002); *Williams Pipe Line Co.*, 88 FERC ¶ 61,014, at 61,040 & n.31 (1999); and *Natural Gas Pipe Line Co. of America*, 39 FERC ¶ 61,153, at 61,599 (1987)).

¹⁰ See, e.g., *Bison*, 131 FERC ¶ 61,013, at P 37; *El Paso*, 130 FERC ¶ 61,096, at P 4-5; *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at 61,505 (2002).

¹¹ See Tallulah's August 31, 2010 Certificate Application, Exhibit P, *Pro Forma* FERC Gas Tariff, Original Volume No. 1, Part 7.9, Consent and Agreement.

15. In rejecting the form of Consent and Agreement, the Certificate Order stated that the form of Consent and Agreement in Tallulah's *pro forma* tariff deviates materially from Tallulah's *pro forma* service agreements and that such deviations may present a substantial risk of undue discrimination. For these reasons, the Certificate Order held that Tallulah had not sufficiently supported inclusion of such a provision in its tariff, or adequately explained the impact on shippers and on the operations of Tallulah's storage project. The Certificate Order directed Tallulah to either remove this provision from its tariff when it files its actual tariff records or fully support the need for this tariff provision and its impact on shippers' rights and on the operations of the storage project in a compliance filing within 30 days of the issuance of this order.¹²

16. Tallulah has submitted additional information explaining the rationale for a form of Consent and Agreement, the efficiencies to be realized from such a form, and the impact of a Consent and Agreement contract. First, Tallulah states that it is customary in project-financing practice for lenders to require the company to grant a collateral security interest in its contracts with shippers or storage service customers,¹³ and that Tallulah's lenders are not likely to be any different. Tallulah explains that since there is no privity of contract between the lenders and the storage service customers, the lenders require (1) a consent from the customers, for the benefit of the lenders, to the lenders' (or their nominee's) taking over operations; and (2) an agreement from the customers that they will continue to perform under their service agreements after a foreclosure.¹⁴ Tallulah states that in order to give meaningful effect to the security interest granted to Tallulah's lenders, each of Tallulah's customers will need to execute a Consent and Agreement. Tallulah asserts that its form of Consent and Agreement is similar to the form of Consent and Agreement included in East Cheyenne Gas Storage, LLC's *pro forma* tariff.¹⁵

¹² Certificate Order, 134 FERC ¶ 61,221 at P 66.

¹³ Tallulah cites *Caledonia Energy Partners, L.L.C.*, Docket No. CP05-15-003 (April 27, 2007) (delegated letter order) (accepting for filing a Consent and Agreement executed by five firm storage service customers), and *Colorado Interstate Gas Co.*, 101 FERC ¶ 61,268, at P 20 (2002) (*Colorado*) (accepting non-conforming tariff provision allowing shipper to assign service agreement in favor of lenders).

¹⁴ Tallulah's April 15, 2011 Pleading at 8.

¹⁵ *East Cheyenne Gas Storage, LLC*, 132 FERC ¶ 61,097 (2010) (generally finding East Cheyenne's *pro forma* tariff in compliance with Part 284 of the Commission's regulations, which tariff included a form of Consent and Agreement at sheet nos. 260-265).

Tallulah also states that the Commission has approved other forms related to shipper support for inclusion in open-access tariffs.¹⁶

17. Second, Tallulah states that absent a form agreement, each Consent and Agreement would be treated as a non-conforming agreement which Tallulah would need to file with the Commission for review and approval, and list separately in the tariff. Thus, Tallulah maintains that providing a form of Consent and Agreement in its tariff will save the time and resources of Tallulah's customers, Tallulah, and the Commission staff. Tallulah states that the form of Consent and Agreement is a standardized contract that will serve as the basis for negotiating an agreement between Tallulah and each of its customers, and will minimize transaction costs by attempting to limit the negotiations to a pre-approved form. As a consequence, Tallulah states that it expects that there will be less likelihood of variation among the Consent and Agreement contracts and, therefore, less need to file non-conforming agreements. Tallulah also asserts that a form agreement makes clear to prospective customers the contractual expectations of Tallulah's lenders for service on the project facilities. Further, Tallulah argues that the review of one form of Consent and Agreement prior to commencement of service, as opposed to piecemeal approval of individual agreements as they are executed, provides certainty for lenders that the form is acceptable to the Commission.

18. Third, with respect to the impact of the Consent and Agreement contract, Tallulah asserts that the Consent and Agreement would not affect the rights of Tallulah's customers and the operations of the project, unless Tallulah defaults on its obligations to the lenders and the lenders foreclose. Tallulah states that it fully expects to meet all financial and service obligations. Tallulah also acknowledges that in the unlikely event of default and foreclosure which lead to the contractual requirement that the project facilities be operated by an entity other than Tallulah, the entity seeking to assume control and Tallulah would be required to obtain the appropriate authorizations from the Commission. Tallulah states that the required filings for such authorization would allow the Commission and staff sufficient time to review the proposed change of control of the project and to assess the ability of the lender or its designee to operate the Tallulah Gas Storage Project and to provide service to Tallulah's customers.

19. The form of Consent and Agreement provision at issue is a standardized form for a Consent and Agreement contract. As Tallulah explains, it is a common practice in project financing for project lenders to require the company owning the assets to grant the lenders a collateral security interest in the underlying service agreements in order to

¹⁶ Tallulah cites *Elba Express Co., L.L.C., et al.*, 119 FERC ¶ 61,015 (2007) (*Elba Express*) (generally approving Elba Express' tariff, which tariff included a "form of Guarantee.")

provide financial security that the project will be constructed, completed, and become fully operational in the event of default by the company. Because there is no privity of contract between lenders and the project's customers, the lenders require the customers to sign a Consent and Agreement under which the customers consent to the company's grant of the security interest and the lenders' taking over operations in the event of default, and agree to continue to perform under their service agreements after a foreclosure. The Consent and Agreement is essentially an ancillary agreement that provides assurance to the lenders that in the event of default, service will continue so that the loans will be repaid.

20. The Commission has previously accepted ancillary agreements that provide a collateral security interest in the shipper's service agreements or other such security to project finance lenders. For example, in *Colorado Interstate Gas Co.*, the Commission accepted a Consent and Agreement allowing a shipper to assign a service agreement to lenders as collateral security for the loans used to fund the project in order to avoid default.¹⁷ Moreover, as Tallulah's explanation makes clear, the proposed form of Consent and Agreement is intended specifically to avoid the need for each Consent and Agreement to be filed as non-conforming service agreement, thereby saving time and resources of Tallulah. Thus, the Commission finds that Tallulah has justified the proposed requirement for its shippers to execute a Consent and Agreement to support the financing for the project, and its inclusion in its tariff of a form of Consent and Agreement.

21. Nevertheless, the Commission's rejection of the proposed form of Consent and Agreement in the Certificate Order stemmed from concerns of potential undue discrimination. In that regard, it is not clear whether Tallulah intends to require all shippers or only certain shippers to execute a Consent and Agreement. Tallulah states that the Consent and Agreement is applicable to "Tallulah's customers whose storage service agreements will be used as collateral security by Tallulah's lenders."¹⁸ Further, as indicated in the Certificate Order,¹⁹ Tallulah proposes to include tariff provisions that require a customer to execute the Consent and Agreement upon request. That language provides, in relevant part:

¹⁷ *Colorado*, 101 FERC ¶ 61,268 at P 20 (accepting the consent agreement for filing, subject to the transportation service provider's tariff and Commission regulations). In *Elba Express*, 119 FERC ¶ 61,015, the Commission accepted without modification a "form of Guarantee" tariff provision.

¹⁸ Tallulah's April 15, 2011 Pleading at 6-7.

¹⁹ Certificate Order, 134 FERC ¶ 61,221 at P 65.

From time to time Tallulah may request that Customer execute a Consent and Agreement, on the form provided in Tallulah's FERC Gas Tariff, in favor of lenders providing financing in support of the Facility or any expansion thereof. Customer shall execute such Consent and Agreement within thirty (30) days of Tallulah's request.²⁰

22. The Commission reminds Tallulah that it must make requests to its shippers to execute the Consent and Agreement contract on a non-discriminatory basis, so that all similarly situated customers will be required to execute a Consent and Agreement.

23. Finally, Tallulah has indicated that in the unlikely event that it defaults on its obligations to the project finance lenders, triggering the contractual requirement that the project facilities be operated by an entity other than Tallulah, Tallulah and the entity to assume control of the project facilities will seek appropriate authorization from the Commission.²¹ The Commission clarifies and emphasizes that it will require Tallulah and the entity assuming control to submit appropriate certificate applications under section 7 of the Natural Gas Act (NGA)²² and Part 157 of the Commission's regulations for Commission review prior to an entity other than Tallulah assuming control of the project facilities and services rendered thereon pursuant to Tallulah's financing documents. The Commission further emphasizes that the certificate issued to Tallulah is not transferable in any manner and shall be effective only so long as Tallulah continues the operations authorized by the Certificate Order and in accordance with the provisions of the NGA, as well as with the applicable rules, regulations, and orders of the Commission.²³

The Commission orders:

(A) Tallulah's request that the Commission find that GT&C section 27 of Tallulah's *pro forma* tariff is consistent with Commission policy is granted.

²⁰ See Exhibit P, Part 7.1, FSS Service Agreement Section 6; Exh. P, Part 7.2, ISS Service Agreement Section 6; Exh. P, Part 7.3, FP Service Agreement Section 6; Exh. P, Part 7.4, FLS Service Agreement Section 6; Exh. P, Part 7.5, FHBS Service Agreement Section 6; Exh. P, Part 7.6, IHBS Service Agreement Section 6; and Exh. P, Part 7.7, Hub Services Agreement, Section 7.

²¹ Tallulah's April 15, 2011 Pleading at 10.

²² 15 U.S.C. § 717f (2006).

²³ 18 C.F.R. § 157.20(e) (2011).

(B) The Commission approves the form of Consent and Agreement included in Tallulah's *pro forma* tariff, subject to the conditions discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.