

111 FERC ¶ 61,509
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Tennessee Gas Pipeline Company and
Dartmouth Power Associates Limited Partnership

Docket No. RP05-372-000

ORDER GRANTING WAIVERS

(Issued June 30, 2005)

1. On June 7, 2005, Tennessee Gas Pipeline Company (Tennessee) and Dartmouth Power Associates Limited Partnership (Dartmouth Power) filed a joint petition for expedited grant of limited waivers of Tennessee's capacity release tariff provisions and the Commission's Order No. 636-A policy regarding the "tying" of gas delivery contracts to released transportation capacity.¹ These waivers are requested to effectuate the permanent transfer of Dartmouth Power's transportation capacity under contracts with Tennessee and Iroquois Gas Transmission System, L.P. (Iroquois) and dependent gas delivery contracts to Dartmouth Power's prearranged replacement shipper or to some other third-party replacement shipper who may prevail in the capacity release auction. The Commission will grant the limited waivers, as discussed below. This order benefits customers by allowing a shipper to exit the gas marketing business in a reasonable and non-discriminatory fashion.

¹ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 *Fed. Reg.* 13,267 (April 16, 1992), *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 30,939, at pp. 30446-48 (April 8, 1992); *order on reh'g*, Order No. 636-A 57 *Fed. Reg.* 36,128 (August 12, 1992), *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 57 *Fed. Reg.* 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); *reh'g granted*, 62 FERC ¶ 61,007 (1993); *aff'd in part and remanded in part, United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

I. Background

2. Dartmouth Power states that it owns and operates a 77 MW gas-fired, combined-cycle electric generation facility in Dartmouth, Massachusetts. Dartmouth Power states that it currently holds long-term gas purchase agreements and gas transportation capacity to transport gas purchased under those agreements to the Dartmouth facility. In addition, Dartmouth power states that under a call option it is obligated to deliver and sell gas at delivery points in Massachusetts.

3. Dartmouth Power states that in 2005, it decided to exit its long-dated gas purchase and sale and transport arrangements in connection with the anticipated restructuring of Dartmouth Power's sales activities and sale of the Dartmouth facility. Dartmouth Power asserts that winding down its gas related supply and transportation assets has required a structured approach in order to ensure the continued performance of Dartmouth Power's contractual obligations, while at the same time maximizing the value of Dartmouth Power's assets.

4. Dartmouth Power states that it has decided to transfer its gas contracts as a bundle of assets and that the capacity on Tennessee consists of one contract between Dartmouth Power and Tennessee. In addition, Dartmouth Power states that as part of this bundle it is offering one transportation contract on Iroquois, two upstream, non-jurisdictional Canadian transportation contracts, and Dartmouth Power's associated and dependent gas purchase and sales contracts² (collectively, Gas Contracts). It states that the Gas Contracts include all of Dartmouth Power's transportation capacity on the Tennessee and Iroquois systems.

² Dartmouth Power states that the gas purchase and sales contracts included in the Gas Contracts package include three contracts between Dartmouth Power and non-U.S. gas commodity suppliers providing only for sales of natural gas to Dartmouth Power and a single agreement under which Dartmouth Power is to supply gas during the winter season to an unaffiliated entity. Dartmouth Power states that none of these agreements are associated or bundled with any transmission capacity, and no Commission-jurisdictional natural-gas company is a party thereto.

5. Dartmouth Power states that it intends to execute a Purchase and Sale Agreement with a qualified, creditworthy third-party (the Prearranged Replacement Shipper).³ Dartmouth Power and the Prearranged Replacement Shipper wish to effectuate the sale, release and assignment of the Gas Contracts, the transfer of which will be made effective on or about July 8, 2005.

6. Dartmouth Power states that the Purchase and Sale Agreement calls for the Gas Contracts to be permanently transferred to the Prearranged Replacement Shipper as a single package.⁴ It states that the Purchase and Sale Agreement also includes a commitment by Dartmouth Power to make a payment to the Prearranged Replacement Shipper as consideration for the Prearranged Replacement Shipper to acquire the Gas Contracts, which include maximum tariff rate transportation contracts on the Tennessee and Iroquois systems. Accordingly, Dartmouth Power states that it has requested Tennessee to post the prearranged transaction for competing bids, with the bids being evaluated on the basis of which shipper will require the smallest payment by Dartmouth Power to the shipper in order to accept a transfer of the Gas Contracts (a reverse auction bidding process). Dartmouth Power states that it and Tennessee are in agreement that capacity released pursuant to a reverse auction process should be posted for competing bids because the payment to the replacement shipper constitutes a discount.⁵

II. Waiver Request

7. Dartmouth Power states that the Prearranged Replacement Shipper (or any successful third-party bidder) will execute a Purchase and Sale Agreement with Dartmouth Power wherein it will agree to acquire, in its entirety, Dartmouth Power's Gas Contracts. Tennessee and Dartmouth Power state that in order to post and bid upon the gas contracts as a package, several waivers are necessary. Tennessee and Dartmouth Power also request that the Commission waive the "tying prohibition" set forth in

³ Dartmouth Power asserts that because of the counterparties to the gas purchase and sale agreements have certain credit requirements, it is essential that any purchaser of the Gas Contracts have an investment grade credit rating (or provide a full and unconditional guarantee of its obligations from any entity with an investment grade credit rating).

⁴ As a condition of its release on Tennessee, Dartmouth Power states that it will post a requirement that bidders must submit a single bid for all of the Gas Contracts.

⁵ Citing, *Pacific Gas Transmission Co. and Southern California Edison Co.*, 82 FERC ¶ 61,227 (1998).

Order No. 636-A to allow open competitive bidding for the Dartmouth Power assets under Tennessee's capacity release tariff provisions, citing, *inter alia*, a similar waiver recently granted in *Northwest*.⁶

8. The following is a summary of capacity release tariff provisions that Tennessee and Dartmouth Power are seeking waiver.

1. Posting Procedure

9. Section 11.1 of the General Terms and Conditions (GT&C) of Tennessee's tariff requires that:

[a] Releasing Shipper that desires to release its rights to service on a basis which does not qualify for an exemption from prior posting pursuant to section 11.3, may post directly on PASSKEY a Release Request containing the information as set forth below. If Releasing Shipper desires to establish a minimum rate for acceptable bids, then Releasing Shipper shall either include such minimum rate in its Release Request or include in its Release Request a statement that the minimum rate has been provided to Transporter. If Releasing Shipper elects to provide the minimum rate solely to Transporter, then Transporter shall not reveal such rate until after the awarding of the subject capacity and the execution of a service agreement between Transporter and Replacement Shipper. At such time Transporter will post the minimum rate under the release on PASSKEY.

Section 11.1(a) contemplates a separate posting for each contract offered for release. However, it does not expressly permit multiple contracts to be offered simultaneously in a single posting.

10. Dartmouth Power states that it intends that the Gas Contracts be permanently released as a single package. Dartmouth Power and Tennessee state that Tennessee would post the transaction in the "informal posting" area of its website, which will provide the requisite detailed information for each of the contracts involved, and will also note that all the Gas Contracts are being transferred in a single capacity release package.⁷ To the extent that posting and bidding of a release transaction outside of the PASSKEY system requires a waiver of Tennessee's tariff, a waiver is requested.

⁶ *Northwest Pipeline Corporation and Duke Energy Trading and Marketing L.L.C.*, 109 FERC ¶ 61,044 (2004) (*Northwest*).

⁷ Dartmouth Power states that a notice concerning the proposed transactions and release described in this application will be posted on Iroquois' "Iroquois Online" page, with a reference to the applicable Tennessee PASSKEY page.

2. Posting of Release Requests and Replacement Shipper Requests

11. Section 11.4 of the GT&C of Tennessee's tariff includes the requirement that the "Releasing Shipper shall post all applicable information required by section 11.1 on PASSKEY..." However, Dartmouth Power and Tennessee state that the PASSKEY system does not allow for all of the information related to Dartmouth Power's assignment of the Gas Contracts as a package to be posted. Thus, Dartmouth states it has requested that Tennessee post, and Tennessee has agreed to post, all the terms and conditions of Dartmouth Power's proposed prearranged permanent capacity release on the informational posting portion of its internet website and accept competing bids by fax or e-mail during a five business day open season period.⁸ To the extent that the required informational posting will be done outside of the PASSKEY system requires a waiver of Tennessee's tariff, a waiver is requested.⁹

3. Bidding Restrictions

12. Section 11.5(e)(iv) of the GT&C of Tennessee's tariff allows a shipper that desires to acquire rights to certain transportation services to specify "the Transportation Quantity (TQ) for the Bid, which must equate to the TQ specified in the Release Request or be no less than any minimum TQ specified in the release request." As discussed above, rather than setting a minimum TQ, Dartmouth Power desires that all the Gas Contracts be permanently released as a package, with bids required to be for the whole package. To the extent necessary, a waiver of Tennessee's tariff is requested.

4. Prearranged Bidder

13. Section 11.1(k) of the GT&C of Tennessee's tariff requires that the posting include "whether the Releasing Shipper has made prior arrangements with a person to release to such person such transportation rights ("Prearranged Bidder"). In such event the

⁸ *Citing Northwest, supra.* Dartmouth states that in *Northwest*, the Commission required a 20-day period for prospective bidders to review and evaluate 174 transportation contracts. Dartmouth asserts, that in this case, it is proposing to transfer only eight Gas Contracts, making a five business day period a reasonable amount of time to achieve a fair process under which potential bidders may fully assess the value of the released capacity and associated contracts. *Citing Northwest* at P 32-33.

⁹ Dartmouth Power asserts that the NAESB timelines for a biddable long-term release, set forth in Section 11.7(a), do not apply in this case by virtue of Section 11.7(b), which states that the "deadlines set forth in this Section 11 are only applicable if ... (ii) there are no special terms or conditions of the release."

Releasing Shipper shall submit [the information specified in sections 11.1(k)(i) through 11.1(k)(iv)].” As discussed below, not all the terms of Dartmouth Power’s proposed transaction will be publicly posted, since the gas purchase and sales contracts bundled with the transportation contracts being released contain proprietary information and, therefore, are being made available only to bidders that sign a non-disclosure agreement.¹⁰ Further, as discussed above, various elements of the posting and bidding procedures set forth in the Tennessee tariff must be modified for the purposes of this transaction. To the extent necessary, a waiver of this informational posting requirement is requested.

14. Dartmouth Power states that it intends to effectuate the transfer of these Gas Contracts by July 1, 2005. Consequently, Dartmouth Power and Tennessee request that the Commission grant a waiver of these capacity release tariff provisions, as well as any other provisions of the Tennessee tariff that the Commission deems necessary or advisable to waive in order to permit Tennessee to accommodate the permanent capacity release of Dartmouth Power’s Gas Contracts as indicated.

5. Tying Prohibition

15. Dartmouth Power also requests that the Commission waive its “tying prohibition” as defined in Order No. 636-A in order for Dartmouth Power to execute a Purchase and Sale Agreement as discussed above.

16. Dartmouth Power asserts that in Order No. 636-A the Commission responded to industrial end-users and marketers over the potential abuses by releasing shippers in “tying the release of capacity to other compensation paid to the releasing shipper” or “requiring compensation outside of the reassignment process,” by stating that:

The Commission reiterates that *all* terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions.¹¹

17. Dartmouth Power and Tennessee state that this language appears to prohibit Dartmouth power’s proposal to release its Tennessee capacity and dependent delivery contracts together, as a package. Therefore, Dartmouth Power and Tennessee request that the Commission waive this tying prohibition.

¹⁰ Dartmouth Power states that the posting will identify and generally describe the gas supply contracts and that after signing a non-disclosure agreement interested bidders can obtain complete copies of the contracts.

¹¹ Order No. 636-A at 30,559.

18. Dartmouth Power and Tennessee argue that in Order No. 636-A by prohibiting the tying of capacity releases to other conditions the Commission was concerned with the potential undermining of the capacity release market by unposted, extraneous conditions. Dartmouth Power and Tennessee argue that those conditions are not present under this proposal. Dartmouth Power asserts that it is seeking to release its Tennessee capacity in an open and transparent manner to a voluntary purchaser, wherein the associated gas purchase and sales contracts will be identified and described in Dartmouth Power's posting, and unredacted copies of the contracts will be made available for inspection and review to all interested bidders. Dartmouth Power states that it will also post a complete copy of the Purchase and Sale Agreement, containing all of the applicable terms and conditions associated with the transfer of its Gas Contracts to its Prearranged Replacement Shipper. Dartmouth Power maintains that it will then afford all interested bidders an extended, five business day evaluation period in which to submit bids. Dartmouth Power asserts that its proposal is consistent with the Commission's interest in maintaining a transparent capacity release market.

19. Dartmouth Power and Tennessee also state that Dartmouth Power's proposal to bundle its transportation contracts and associated gas purchase and sales contracts is necessary because they are inextricably linked. Dartmouth Power asserts that one of the Gas Contracts provides the counterparty with a call option which is currently served by means of the supply and transportation contained in the other Gas Contracts. As such, the gas purchase and sales agreements are entirely dependent on all of the transportation contracts. Dartmouth Power claims that if it is forced to offer for release its transportation capacity without the dependent gas purchase and sales contracts, it would be placed in a position to lose all of the capacity it needs to deliver gas to the customer it is obligated to serve under a gas sale agreement. Dartmouth Power states that its proposal to assign its transportation capacity with the dependent gas purchase and sales agreements as a package protects the value and integrity of both.

20. Further, Dartmouth Power states that releasing the Gas Contracts as a package does not frustrate the Commission's larger capacity allocation goals. Dartmouth Power states that it and its Prearranged Replacement Shipper have negotiated an arms-length agreement under which all of the Gas Contracts will be acquired as a package. Dartmouth Power states that the Prearranged Replacement Shipper's¹² selection will

¹² Dartmouth Power states that the Prearranged Replacement Shipper is not affiliated with Dartmouth Power, its parents, Tennessee, or Iroquois.

result from an auction involving a number of qualified industry participants that have the technical and financial capability and expertise to step into Dartmouth Power's shoes and continue to perform Dartmouth Power's obligations.¹³

21. Dartmouth Power and Tennessee point out that at that time the Commission stated this prohibition the Commission had formulated a capacity release regime but had not yet approved any pipeline's implementing tariffs. Dartmouth Power states that since the secondary market for capacity release did not yet exist, at that time the Commission was concerned that its new regulatory initiative could be undermined by improper practices (such as "under-the-table" tying arrangements) among capacity holders. Dartmouth Power and Tennessee argue that the situation today is quite different in that the capacity release markets have evolved and matured dramatically over time.

22. Finally, Dartmouth Power and Tennessee point out that as the release markets have evolved, the Commission has shown flexibility in permitting capacity holders to release their capacity "in whole or in part, on a permanent or short-term basis, without restriction on the terms and conditions of the release" (18 C.F.R. § 284.8 (2004)), and has provided releasing shippers wide latitude in setting "reasonable and non-discriminatory terms and conditions to accommodate individual release situations."¹⁴ Therefore, Dartmouth Power and Tennessee request that the Commission waive, to the extent necessary, its tying prohibition such that Dartmouth Power may assign its Gas Contracts as a package.

III. Notice and Comments

23. Public notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 35,242 (2005), with comments interventions and protests due as provided for in section 154.210 of the Commission's regulations (18 C.F.R. §154.210 (2004)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2004)), all timely-filed motions to intervene and any motions

¹³ Dartmouth Power states that it does not wield, nor did it ever have, any market power to force any entity to participate in the entirely voluntary diligence and bidding process for the Gas Contracts. Dartmouth Power asserts that the market interest in its Gas Contracts demonstrates that it is not manipulating the capacity markets on Tennessee's system by offering the Gas Contracts as a package.

¹⁴ *Citing Northwest, supra*, and *Mojave Pipeline Co.*, 62 FERC ¶ 61,195, at 62,370 (1993). Dartmouth Power and Tennessee also assert that the Commission has reiterated that releasing shippers should have the ability "to develop terms and conditions that will maximize the efficiency of their capacity releases in all the varied releasing situations." *Citing Transwestern Pipeline Co.*, 61 FERC ¶ 61,332, at 62,233 (1992).

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 the proceeding or place additional burdens on existing parties. Iroquois Gas Transmission System, L.P. filed comments and Tennessee and Dartmouth Power filed a clarifying comment.

24. Iroquois states that the reverse auction for the entire package of contracts would take place on Tennessee's website and that a notice of the proposed transactions and release would be posted on Iroquois' "Iroquois Online" page, with a reference to the applicable Tennessee PASSKEY page. Iroquois states that it does not oppose Dartmouth Power and Tennessee's waiver request. However, Iroquois states that any waiver necessary for Tennessee's capacity release would need to include Dartmouth Power's release of its contract with Iroquois. Iroquois states that Dartmouth Power has not requested any waivers of Iroquois' tariff. However, Iroquois requests that the Commission include Iroquois in granting the waiver. On June 20, 2005, Dartmouth Power clarified that it had discussed the proposed transaction with Iroquois prior to filing the waiver request and that Iroquois has no objections to the transaction or to Dartmouth Power's petition or its comment.

IV. Discussion

25. As discussed below, for good cause shown the Commission will grant the requested waivers of Tennessee's tariff, and the corresponding tariff provisions in Iroquois' tariff, and the waiver of the Commission's policy against tying arrangements as necessary to permit Dartmouth Power to permanently release its Tennessee and Iroquois contracts in one package. Additionally, the Commission will also grant all other waivers necessary to implement the proposed reverse auction process. The Commission finds that since the releasing shipper is attempting to exit the gas transportation business, it should, within certain limitations, be permitted to exit in a rational and orderly fashion, if such action is open and transparent and will not unduly discriminate against other shippers.

26. In Order No. 636-A the Commission stated that:

Releasing Shippers may include in their offers to release capacity reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids. All such terms and conditions applicable to the release must be posted on the pipeline's electronic bulletin board and must be objectively stated, applicable to all potential bidders, and non-discriminatory. For example,

the terms and conditions could not favor one set of buyers, such as end users of an LDC, or grant price preferences or credits to certain buyers. The pipeline's tariff also must require that all terms and conditions included in offers to release capacity be objectively stated, applicable to all potential bidders, and non-discriminatory.¹⁵

27. However, in response to concerns that releasing shippers might attempt to add terms and conditions which tied the release of capacity to other compensation paid to the releasing shipper, such as an LDC requiring the potential replacement shipper to pay a certain price for local gas transportation service or a producer conditioning the release of capacity on the purchase of the producer's gas, the Commission added the language to which Dartmouth Power and Tennessee refer, which stated that "all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines."¹⁶ Thus, the Commission noted that the release of pipeline capacity cannot be tied to any other conditions. Moreover, the Commission stated that it would not tolerate deals undertaken to avoid the notice requirements of the regulations.

28. In the instant proceeding, the releasing shipper presents a unique case not contemplated by the Commission in Order No. 636-A as it attempted to set forth transparent and non-discriminatory rules for the release of capacity in order that a vibrant market for such capacity might be created. Dartmouth Power's unique situation is similar to that in *Northwest, supra*, where the Commission granted waiver, but unlike *Wyoming*¹⁷ and *Cheyenne*¹⁸ where the Commission rejected waiver requests upon finding no unique circumstances existed. Here, similar to *Northwest*, a shipper has proposed to release capacity in an open and transparent manner consistent with the Commission's rules of capacity release, and in an attempt to exit the gas transportation business in an orderly manner, has proposed to include its release of pipeline capacity packaged with its gas delivery contracts.

¹⁵ Order No. 636-A at 30,557.

¹⁶ *Id.* at p. 30,559.

¹⁷ *Wyoming Interstate Company, Ltd.*, 110 FERC ¶61,325 (2005) (*Wyoming*).

¹⁸ *Cheyenne Plains Gas Pipeline Company, L.L.C.* 110 FERC ¶ 61,326 (2005) (*Cheyenne*).

29. In essence, Dartmouth Power is attempting to find other providers for its gas delivery customers before it leaves the business. Given these circumstances, this is a valid reason for Dartmouth Power to package its gas delivery contracts with its permanent release of capacity. As noted above, in prohibiting tying arrangements, the Commission was primarily concerned with supply related tying arrangements such as an LDC requiring the potential replacement shipper to pay a certain price for local gas transportation service or a producer conditioning the release of capacity on the purchase of the producer's gas. Here, because the contracts in question are delivery contracts, the Commission's concerns with the tying arrangement are somewhat alleviated and balanced by the fact that Dartmouth Power's gas delivery customers will receive the benefit of their bargain and their gas deliveries will be maintained even as Dartmouth Power exits the business in a complete and orderly fashion.

30. Furthermore, Order No. 636 permitted the packaging of transportation contracts in certain situations where such aggregation would enhance the marketability of the contracts for release. In Order No. 636-A, the Commission stated that it "finds nothing in the regulations promulgated by Order No. 636 that would prevent firm capacity holders from aggregating firm capacity on the same or different pipelines to enhance its marketability for release."¹⁹ Allowing the capacity aggregation of Dartmouth Power's contracts as part of the reverse auction procedures provides an open and transparent procedure for reallocating Dartmouth Power's capacity. The Commission emphasizes that it is not deciding here whether all aggregations of unrelated capacity on different pipelines are justified and would provide the kinds of efficiencies envisioned by the Commission in Order No. 636-A. Any such aggregation of cross-pipeline contracts must be considered based upon the circumstances involved.

31. Consistent with Order No. 636-A, the process Dartmouth Power is proposing for the reverse auction establishes "reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids."²⁰ Dartmouth Power asserts that the subject Gas Contracts will be identified and described in Dartmouth Power's posting, and unredacted copies of the contracts will be made available for inspection and review to all interested bidders and that it will also post a

¹⁹ Order No. 636-A at 30,558. The Commission also indicated that shippers could create a pool of capacity on different pipelines, with the only caveat being whether the average price for the pool would exceed the pipeline's maximum rate. *Id.* at 30,557. Here none of the capacity will be released above Tennessee's maximum rate; indeed, under the reverse action, it will be released at a discounted rate.

²⁰ *Id.* at 30,559.

complete copy of its Purchase and Sale Agreement, containing all of the applicable terms and conditions associated with the transfer of its Gas Contracts to its Prearranged Replacement Shipper. Dartmouth Power states that it will then afford all interested bidders a five business day evaluation period in which to submit bids.

32. The Commission finds that this aspect of Dartmouth Power's proposal is a reasonable attempt to craft an open and transparent auction process under which the release of capacity will be awarded to the shipper that values it the most.

The Commission orders:

The Commission grants the requested waivers.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.