117 FERC ¶ 61,016
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 4, 2006

In Reply Refer To:
East Tennessee Natural Gas, LLC
Docket No. RP97-13-025

East Tennessee Natural Gas, LLC
P.O. Box 1642
Houston, Texas 77251-1642

Attention: David A. McCallum, Director, Rates and Tariffs

Reference: Original Sheet No. 24, Original Sheet No. 25 and Sheet Nos. 26-100 to FERC Gas Tariff, Third revised Volume No. 1

Dear Mr. McCallum:

1. On September 11, 2006, East Tennessee Natural Gas Company (East Tennessee) filed the referenced tariff sheets to disclose the details of a negotiated rate agreement between itself and CNX Gas Company LLC (CNX Gas). East Tennessee requests that the referenced tariff sheets be accepted effective upon the earlier of October 1, 2006, or the date on which facilities are completed and service commences on the Jewell Ridge Lateral Project (Jewell Ridge). East Tennessee requests waiver of the Commission's notice requirements to permit the tariff sheets to be made effective as requested. The Commission grants waiver of the notice period and accepts the tariff sheets effective the later of October 1, 2006, or the date on which the Jewell Ridge facilities are placed into service, subject to the condition discussed below. East Tennessee is directed to notify the Commission of the effective date of the tariff sheets.

Background

2. On February 8, 2006, the Commission issued its *Order Issuing Certificate* relative to East Tennessee's Jewell Ridge Lateral Project.[1] Paragraph 25 of the precedent agreement between East Tennessee and CNX Gas sets forth the details of a capacity turnback provision, by which CNX Gas would have the right but not the obligation, to turn back a portion of its Maximum Daily Take Quantity (MDTQ) under its FT-L Service Agreement by up to 50% of the new firm capacity acquired by third party shippers other than through capacity release on the Jewell Ridge facilities under Rate Schedule FT-L,

[1] *East Tennessee Natural Gas, LLC*, 114 FERC ¶ 61,122 (2006) (February 8 2006 Order).

but that shipper's total reduction of its MDTQ may not exceed 25,000 Dth during the term of the service agreement. In response to a request for more information from Commission staff,[2] East Tennessee characterized this provision as a "reverse open season." The Commission noted in the February 8, 2006 Order that the precedent agreement made no mention of a reverse open-season process, nor did East Tennessee explain why the reverse open season should continue for the term of the FT-L service agreement. The Commission also noted that paragraph 11 of the precedent agreement also provided that paragraph 25 shall survive the termination of the precedent agreement for so long as the FT-L Service Agreement remains in effect unless otherwise specified.

3. The Commission determined that the precedent agreement with CNX Gas was for a negotiated rate transaction. However, in the February 8, 2006 Order the Commission declined to examine the negotiated rates in the context of its review of the merits of a certificate application.[3] The February 8, 2006 Order found that the capacity turnback provision might constitute an impermissible negotiated term and condition of service under section 49 of the GT&C of East Tennessee's tariff, and that East Tennessee's *pro forma* Firm Lateral Transportation Agreement does not specifically provide for turnback rights available to all FT-L shippers. The Commission directed East Tennessee to explain why the capacity turnback provision is not unduly discriminatory and does not constitute an impermissible negotiated term and condition of service when it files to implement its negotiated rate with CNX Gas.

Details of Filing

4. East Tennessee characterizes the instant filing as a compliance filing to the February 8, 2006 Order, as well as a filing to disclose the details of a negotiated rate agreement. East Tennessee states that the referenced tariff sheets comply with the February 8, 2006 Order, which authorized East Tennessee to construct and operate the proposed Jewell Ridge facilities in order to provide up to 235,000 Dth per day of firm natural gas transportation service. East Tennessee states that in paragraph 29 of the February 8, 2006 Order, the Commission ordered East Tennessee to file, prior to the commencement of service, tariff sheets implementing the negotiated rate agreement with CNX Gas in accordance with section 49.6 of the General Terms and Conditions (GT&C) of East Tennessee's Tariff. East Tennessee also acknowledges that in paragraph 27 of the February 8, 2006 Order, the Commission directed East Tennessee to explain the capacity turnback provision with CNX Gas reflected in the firm service agreement.

5. East Tennessee asserts that Original Sheet Nos. 24 and 25 establish the negotiated rates for service to CNX Gas on the Jewell Ridge facilities and reflect the essential elements of the negotiated rate agreement with CNX Gas as discussed in the February 8,

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[2] *See* East Tennessee December 22, 2005 Response to Staff's Information Request No. 5.

[3] *Tennessee Gas Pipeline Co.*, 101 FERC ¶ 61,360 (2000).

2006 Order. East Tennessee states that, consistent with the negotiated rate filing procedures set forth in GT&C section 49.7 of its tariff, East Tennessee has executed a letter agreement, a copy of which is included in Appendix B to the instant filing, and which has the sole purpose of indicating the parties' agreement to the terms of the negotiated rate transaction. East Tennessee asserts that the substantive provisions of the tariff sheets attached to the letter agreement are identical in all respects to the provisions in the tariff sheets proposed herein. East Tennessee states that, in accordance with GT&C section 49.5, East Tennessee will keep separate and identifiable each volume transported, billing determinant, rate component, surcharge, and revenue associated with a negotiated rate to permit filings in the form of Statements G, I and J in East Tennessee's future rate proceedings.

6. East Tennessee states that in Docket No. CP05-413-000, it proposed to allocate revenues from interruptible services to firm shippers rather than allocating costs to interruptible services. In addition, consistent with the Commission policy that a pipeline may agree specifically to provide a negotiated rate shipper with credits for IT revenue, and in accordance with section 4.4 of Rate Schedule IT-L, which permits East Tennessee and a shipper to agree to an allocation of net revenues in the context of a negotiated rate agreement, East Tennessee and CNX Gas have agreed to a sharing mechanism for such net revenues.

7. Finally, East Tennessee states that the CNX Gas negotiated rate agreement includes a capacity turnback provision as previously included in the precedent agreement as detailed above. East Tennessee notes that CNX Gas is the anchor shipper for this project, and that CNX Gas negotiated for the ability to turn back a portion of its contract quantity, but only in a stated proportion to the firm capacity on the new Jewell Ridge lateral pipeline that is acquired subsequently by other shippers. East Tennessee asserts that the Commission has previously accepted arrangements that provide for reductions in the contract quantities of anchor shippers, and that it should do so here where the reduction relates directly to the acquisition of capacity on the lateral by third party shippers.[4] Further, East Tennessee states that as a matter of general policy, the Commission has determined that terms that recognize the unique position of anchor shippers like CNX Gas in providing essential support for the pipeline to proceed with the project are not unduly discriminatory.[5]

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[4] *Citing Maritimes & Northeast Pipeline L.L.C.*, 87 FERC ¶ 61,061 (1999) (Maritimes).

[5] *Citing Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, 71 Fed. Reg. 36,276, 36,289 (June 26, 2006), FERC Stats. & Regs. ¶ 32,606, at P 98 (2006) (Notice of Proposed Rulemaking) (clarifying that a natural gas company is not engaged in a *per se* unduly discriminatory practice if it charges customers different rates for the same service based on the date that such customers commit to service).

Notice

8. Public notice of the filing was issued on September 15, 2006. Interventions and protests were due September 20, 2006. Pursuant to Rule 214 (18 C.F.R. §385.214 (2006)), all timely filed motions to intervene and any motions to intervene out-of-time filed by the issuance date of this order are granted. No comments or protests were filed.

Discussion

9. East Tennessee asserts that in paragraph 27 of the February 8, 2006 Order, the Commission directed East Tennessee to explain the capacity turnback provision with CNX Gas reflected in the firm service agreement. In fact, in paragraph 27 of the February 8, 2006 Order, the Commission directed East Tennessee to do much more. East Tennessee was directed to explain why the capacity turnback provision is not unduly discriminatory and does not constitute an impermissible negotiated term and condition of service. The Commission finds that East Tennessee has failed to do so.

10. East Tennessee cites *Maritimes* as justification for the capacity turnback provision proffered in the subject negotiated rate agreement with CNX Gas. East Tennessee states that in *Maritimes*, the Commission accepted arrangements that provided for reductions in the contract quantities of anchor shippers, and that it should do so here where the reduction relates directly to the acquisition of capacity on the lateral by third party shippers. The Commission finds that the facts in *Maritimes* are distinguishable from those present in this proceeding. In *Maritimes*, an anchor shipper was permitted a one-time assignment of capacity to a third party or parties before the pipeline went into service coupled with a modification of the shipper's Minimum Daily Transportation Quantity. The shipper, however, was obligated under a "Backstop Agreement" requiring the shipper to pay Maritimes for capacity in the event capacity was not contracted for by other shippers prior to Maritimes' in service date. In *Maritimes*, the shipper's right to turn back capacity was a quid pro quo for a formal obligation on the shipper's part to back-up unsubscribed capacity. East Tennessee has not demonstrated that CNX Gas has a similar back-stop obligation to pay for capacity not contracted for prior to or during service being rendered on the Jewell Ridge facilities.

11. Further, East Tennessee's reliance on the Notice of Proposed Rulemaking as permitting the capacity turnback provision is misplaced. The Notice of Proposed Rulemaking addresses, among other things, different rates paid by customers for the same service based on the date customers commit to service. East Tennessee's capacity turnback provision is a service issue, and is not related to rates.[6] As such, the capacity turnback provision is not supported by the Notice of Proposed Rulemaking.

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[6] *See* Notice of Proposed Rulemaking at P 104, in which the Commission affirmed, "[T]he instant proposal does not apply to non-rate issues such as capacity allocation."

12. Finally, the Commission finds no provision in East Tennessee's GT&C or in Rate Schedule FT-L authorizing the turnback of capacity as reflected in the subject proposed tariff sheets and service agreement. Accordingly, the Commission conditions its acceptance of the subject tariff sheets on East Tennessee's removal of this provision from the subject tariff sheets and the CNX Gas service agreement within 15 days of this order. Alternatively, within 15 days of this order, East Tennessee may file to propose a modification of its tariff to provide for the turnback of capacity for all similarly situated shippers on a not unduly discriminatory basis.

By direction of the Commission.

Magalie R. Salas,
Secretary.

cc: All Parties