

130 FERC ¶ 61,144
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

February 26, 2010

In Reply Refer To:
Elba Express Company, LLC
Docket Nos. RP10-342-000
RP10-386-000

Elba Express Company, LLC
P.O. Box 2563
Birmingham, AL 35202-2563

Attention: Patricia S. Francis, Senior Counsel

Reference: Tariff Sheets and Negotiated Rate Agreement in Compliance with
September 20, 2008, Certificate Order and April 4, 2007 Preliminary
Determination Order

Dear Ms. Francis:

1. On January 29, 2010, Elba Express Company, L.L.C. (Elba Express) filed in Docket No. RP10-342-000 tariff sheets¹ to comply with: (1) the Commission's September 20, 2008 Order Issuing Certificates (September 20 Certificate Order);² and, (2) the Commission's April 4, 2007 Preliminary Determination on Non-Environmental Issues (April 4 PD),³ which required Elba Express to file revised tariff sheets to comply with requirements of the Certificate Order and Preliminary Determination no sooner than 60 days but no later than 30 days prior to commencement of service. Elba Express states that it expects to commence service on March 1, 2010, and therefore, requests that the proposed tariff sheets filed herein become effective on that date. The Commission

¹ For a list of these tariff sheets, *see* Appendix.

² *See Elba Express Company, L.L.C. et. al.*, 120 FERC ¶ 61,258 (2007).

³ *See Elba Express Company, L.L.C. et. al.*, 119 FERC ¶ 61,015 (2007).

accepts the tariff sheets so indicated in the Appendix to be effective March 1, 2010, as requested. As discussed below, the Commission also rejects certain tariff sheets related to Appendix F as designated in the Appendix.

2. On January 29, 2010, Elba Express also filed in Docket No. RP10-386-000 its negotiated rate agreement with Shell NA LNG LLC (Shell LNG) for firm transportation service to comply with the September 20 Certificate Order. Elba Express requests that the filed negotiated agreement become effective on March 1, 2010, when it commences service. The Commission accepts the negotiated agreement to become effective on March 1, 2010 as requested subject to Elba Express filing a revised negotiated rate agreement within 30 days of the date of this order.

3. Southern LNG, Inc. (Southern LNG) operates an LNG import terminal on Elba Island in Chatham County, Georgia. Southern LNG commenced operations at the Elba Island terminal in 1978. In a series of orders issued from 1999 – 2003, the Commission authorized a number of expansions of the Elba Island facility.⁴ On September 29, 2006, Southern LNG proposed another expansion of the storage capacity of its Elba Island LNG import terminal (Elba III) in two phases. Specifically, Southern LNG proposed Phase A and Phase B expansions with an in-service date of June 1, 2010 for Phase A and an in-service date of December 3, 2012 for Phase B.

4. Elba Express, a subsidiary of Southern Natural Gas Company (Southern), is a Delaware Limited Liability Company formed to provide, among other things, open-access transportation service from Southern LNG's Elba Island terminal to Transco.

5. On September 29, 2006, Elba Express filed an application for a certificate of public convenience and necessity in Docket No. CP06-471-000 to: (i) acquire an undivided ownership interest in Southern's twin 30-inch diameter pipelines (Twin 30s) which extend from Southern LNG's Elba Island LNG terminal to an interconnection with Southern's pipeline system in Port Wentworth, Georgia; (ii) construct and operate a new pipeline extending from Port Wentworth through Georgia to interconnections with the interstate pipeline facilities of Transcontinental Gas Pipe Line Corporation (Transco) in Georgia and South Carolina; and (iii) construct and operate, in a second phase, a compressor station in Jenkins County, Georgia. Simultaneously, in Docket No. CP06-473-000, Elba Express filed an application requesting a blanket certificate to provide open access transportation services and requesting approval of its proposed recourse rates

⁴ See *Southern LNG, Inc.*, 89 FERC ¶ 61,314 (1999), *reh'g denied*, 90 FERC ¶ 61,257 (2000); *Southern LNG, Inc.*, 94 FERC ¶ 61,188 (2001); *Southern LNG, Inc.*, 96 FERC ¶ 61,083 (2001) (This group of cases constitutes the "Elba I" expansion); See also, *Southern LNG, Inc.*, 101 FERC ¶ 61,187 (2002), *order on reh'g*, 103 FERC ¶ 61,029 (2003). (This group of cases constitutes the "Elba II" expansion).

and *pro forma* tariff. Elba Express stated that, upon approval of its applications, it will be able to provide firm transportation service from Southern LNG's Elba Island LNG terminal to the interconnections with Transco (Elba Express project).

6. On April 4, 2007, the Commission issued a Preliminary Determination granting conditional approval of the Elba Express project; granting Elba Express the ability to charge negotiated rates; and directing Elba Express to make specific modifications to its *pro forma* tariff.⁵

7. On September 20, 2007, the Commission issued a combined order: 1) approving Southern LNG's request to expand its Elba Island LNG terminal; 2) directing Elba Express to file actual tariff sheets no sooner than 60 days but no later than 30 days prior to the commencement of service to place the rates approved into effect, including the red-lined tariff sheets reflecting how its actual tariff filing differs from its *pro forma* tariff and those changes discussed in the April 4 PD Order; and 3) directing Elba Express to file its negotiated rate contracts or numbered tariff sheets no later than 30 days and no sooner than 60 days prior to the commencement of service on the Elba Express facilities; and 4) approving other matters related to the Elba Express project not at issue here.⁶

8. Elba Express states that Appendix B⁷ and Appendix C⁸ of its filing identify the numerous corrections and deletions required by the Commission in the April 4 PD Order and the September 20 Certificate Order.⁹ In addition to the above corrections, Elba Express proposes tariff modifications in compliance with the capacity release

requirements promulgated by the Commission in Order Nos. 712¹⁰ and 717.¹¹ Elba Express also states that it is proposing updates to its FERC Gas Tariff adopted by the

⁵ See *Elba Express*, 119 FERC ¶ 61,015 at P 5.

⁶ See *Elba Express*, 120 FERC 62,215, Ordering Paragraphs M and N.

⁷ Elba Express' Appendix B includes a list of the required changes set forth in Appendix of the April 4 PD (Appendix B.I.) and a list of the changes that Elba Express proposes (Appendix B. II.) along with the section references.

⁸ Elba Express' Appendix C includes a table of NAESB Standards and the locations of those standards as required by the April 4 PD.

⁹ For a detail list of the changes and modifications, see Appendix.

¹⁰ *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 (2008), *order on reh'g*, Order (continued)

Commission in Order No. 587-T reflecting the newly released North American Energy Standards Board (NAESB) Version 1.8 standards.¹² Elba Express further asserts that it has corrected typographical errors in its *pro forma* tariff.

9. Section 27 of the GT&C authorizes Elba Express to enter into negotiated rate agreements with its shippers and sets forth the procedures for filing such agreements for Commission approval. Elba Express' form of service agreement for firm transportation service includes an Exhibit F for setting forth a shipper's negotiated rate (Exhibit F). The proposed Exhibit F contains a complex rate formula to establish negotiated rates for the use of the pipeline's firm transportation service by shippers.

10. Elba Express states that it is filing its negotiated rate agreement with Shell LNG pursuant to the Commission's *Negotiated Rate Policy Statement* (Policy Statement),¹³ the September 20 Certificate Order, and section 27 of its GT&C concerning negotiated rates. Elba Express and Shell executed a service agreement (Contract No. EEC-1) for firm transportation service under Rate Schedule FTS on October 5, 2007. The negotiated rate agreement is set forth in Exhibit F to the Service Agreement. Elba Express states that the negotiated rate for firm transportation service shall be effective on the date that the Elba Express pipeline is placed in service. Elba Express states that it is only filing Exhibit F to

No. 712-A, 73 Fed. Reg. 72692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712).

¹¹ *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009).

¹² On February 24, 2009, the Commission issued Order No. 587-T in Docket No. RM96-1-029 to incorporate by reference, in the regulations, Version 1.8 of business practice standards developed by the Wholesale Gas Quadrant (WGQ) of the NAESB. 126 FERC ¶ 61,129 (2009).

¹³ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order denying reh'g and clarification*, 75 FERC ¶ 61,024 (1996), *reh'g denied*, 75 FERC ¶ 61,066 (1996), *pet. for review denied*, *Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, *et al.*, U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998). *See also*, *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

the service agreement, because the body of the service agreement matches entirely the *pro forma* service agreement in Elba Express' tariff. Elba Express further asserts that the agreement other than Exhibit F contains no non-conforming changes.

11. Public notice of the tariff filing in Docket No. RP10-342-000 was issued on February 2, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2009)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely filed motions to intervene and any motion 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. No protests or adverse comments were filed.

12. Public notice of the negotiated rate agreement in Docket No. RP10-380-000 was issued on February 22, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2009)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely filed motions to intervene and any motion 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. No protests or adverse comments were filed.

13. The Commission accepts the proposed tariff sheets in compliance with the Commission's April 4 PD Order and September 20 Certificate Order, with the exception of the new *pro forma* Exhibit F for use in connection with negotiated rate agreements for firm transportation service. The purpose of a *pro forma* service agreement is to provide the basic structure of the service agreement to be used by all shippers, with blank spaces to be filled in with the specifics of each transaction, including the shipper's contract quantity, the term of the agreement, receipt and delivery points, and, for discounted or negotiated rate agreements, the particular rate agreed upon between the parties for that transaction.¹⁴ In the instant case, Elba Express' proposed *pro forma* Exhibit F to its form of service agreement for firm transportation service does not contain a blank for filling in the negotiated rate. Instead, it includes a specific, complex negotiated rate formula. That is contrary to the purpose of a *pro forma* service agreement of providing blanks for filling in the specifics of individual transactions, as opposed to actually including those specifics. Therefore, the proposed *pro forma* Exhibit F is not in compliance with the Commission's policy regarding *pro forma* service agreements. Accordingly, the

¹⁴ The Commission's regulations provide that the *pro forma* service agreement must refer to the service to be rendered and the applicable rate schedule of the tariff; and, provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Blank spaces may be provided for the insertion of receipt and delivery points, contract quantity and other specifics of each transaction as appropriate. 18 C.F.R. § 154.110 (2009).

Commission rejects Elba Express's proposed tariff sheets setting forth a new *pro forma* Exhibit F for Rate Schedule FTS service Original Sheet Nos. 143-163. The Commission requires that Elba Express file revised tariff sheets including a *pro forma* Exhibit F applicable to service under Rate Schedule FTS consistent with the above discussion.

14. The Commission finds that the remaining proposed tariff revisions identified in Appendix are in compliance with both the April 4 PD Order and September 20 Certificate Order and therefore, are just and reasonable. In addition, the Commission accepts Elba Express' proposed tariff modifications in compliance with the Commission's capacity release requirements and finds that these changes conform to Order Nos. 712 and 717. The Commission also accepts Elba Express' proposed tariff modifications containing updates incorporating the NAESB Version 1.8 standards and find that the amendments are in compliance with the most recent NAESB standards adopted by the Commission on March 3, 2009.¹⁵

15. Therefore, the Commission will accept and reject Elba Express proposed tariff sheets as set forth in the Appendix, to be effective on March 1, 2010, as proposed. However, Elba Express must file a revised *pro forma* Exhibit F as discussed above within 30 days of the issuance of this order.

16. Elba Express's filing of its negotiated rate agreement with Shell LNG does not comply with the Commission's filing requirements for negotiated rate agreements. The Commission has held that a pipeline must use its form of service agreement as the starting point for drafting any negotiated rate agreement.¹⁶ Moreover, if a negotiated rate agreement includes material deviations from the form of service agreement,¹⁷ the pipeline must clearly delineate differences between its negotiated contractual terms and that of its Form of Service Agreement in redline/strikeout and provide a detailed narrative "outlining the terms of its negotiated rate contract, the manner in which such terms differ from its form of service agreement, the effect of such terms on the rights of the parties, and why such deviation does not present a risk of undue discrimination."¹⁸ In this case,

¹⁵ *Standards of Business Practices for Interstate Natural Gas Pipelines*, Order No. 587-T, 74 FR 9162, (March 3, 2009), FERC Stats & Regs. ¶ 31,289 (2009).

¹⁶ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 33 (2003) (*Policy Statement*).

¹⁷ In *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,004 (2001), the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.

¹⁸ *East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,162, at P 16 (2003).

as described above, Elba Express has proposed a *pro forma* Exhibit F to its service agreements for purposes of setting forth any negotiated rate agreement. Therefore, it should use the *pro forma* Exhibit F as the starting point for drafting any negotiated rate agreement. It must delineate any material deviations from the *pro forma* Exhibit F in redline and strikeout and provide the required narrative explaining and supporting those deviations.

17. Elba Express has not complied with any of these requirements. It does not appear to have used its proposed *pro forma* Exhibit F as the starting point for drafting the Exhibit F in its service agreement with Shell LNG. In any event, the Shell LNG Exhibit F bears little resemblance to the proposed *pro forma* Exhibit F. For example, the Shell LNG Exhibit F does not include the lengthy, complex rate formula in the *pro forma* Exhibit F. Despite these facts, Elba Express did not identify any deviations between Shell LNG Exhibit F filed in Docket No. RP10-386-000 and the *pro forma* Exhibit F filed in Docket No. RP10-342-000. Elba Express has also failed to provide any detailed narrative explaining each of the deviations in the Shell LNG Exhibit F, whether and how each provision differs from the tariff or *pro forma* service agreement Exhibit F provisions that will govern service to other shippers, the effect of such terms on the rights of the parties, and why any material deviation does not present a risk of undue discrimination, as required by Commission policy.¹⁹

18. In the preceding section of this order, the Commission has found that Elba Express's proposed *pro forma* Exhibit F does not comply with the Commission's policy regarding *pro forma* service agreements, and is requiring Elba Express to file a revised *pro forma* Exhibit F. Therefore, the Commission will also require Elba Express to refile its negotiated rate agreement with Shell LNG. The parties must use the proposed revised *pro forma* Exhibit F as the starting point for drafting the negotiated rate agreement between Elba Express and Shell LNG. If the parties include in the Shell LNG negotiated rate agreement any material deviations from the revised *pro forma* Exhibit F, Elba Express must identify those deviations and file detailed narrative describing and supporting those deviations consistent with the above discussion.

19. Finally, the Commission reminds Elba Express that when it files a negotiated rate agreement with the Commission, it must file the entire service agreement, not just those parts of the service agreement that contain material deviations. By filing only the Exhibit F of its service agreement with Shell LNG, Elba Express failed to disclose certain essential elements of its agreement with Shell LNG, such as the primary receipt and delivery points and Shell LNG's contract demand. Such information is necessary to

¹⁹ *Policy Statement*, 104 FERC ¶ 61,134 at P 33.

permit shippers that believe they may be similarly situated to the shipper receiving the negotiated rate to make such a determination.²⁰

20. Therefore, based on our review of the filed Shell LNG negotiated rate agreement, the Commission requires that, within 30 days of the date of this order, Elba Express file a revised service agreement, together with redlined agreements showing any non-conforming provisions and supporting information for any material deviations contained in the revised agreement, consistent with the discussion above.

By direction of the Commission

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁰ *Policy Statement*, 104 FERC at P 26.

APPENDIX

**Elba Express Company, L.L.C.
FERC Gas Tariff, Original Volume No.1**

Accepted, Effective March 1, 2010:

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Original Sheet No.2
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