

130 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Southern LNG Inc.

Docket Nos. RP10-271-000
RP10-350-000

ORDER ACCEPTING AND REJECTING TARIFF SHEETS

(Issued February 26, 2010)

1. On December 29, 2009, Southern LNG, Inc. (Southern LNG) filed revised tariff sheets¹ to comply with a Commission order issued on September 20, 2007 in Docket No. CP06-470, *et al.*² This order approved, *inter alia*, Southern LNG's request to expand its Elba Island LNG terminal and directed Southern LNG to file actual tariff sheets reflecting Rate Schedule LNG-3 and Rate Schedule LNG-3 specific changes with the Commission prior to the commencement of service on the expansion facilities. In addition, Southern LNG submitted revised tariff sheets to its existing Rate Schedules LNG-1 and LNG-2 and to its General Terms and Conditions (GT&C). The Commission accepts the tariff sheets so indicated in the Appendix to be effective March 1, 2010, as requested, subject to conditions set forth below. As discussed below, the Commission also rejects certain tariff sheets related to Exhibit F to the Rate Schedule LNG-3 *pro forma* service agreement, as designated in the Appendix.

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

² *Southern LNG, Inc., et al.*, 120 FERC ¶ 61,258 (2007) (September 20 Order). This order directed that Southern LNG:

file actual tariff sheets no sooner than 60 days but no later than 30 days prior to the commencement of service to place the Rate Schedule LNG-3 rates and Rate Schedule LNG-3 specific changes to its tariff into effect, including the red-lined tariff sheets reflecting how its actual tariff filing differs from its *pro forma* sheets, including those changes discussed in this order. *Id.* at Ordering Paragraph (K).

2. On January 29, 2010, Southern LNG filed two negotiated rate contracts with Shell NA LNG, LLC (Shell) in Docket No. RP10-370-000. The Commission accepts these negotiated rate agreements to be effective March 1, 2010, subject to conditions.

I. Background

3. Southern LNG operates an LNG import terminal on Elba Island in Chatham County, Georgia, five miles downstream from the city of Savannah, Georgia on the Savannah River. 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.³

4. On September 29, 2006, Southern LNG proposed to expand the storage capacity of its Elba Island LNG import terminal (Elba III) by 8.44 Bcf and its vaporization capacity by 900 MMcf per day in two phases 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

5. Southern LNG provides firm terminal service under Rate Schedule LNG-1 (LNG-1) and interruptible service under Rate Schedule LNG-2 (LNG-2) for the existing Elba Island facilities. In its Elba III certificate proceeding, Southern LNG proposed incremental Rate Schedule LNG-3 rates under its open-access tariff.⁵ Southern LNG proposed that the Rate Schedule LNG-3 commodity rate be equal to the Rate Schedule LNG-1 commodity rate and that the new LNG-3 Rate Schedule would not include any

³ 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) (“Elba I” expansion); *see also* *Southern LNG, Inc.*, 101 FERC ¶ 61,187 (2002), *order on reh'g*, 103 FERC ¶ 61,029 (2003) (“Elba II” expansion).

⁴ Specifically, in Phase A, Southern LNG proposed to: (i) construct a new 200,000 cubic meter tank (1.25 million barrels) having a storage capacity of 4.22 Bcf of LNG with a boil-off recondenser and three boil-off gas compressors; (ii) install submerged combustion vaporizers with a firm send-out capacity of 405 MMcf per day; and (iii) modify the existing unloading docks to accommodate larger LNG ships and to facilitate simultaneous unloading of two LNG ships. In Phase B, Southern LNG proposes to: (i) construct an additional 200,000 cubic meter tank (1.25 million barrels) with a storage capacity of 4.22 Bcf; and (ii) install submerged combustion vaporizers with a firm send-out capacity of 495 MMcf per day. In addition, Southern LNG proposed, separate and apart from the proposed expansion, to abandon certain unutilized facilities at its riverside dock. 120 FERC ¶ 61,258 at P 4-5.

⁵ September 20 Order, 120 FERC ¶ 61,258 at P 52.

interruptible service. Rather, Southern LNG proposed to use its existing interruptible Rate Schedule LNG-2 for interruptible service using the incremental capacity. Southern LNG also stated that it had entered into precedent negotiated rate agreements with Shell for the entire firm capacity of Phase A and a similar agreement with BG LNG Services (BG LNG) for firm capacity in Phase B. These agreements account for all the firm capacity of the Elba III Terminal Expansion Project. Shell and BG LNG both agreed to pay a negotiated rate for service from Southern LNG.⁶

6. On September 20, 2007, the Commission approved, *inter alia*, Southern LNG's request to expand its Elba Island LNG terminal and directed Southern LNG to file actual tariff sheets reflecting Rate Schedule LNG-3 and Rate Schedule LNG-3 specific changes no later than 30 days and no sooner than 60 days prior to the commencement of service on the expansion facilities.⁷

7. Southern LNG states that it expects to commence service on Phase A of the expansion on March 1, 2010.

II. Tariff Filing in Docket No. 10-271-000

A. Description of the Filing

8. In addition to its filing of Rate Schedule LNG-3 and Rate Schedule LNG-3 specific changes to comply with the September 20, 2007 Order, Southern LNG also proposes several modifications to its current tariff. These changes are described in Appendix B to Southern LNG's instant filing and include:

- a. The addition of a charge for storage capacity used in excess of a firm shipper's Maximum Storage Quantity (MSQ);
- b. The addition of a buyout election for an extended Force Majeure event;
- c. The addition of electronic notice in some sections;
- d. The revision of the LNG Balance language to provide that it will be updated by nomination cycle instead of by day;
- e. The recognition of more than one Pipeline Interconnection;
- f. The removal of the in-storage transfer notice language;
- g. The revision of language for the extension of a primary term;
- h. The addition of language regarding the BTU Conversion Factor;

⁶ *Southern LNG, Inc.*, 120 FERC ¶ 61,258 at P 6, P 60 (2007).

⁷ September 20 Order, 120 FERC ¶ 61,258 at Ordering Paragraph (K).

- i. The revision of the existing *pro forma* negotiated rate Exhibit F to the Service Agreement and the addition of a *pro forma* Exhibit F applicable only to Rate Schedule LNG-3 service;
 - j. The addition of language with respect to Southern LNG's ability to file rate changes;
 - k. The revision of language regarding the scheduling priorities for delivery nominations;
 - l. The revision of the previously filed Dredging and Electric Power Cost Adjustment (EPCA) Surcharges to reflect the actual and currently approved surcharges; and,
 - m. Changes to the measuring units for MSQ and Maximum Daily Vaporization Quantity (MDVQ) from Dth to Mcf, as well as the correction of miscellaneous typos.
9. Southern LNG asserts that these changes are necessary to comply with the Commission's September 20, 2007 Order concerning Rate Schedule LNG-3 and are necessary for commencement of service of Southern LNG's proposed Elba III Expansion Project. Southern also submits that the above proposed modifications to Rate Schedules LNG-1 and LNG-2 were previously proposed in Southern LNG's certificate application and were rejected by the Commission in that proceeding without prejudice.⁸

B. Notice, Interventions, and Comments in Docket No. RP10-271-000

10. Public notice of the filing was issued January 4, 2010, with interventions and protests due as provided in Rule 210 of the Commission's regulations. 18 C.F.R. § 154.210 (2009). Pursuant to Rule 214 of the Commission's regulations, 18 C.F.R. § 385.214 (2009), all timely motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted.

⁸ In that certificate proceeding the Commission found that:

However, Southern LNG has proposed numerous changes to the existing Rate Schedules LNG-1 and LNG-2, and also changes to the existing GT&C that could change the rates, terms and conditions applicable to existing customers. . . . These proposed changes are rejected. Southern LNG is not proposing to change the facilities or services it renders to Rate Schedule LNG-1 and LNG-2 customers in this proceeding. If Southern LNG desires to make changes to the terms and conditions of service or rates of Rate Schedules LNG-1 and LNG-2, it should do so in a NGA section 4 filing made pursuant to Part 154 of the Commission's regulations. The Commission rejects the *pro forma* tariff sheets referenced in Appendix A without prejudice. 120 FERC ¶ 61,258 at P 73-74.

10. On January 11, 2010, Marathon LNG Marketing, LLC (Marathon) filed a motion to intervene and protest in the instant filing. Marathon protests Southern LNG's proposal to (1) alter the monthly reservation charge for storage capacity to reflect additional capacity used in excess of a customer's MSQ under Rate Schedule LNG-1; (2) alter the commodity charge for storage capacity to reflect additional capacity used in excess of a customer's MDVQ under Rate Schedule LNG-1; (3) revise the Form of Service Agreement to allow the agreement to control over the Rate Schedules, and to allow Southern LNG to negotiate to deny the customer the right to challenge rate and tariff filings. Marathon also states that Southern LNG's proposed *pro forma* Exhibit F applicable to service under Rate Schedule LNG-3 improperly contains negotiated terms and conditions of service and a specific, complex rate formula by the Rate Schedule LNG-3 customers in their Precedent Agreements for Rate Schedule LNG-3 service. Marathon protests each of these proposed tariff changes and reserves the right to raise additional objections.

11. On January 22, 2010, Southern LNG filed an Answer to Marathon's protest. Rule 213(a)(2) of the Commission's Regulations does not permit such answers, "unless otherwise ordered by the decisional authority." 18 C.F.R. § 385.213(a)(2) (2009). However, in the instant proceeding the Commission will permit the instant answer in order to help it fully understand the filing before it and provide for a more complete record to assist in the decision-making process.

C. Discussion

12. The Commission finds that Southern has generally complied with the dictates of the September 20, 2009 order and will accept the tariff sheets comprising Rate Schedule LNG-3 rates and a Rate Schedule LNG-3. The additional tariff sheets filed by Southern LNG related to Rate Schedules LNG-1 and LNG-2 and to its General Terms and Conditions (GT&C) and Appendix F are discussed below.

1. Rate Schedule LNG-1 -- Section 4.2

13. Southern LNG proposes to modify this section by adding a charge for overrun service in excess of a LNG-1 shipper's firm entitlement to service. Specifically, Southern LNG proposes to add the language shown in italics:

For service rendered to Customer under Rate Schedule LNG-1, customer shall pay Southern LNG each month (i) a Reservation charge per Dth of Customer's MSQ *plus a Monthly Storage Charge calculated under Rate Schedule LNG-2 for any Dth in excess of Customer's MSQ*, and (ii) a Commodity rate per Dth of the aggregate quantities of vaporized LNG

delivered for Customer's account (*both for firm quantities scheduled up to and including Customer's MDVQ and, if any, for quantities scheduled in excess of Customer's MDVQ*) pursuant to the nomination procedure on each day during the month.

14. Marathon contends that this change in the Reservation Charge and Commodity Charge components of the Rate Schedule LNG-1 rates is inconsistent with the Settlement approved by the Commission in Docket No. CP99-579-003.⁹ Marathon states that by that settlement Southern LNG agreed that throughout the term of the agreed rate moratorium, Southern LNG would make no filings to change the Base Rates then in effect. Further, Marathon asserts that Southern LNG does not possess certificate authority for an "overrun service" and, therefore, may not independently assess its customers an "overrun charge" associated with an unauthorized service.

15. Southern LNG responds that the purpose of its changes to this section is to allow shippers to have the right to overrun volumes in excess of their MSQ or MDVQ. Southern LNG asserts that its proposal represents a service enhancement available to all customers. Southern LNG asserts that its proposal recognizes that overruns may occur from time to time when operationally feasible and does not alter the existing reservation charge under Rate Schedule LNG-1, which Southern LNG asserts remains the same for the firm MSQ and the MDVQ subscribed; or (ii) change Southern LNG's base rates contrary to the Settlement in Docket No. CP99-579-003.

16. Southern LNG states that the rate proposed for the overrun service is the existing LNG-2 (interruptible terminal service) rate.¹⁰ Southern LNG states that a service provider is not obligated to provide overrun service through its firm services and may require customers to obtain interruptible service separately; however, it argues the given the manner in which an LNG terminal operates, this option is less practical than it would be on an interstate pipeline where most shippers have both firm and interruptible transportation agreements. Southern LNG contends that if it is to offer a overrun service under Rate Schedule LNG-3, then it follows that the same mechanism for overruns should be provided to firm customers under Rate Schedule LNG-1.

17. The Commission finds that Southern LNG's proposal to modify Section 4.2 of its Rate Schedule LNG-1 is reasonable. Marathon's claim that this action is barred by

⁹ Marathon Protest at 5, *citing Southern LNG, Inc.*, 112 FERC ¶ 61,314 (2005).

¹⁰ Southern LNG argues that in the case where a service provider offers overrun service under existing firm services, the application of a service provider's interruptible rate to overrun service is consistent with Commission policy. Southern LNG Answer at 6, *citing Elba Express Company, LLC.*, 119 FERC ¶ 61,015, at P 41 (2007).

settlement prohibition against a change in base rates is without merit. Southern LNG has made no change to the base rates for the existing Rate Schedule LNG-1 service, as claimed by Marathon. No rate components under rate schedule are modified by this proposal, if service received remains within the shipper's contractual entitlements to LNG-1 service. The rates under Rate Schedule LNG-1 for service within the agreed to limits remain precisely as proscribed by the Settlement. The change proposed by Southern LNG provides Rate Schedule LNG-1 shippers an additional overrun service, which they did not have before. Up to now, LNG-1 shippers desiring service in excess of their contractual entitlements would have to contract with Southern LNG for a separate interruptible service under Rate Schedule LNG-2 or incur penalties. Southern LNG proposes to charge Rate Schedule LNG-1 shippers the same maximum rates for the new overrun service, as it currently charges for LNG-2 interruptible service. Thus, Southern LNG's proposal provides Rate Schedule LNG-1 shippers the convenience of being able to obtain service in excess of contractual entitlements at the same rate as previously but without the need to execute a separate contract for Rate Schedule LNG-2 interruptible service.

18. Further, Marathon's contention that Southern LNG does not possess certificate authority for an "overrun service" and may not assess its customers an "overrun charge" associated with an unauthorized service is also misplaced. Southern LNG has made a filing under NGA section 4 to implement certain changes in Rate Schedule LNG-1. The Commission's open access regulations clearly provide Southern LNG with blanket authority pursuant to 18 CFR § 284.221 (2009) to provide new services. Moreover, Southern LNG's proposal to use its Rate Schedule LNG-2 rate as the rate to be utilized for its new overrun service under Rate Schedule LNG-1 is reasonable.

2. Form of Service Agreement -- Section 2.1

19. Southern LNG proposes to modify Article II, section 1 of its *pro forma* service agreement for both LNG-1 and LNG-3 service in order to permit its service agreement to control in the event of any conflict between the service agreement and its Rate Schedule. In pertinent part, Southern LNG proposes to modify this section with additions in italics and deletions in brackets as follows:

In the event of any conflict between this Agreement and *the firm* Rate Schedule [LNG-1], the terms of [Rate Schedule LNG-1 shall] *the Agreement shall* govern as to the point of conflict. Any limitation of Terminal Service hereunder shall be in accordance with the priorities set out in Southern LNG's tariff.

20. Marathon asserts that this proposal should be rejected, because the terms and conditions of service under the tariff may not be altered by agreement of the parties, even with negotiated rate agreements, because the Commission has yet to authorize negotiated terms and conditions of service. Marathon argues that as proposed, this provision would

give Southern LNG and its customers the unfettered discretion to vary the terms and condition of service by agreement. Marathon contends that this proposed tariff change, and any other sections of the proposed tariff that seek to accomplish this same result, should be rejected as inconsistent with Commission policy and precedent.

21. Southern LNG answers that its proposal to permit the service agreement to govern in the event of a conflict with the rate schedule does not circumvent the Commission's long-standing rules regarding non-conforming service agreements. Southern LNG states that Southern LNG would have to file to receive approval from the Commission if it deviated from the *pro forma* service agreement or if it entered into a negotiated rate agreement; however, if a nonconforming agreement or negotiated rate agreement were approved, it would make sense that both Southern LNG and the customer would want the terms of such approved agreement to control over any conflict with the rate schedule.

22. The Commission accepts Southern LNG's proposed revision to section 2.1 of the *pro forma* service agreement, subject to clarification. Under Commission regulations and policy, any agreement that deviates from the *pro forma* service agreement contained in the tariff must be filed with the Commission.¹¹ Further, all negotiated rate contracts or a tariff summary thereof must be filed with the Commission.¹² This permits the Commission to review arrangements entered into by the parties that deviate from the *pro forma* service agreement or contain negotiated rates to assure that the agreement is just and reasonable and not unduly discriminatory or preferential.

23. When the Commission has approved an individual service agreement with such material deviations or negotiated rates, it is reasonable that the approved material deviation or negotiated rate control over any conflict with the rate schedule. It appears from Southern LNG's answer that it intends that its proposed revision to section 2.1 be limited this type of situation. However, Southern LNG's proposed revision to section 2.1

¹¹ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001). See also 18 C.F.R. § 154.1(d) (2009).

¹² In its 1996 policy statement, the Commission required that the filing for negotiated rate contracts consist of a summary of the contract in a tariff sheet filed with the Commission or, alternatively, the complete contract documentation. See *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement). *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).

does not make it clear that the provision for the service agreement to control is limited to such circumstances, and could lead to ambiguity in some circumstances as to whether provisions of the service agreement or the rate schedule controlled. For example, section 6.6 of the *pro forma* service agreement incorporates Southern LNG's tariff into the service agreement. If Southern LNG modified its tariff after executing a service agreement with a particular shipper, it could be unclear to what extent the subsequent change in the tariff prevailed over any conflicting provisions in the service agreement. Therefore, the Commission accepts Southern LNG's proposed revision to section 2.1 of the LNG-1 and LNG-3 *pro forma* service agreement, subject to Southern LNG clarifying that the proposed revision to section 2.1 is limited to the situation described in Southern LNG's answer.

24. As so clarified, in each instance any agreement entered into between Southern LNG and a customer must either conform with the *pro forma* service agreement, in which case it complies with the tariff and the matter of which document governs conflicts is irrelevant, or the Commission must expressly find that the agreement which deviates in some manner from the service agreement is nonetheless just and reasonable and not unduly preferential. In the latter case, the parties have every expectation that their reasonable agreement will be upheld and will control any conflict with the Pipeline's tariff.

3. Form of Service Agreement

25. Southern LNG has proposed to modify Article V, section 2 of the Form of Service Agreement to permit Southern LNG to restrict its right to make tariff filings or the customer's right to object to those filings, or both. Southern added the language in italics to the following provisions:

Unless agreed otherwise in writing, Southern LNG shall have the unilateral right to propose, file, and make effective with the Commission, or other regulatory authority having jurisdiction, changes and revisions to the rates and rate design proposed pursuant to Section 4 of the Natural Gas Act, or to propose, file, and make effective superseding rates or rate schedules, for the purposes of changing the rates, charges, rate design, terms, and conditions of service and other provisions thereof effective as to Customer; provided, however, that the (i) firm character of service, (ii) term of agreement (as set forth in Article III above), (iii) quantities, and (iv) points of receipt and delivery shall not be subject to unilateral change under this paragraph.

Unless agreed otherwise in writing, Customer shall have the right to file with the Commission or other regulatory authority in opposition to any such filings or proposals by Southern LNG. This agreement does not, however, alter pre-existing rights under Section 5 of the Natural Gas Act.

26. Marathon states that section 2 of Article V currently gives Southern LNG the right to make tariff filings under NGA Section 4 and Southern LNG's customers the right to object to such filings but that Southern LNG proposes to eliminate, by agreement of the parties, either Southern LNG's right to make tariff filings or the customer's right to object to those filings, or both. Marathon's objection to this provision is limited to ensuring that if such an agreement were to be entered into between BG LNG Services and Southern LNG, that such an agreement will have no effect on Marathon.

27. Marathon requests that the Commission find that that even if BG LNG Services is willing to waive its right to object to tariff filings made by Southern LNG, any such waiver will not serve as a bar to Marathon protesting any such filing in its own right.

28. Southern LNG states that it proposes that Southern LNG and a customer may agree not to propose or oppose certain rate agreements. It points out in particular, that the standard negotiated rate agreement on First Revised Sheet No. 137A provides that:

If Customer and Southern LNG agree to a Negotiated Rate for the service under this Service Agreement, neither party shall take any steps during the term of the Service Agreement to change or terminate the Negotiated Rate.

Southern LNG states that it added the "unless mutually agreed otherwise" language in Section 2 to support such agreement in the negotiated rate provision and to eliminate any potential conflict. Southern LNG also states that Marathon's agreement with BG LNG Service is a non-jurisdictional agreement. Southern LNG argues that even if the Commission found that it had the authority to interpret this agreement, Marathon has not properly entered the contract as evidence in this proceeding to support its claim that any such waiver by BG LNG Services will not also bar Marathon from opposing the negotiated rate.

29. The Commission is concerned with the fact that the provision as modified by Southern LNG appears to allow Southern LNG to negotiate with shippers very broad waivers of section 4 and 5 rights and may violate the Commission's policies on such waivers. The Commission allows pipelines and shippers to include in a discounted or negotiated rate agreement a provision that the parties will not seek a change in agreed-upon rate for that transaction under NGA section 4 or 5, similar to the provision Southern LNG quotes above from its pro forma negotiated rate letter agreement. However, in *Columbia*,¹³ the Commission held that because gas pipelines have market power, it

¹³ *Columbia Gas Transmission Corp., et al.*, 111 FERC ¶ 61, 338 (2005) (*Columbia*), *aff'd*, *Columbia Gas Transmission Corp., et al. v. FERC*, 477 F.3d 739 (D.C. Cir. 2007).

would not allow pipelines to include in service agreements with individual shippers limits on the shipper's statutory rights under NGA section 5 to challenge the justness and reasonableness of the pipeline's other rates, including its recourse rates for all services.¹⁴ Therefore, the Commission is reluctant to sanction a section 5 waiver in a service agreement for a particular transaction, where the customer waives its section 5 rights not only as to the rate for its particular transaction at issue, but as to the pipeline's rates for all services.

30. Southern LNG's proposed modification to section 5.2 would appear to give it a broad authorization to negotiated any form of limit on the parties' rights to seek rate changes, and therefore the Commission cannot find that the modification as proposed is consistent with *Columbia*. Accordingly, the Commission will accept the proposed tariff sheet containing this modification, subject to Southern LNG filing to clarify the proposed limits of the rights, consistent with the above discussion.

31. The Commission will not rule on the effect Southern LNG's proposed revision to section 5.2 may have on agreements Southern LNG's customers may have with third parties. Such agreements are outside of our jurisdiction.

4. Form of Service Agreement -- Exhibit F

32. Section 24.4 of Southern LNG's GT&C authorizes it to negotiate rates with its shippers. Southern LNG's form of service agreement for firm terminal service under Rate Schedule LNG-1 includes an Exhibit F for setting forth a shipper's negotiated rate. That Exhibit F includes blanks for the negotiated rate and for indicating whether the shipper will have a contractual right of first refusal, as well a provision binding both parties to the negotiated rate for the term of the agreement.

33. In the September 20, 2007 certificate order, the Commission approved Southern LNG's proposal to extend its negotiated rate authority to Rate Schedule LNG-3. The Commission also noted that Southern LNG had filed in the certificate proceeding an Exhibit F to the Form of Service Agreement for Rate Schedules LNG-1 and LNG-3, and that exhibit laid out the calculation of the negotiated rates Southern LNG had arranged with the shippers who signed Rate Schedule LNG-3 precedent agreements. The Commission stated that it does not approve negotiated rate agreements in certificate proceedings, and therefore the filing of the Rate Schedule LNG-3 negotiated rate material was premature. Therefore, the Commission directed that Southern LNG "file its

¹⁴ *Columbia* at P 12, citing *Columbia Gas Transmission Corporation*, 79 FERC ¶ 61,044, at 61,200 (1997).

negotiated rate expansion contracts or numbered tariff sheets no later than 30 days and no sooner than 60 days prior to the commencement of service on the expansion facilities.”¹⁵

34. In the instant proceeding, Southern LNG has filed to revise the *pro forma* Exhibit F currently in its tariff by adding a blank for setting forth any relief the parties have agreed the shipper shall be given during a *force majeure* period, notwithstanding the contract buyout rights provided by section 5.4.2 of Rate Schedule LNG-1. Southern LNG also proposes to modify the title to the tariff sheet setting forth the existing *pro forma* Exhibit F to indicate that it is applicable to service under both Rate Schedules LNG-1 and LNG-3.¹⁶

35. In addition to these changes, Southern LNG also proposes to add a new *pro forma* Exhibit F applicable only to service under Rate Schedule LNG-3.¹⁷ This *pro forma* service agreement does not have a blank for filling in a shipper’s negotiated rate. Rather, it sets forth a specific, complex negotiated rate formula, which Southern LNG appears to have agreed to in precedent agreements with LNG-3 expansion shippers. It also sets forth a number of other provisions apparently from those precedent agreements, including audit rights (Exhibit F-II), Southern LNG’s obligation to file a general rate case relating to the recourse rates (Exhibit F-HIB), the “negotiated cost of service” to be used for determining rates in the event that the costs and revenues of the expansion are rolled into the Rate Schedule LNG-1 costs and revenues (Exhibit F-IIID.5), the right to effectuate releases of capacity at the negotiated rates (Exhibit F-VII). Finally, this proposed Exhibit F does include blanks for (1) indicating whether the shipper will have a contractual right of first refusal, and (2) setting forth any relief the parties have agreed the shipper shall be given during a *force majeure* period, other than the contract buyout rights provided by section 5.4.2 of Rate Schedule LNG-3.

36. Finally, in connection with this proposed *pro forma* Exhibit F for use in connection with negotiated rates under Rate Schedule LNG-3, Southern LNG proposes to revise section 25.4 of its GT&C to provide,

Exhibit F to the pro forma service agreement of Southern LNG’s Tariff contains a pro forma negotiated rate agreement for service under Rate Schedule LNG-3 with provisions, whether individually or in any combination, to which COMPANY and a Customer may mutually agree

¹⁵ Marathon Protest at 7, *citing* 120 FERC ¶ 61,258 at P 77.

¹⁶ These changes are on First Revised Sheet No. 137A.

¹⁷ This new *pro forma* service agreement is on First Revised Sheet Nos. 137-B through 137-M.

and conform to the authorization in this Section 25.4 (“Pro Forma Negotiated Rate Agreement”). The Pro Forma Negotiated Rate Agreement does not, however obligate COMPANY or Customer to agree to such provisions contained therein. COMPANY will agree to these or similar provisions without undue discrimination among similarly situated Customers.

37. Marathon contends that these proposals by Southern LNG do not comply with the Commission’s directives in the September 20, 2007 certificate order. Marathon argues that Southern LNG has improperly used the directive that Southern LNG file its individual negotiated rate agreements with the LNG-3 expansion shippers as an invitation to include, as a part of the Form of Service Agreement applicable to firm service, including Rate Schedule LNG-1 service, the negotiated terms and conditions agreed to between itself and its Rate Schedule LNG-3 customers, as “Commission-approved” negotiated rate provisions. Marathon asserts that this approach must be rejected. Marathon states that if Southern LNG wishes to file its Rate Schedule LNG-3 Negotiated Rate Agreements with the Commission for approval as non-conforming agreements, it may do so. In the alternative, Marathon states that Southern LNG may file tariff sheets showing for each customer the negotiated rate, all applicable charges, the applicable receipt and delivery points, the volume to be transported, the applicable rate schedule for the service, and a statement affirming that the service agreements do not deviate in any material aspect from the form of service agreement in Southern LNG’s tariff. Marathon argues that Southern LNG cannot bootstrap conformance by filing the negotiated rate provisions themselves as a part of the Form of Service Agreement which, itself, deviates from the tariff.

38. Marathon contends that this is particularly important in the instant filing because the terms and conditions that Southern LNG seeks to have the Commission approve, as Exhibit F to the Form of Service Agreement for all firm rate schedules, are the terms and conditions negotiated between Southern LNG and its Rate Schedule LNG-3 customers. Marathon argues that these terms and conditions include a complex rate formula and matters unrelated to the rates to be charged, including Southern LNG’s obligation to file a general rate case relating to the recourse rates, the right to effectuate releases of capacity at the negotiated rates, and negotiated relief in addition to relief from extended force majeure events otherwise available under the tariff for customers making the contract buyout election. Moreover, the proposed change to Section 25.4(b) of the General Terms & Conditions (GT&C) of Southern LNG’s tariff makes it clear that Southern LNG anticipates that even these terms and conditions may be varied by separate agreement of the parties, without regard to other tariff provisions.

39. Southern LNG answers that in Section 25.4 of the GT&C (Sheet No. First Revised Sheet No. 106B), it makes clear that this is only a *pro forma* agreement and it does not

obligate Southern LNG or any customer to agree to the provisions of such agreement. In addition, neither the *pro forma* negotiated rate agreement nor the explanatory statement in Section 25.4 are intended, directly or indirectly, to circumvent or waive the Commission's requirement that Southern LNG file any negotiated rate agreement (either as a contract or the terms thereof on a rate sheet). Southern LNG asserts that in no circumstances does Section 25.4 or the *pro forma* negotiated rate agreement state that any agreement may be made as suggested by Marathon, "without regard to other tariff provisions."¹⁸

40. Finally, Southern LNG states that it did intend for such *pro forma* negotiated rate agreements to only apply to service under Rate Schedule LNG-3. Southern LNG recognizes that it did not make this clear enough on the tariff sheets and is willing to make adjustments to clarify this specific provision.

41. The Commission accepts Southern LNG's proposed revision to the *pro forma* Exhibit F currently in its tariff, subject to the conditions discussed below. The Commission rejects Southern LNG's proposed new *pro forma* Exhibit F applicable only to Rate Schedule LNG-3 as not being in compliance with the September 20, 2007 certificate order and inconsistent with Commission policy concerning *pro forma* service agreements .

42. Southern LNG's proposal to add to its existing *pro forma* Exhibit F a blank for filling in a negotiated agreement between the parties concerning the relief the shipper may be given during a *force majeure* period is reasonable, so long as the relief is limited to rate relief. Section 5.4 of Rate Schedules LNG-1 and LNG-3 provides shippers two types of relief for during *force majeure* periods: reservation charge credits or an opportunity to buy out of their contracts. The Commission believes it reasonable to permit pipelines to negotiate alternate forms of rate relief with negotiated rate shippers, because such relief is essentially a rate matter. Thus, to the extent Southern LNG's proposed revision to the existing Exhibit F in its tariff is intended to permit such negotiation, the Commission finds the proposal to be reasonable. However, Southern LNG's proposed tariff language does not expressly limit the negotiated relief to rate relief. Non-rate relief could include discriminatory negotiated term and condition of service, and, therefore, the Commission will not authorize Southern LNG to negotiate such non-rate relief without filing any such specific provision negotiated with a shipper for Commission approval. Therefore, the Commission requires Southern LNG to revise

¹⁸ Southern LNG states for example, in one of the provisions cited by Marathon as F-VII regarding capacity releases, the provision specifically states that the right prescribed is, "subject to applicable regulatory requirements and the terms of SLNG's [Southern LNG's] Tariff." Southern LNG Answer at 8, *citing* Article VII on Original Sheet No. 137K.

its proposed addition to the existing Exhibit F to clarify that the negotiated relief is limited to rate relief.

43. It is also unclear whether Southern LNG intended to revise its existing *pro forma* Exhibit F so that it can apply to Rate Schedule LNG-3 service or intends to limit that exhibit to Rate Schedule LNG-1 service. As described above, Southern LNG's revision to the title of the relevant tariff sheet makes it appear that the existing *pro forma* Exhibit F would apply to service under either rate schedule. But its proposed addition of a blank for filling in agreements concerning relief during *force majeure* periods refers only to section 5.4.2 of Rate Schedule LNG -1, and not to the corresponding provision of Rate Schedule LNG-3. Therefore, Southern LNG must revise the tariff sheet on which its existing *pro forma* Exhibit F is located to clarify for what service that exhibit may be used. Southern LNG should also clarify its proposed additional language if it intends "Southern LNG" and "SLNG" to refer to the same entity.¹⁹

44. The Commission rejects Southern LNG's proposed new *pro forma* Exhibit F for use in connection with negotiated rate agreements for Rate Schedule LNG-3 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.²⁰ In the instant case, Southern LNG's proposed new *pro forma* Exhibit F for Rate Schedule LNG-3 negotiated rate agreements does not contain a blank for filling in the negotiated rate. Instead it includes the specific, complex negotiated rate formula that Southern LNG has agreed to in precedent agreements with its Rate Schedule LNG-3 customers. That is contrary to the

¹⁹ Southern LNG proposes to add the following language to First Revised Sheet No. 137-A:

[if applicable] Customer and Southern LNG hereby agree that, notwithstanding Customer's making the Buyout Election under Section 5.4.2 of Rate Schedule LNG-1 for the MDQ and MDVQ to which this Exhibit F applies, during the period of an SLNG Force Majeure (as defined therein), the following negotiated relief shall be provided to Customer:

²⁰ 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).

purpose of a *pro forma* service is agreement of providing blanks for filling in the specifics of individual transactions, not to actually include those specifics.

45. Accordingly, the Commission rejects Southern LNG's proposed tariff sheets setting forth a new *pro forma* Exhibit F for Rate Schedule LNG-3 service. The Commission requires that Southern LNG include in its tariff a *pro forma* Exhibit F applicable to service under Rate Schedule LNG-3 consistent with the above discussion. It may do this either by using the same *pro forma* Exhibit F for both LNG-1 and LNG-3 service or by including in its tariff a separate *pro forma* Exhibit F for each service. Southern LNG may propose to include in the *pro forma* Exhibit F for LNG-3 service any standardized provisions it seeks to include in all negotiated rate agreements for LNG-3 service, and the Commission will then consider the reasonableness of those provisions.

III. Negotiated Rate Contracts

A. Description of the Filing

46. On January 29, 2009 in Docket No. RP10-350-000, Southern LNG filed two negotiated rate contracts.²¹ Southern LNG states that these negotiated rate contracts are for service under Rate Schedules LNG-1 and LNG-2 between Southern LNG and Shell.

47. Southern LNG asserts that the negotiated rate for the Rate Schedule LNG-1 service shall be effective on the date that the Elba Express Pipeline, authorized by the Commission in the September 20 order, is placed in service. Southern LNG asserts that the negotiated rate under Rate Schedule LNG-3 is associated with the service from the Southern LNG Elba III Project Facilities approved by the September 20 order. Southern LNG maintains that the negotiated rate for the LNG-3 service shall be effective on the date that the vaporization facilities associated with Phase A of the Elba III Project are placed in service.

48. Southern states that the Commission directed Southern LNG to file either the negotiated rate agreements themselves, or tariff sheets reflecting the essential elements of such agreements. Southern LNG states that it has elected to submit the negotiated rate agreements themselves, rather than the tariff sheets reflecting such key elements. Southern LNG affirms that the Shell Service Agreement, other than the Exhibit F,

²¹ Southern identified these contracts as Exhibit "F" to SLNG-1 Service Agreement No. SLNG11 dated May 27, 2003 and Exhibit "F" to SLNG-3 Service Agreement No. SLNG25 dated October 5, 2007.

contains no non-conforming changes and, therefore, it is not filing the entire Service Agreement because the text of the base agreement is conforming.

B. Notice, Intervention and Comments in Docket No. RP10- 350-000

49. Public notice of the filing was issued February 2, 2010, with interventions and protests due as provided in Rule 210 of the Commission's regulations. 18 C.F.R. § 154.210 (2009). Pursuant to Rule 214 of the Commission's regulations, 18 C.F.R. § 385.214 (2009), timely motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. No protests were filed.

III. Discussion

50. The September 20, 2007 certificate order required that Southern LNG "file its negotiated rate expansion contracts or numbered tariff sheets no later than 30 days and no sooner than 60 days prior to the commencement of service on the expansion facilities." As the Commission explained in that order,²² the Commission's negotiated rate policy requires that:

Each time Southern LNG enters into a negotiated rate contract, it must file either the contract or numbered tariff sheets. If it chooses the latter, the tariff filing must state for each shipper the negotiated rate, all applicable charges, the applicable receipt and delivery points, the volume to be transported, the applicable rate schedule for the service, and a statement affirming that the affected service agreements do not deviate in any material aspect from the form of service agreement in Southern LNG's tariff.

51. In the instant filing, Southern LNG has not complied with the Commission's filing requirements for negotiated rate agreements with regard to its Exhibit F for its Rate Schedule LNG-3 Shell contract. The Commission has held that a pipeline must use its form of service agreement as the starting point for drafting any negotiated rate agreement.²³ Moreover, if a negotiated rate agreement includes material deviations from the form of

²² 120 FERC ¶ 61,258 at P 76.

²³ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 33 (2003) (*Policy Statement*).

service agreement,²⁴ 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.”²⁵ In this case, as described above, Southern LNG has proposed a *pro forma* Exhibit F for Rate Schedule LNG-3. Therefore, it should have used that *pro forma* Exhibit F as the starting point for drafting any negotiated rate agreement. It should also have delineated any material deviations from the *pro forma* Exhibit F in redline and strikeout and provided the required narrative explaining and supporting those deviations.

52. Southern LNG has not complied with these requirements with respect to the Shell Rate Schedule LNG-3 negotiated rate agreement. The Shell Exhibit F varies significantly from the proposed *pro forma* Exhibit F. For example, the Shell Exhibit F does not include the lengthy, complex rate formula in the *pro forma* Exhibit F. Nor does it contain provisions such as an obligation for Southern LNG to file an NGA section 4 rate case at least every 10 years as does the proposed *pro forma* Rate Schedule LNG-3 Exhibit F or a recitation of the customer’s capacity release rights as set forth by the proposed *pro forma* Rate Schedule LNG-3 Exhibit F. In addition, other provisions are worded differently from the *pro forma* Exhibit F, but it is not clear whether those differences are intended to affect the substantive rights of the parties.

53. However, Southern LNG has not identified the filed Exhibit F agreement with Shell as containing any material deviations. Southern LNG has also failed to provide any detailed narrative explaining each of the deviations in the Shell Exhibit F for LNG-3 service, whether and how each provision differs from the tariff or *pro forma* service agreement Exhibit F, 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.²⁶

54. In the preceding section of this order, the Commission has rejected the *pro forma* agreement for Rate Schedule LNG-3 service proposed by Southern LNG, and the

²⁴ 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.

²⁵ *Id. East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,162, at P 16 (2003).

²⁶ *Policy Statement*, 104 FERC ¶ 61,134 at P 33.

Commission is requiring that Southern LNG file a revised to file a revised *pro forma* Exhibit F. However, the pipeline should use the *pro forma* agreement as a starting point for drafting any negotiated rate agreement. Therefore, the Commission requires Southern LNG to refile its negotiated rate agreement with Shell for Rate Schedule LNG-3 service. The parties to this agreement must use the proposed revised *pro forma* Exhibit F for that service as the starting point for drafting the negotiated rate agreement between Southern LNG and Shell. However, if the parties include in the agreement any material deviations from the revised *pro forma* Exhibit F, Southern LNG must identify those deviations and file detailed narrative describing and supporting those deviations consistent with the above discussion.

55. Finally, the Commission reminds Southern 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, Southern LNG failed to disclose certain essential elements of its agreement with Shell, such as the primary receipt and delivery points and Shell's contract demand. Such information is necessary to permit shippers that believe they may be similarly situated to the shipper receiving the negotiated rate to make such a determination.²⁷

56. Similarly, while Exhibit F to Shell's service agreement for Rate Schedule LNG-1 service does conform to the *pro forma* Exhibit F for that service,²⁸ Southern LNG failed to file the entire service agreement for this service as well. Therefore, the Commission's acceptance of that negotiated rate agreement is subject to the requirement that Southern LNG file the entire service agreement.

²⁷ *Policy Statement*, 104 FERC ¶ 61,134 at P 26.

²⁸ Exhibit F of the Rate Schedule LNG-1 Shell contract filed by Southern LNG contains several word deviations from the Exhibit F of the current *pro forma* service agreement contained on Original Sheet No. 137-A of Southern LNG's tariff. While we will allow these minor changes which do not affect the meaning of the provisions or the rights of the parties, we remind Southern LNG that unnecessary deviations from the *pro forma* service agreement "hinder the Commission's ability to assess whether the transaction is unduly discriminatory as well as the assessment of the transaction by shippers attempting to determine if they are similarly situated to the shipper in the negotiated transaction." *Policy Statement*, 104 FERC ¶ 61,134 at P 31.

The Commission orders:

(A) The tariff sheets so listed in the Appendix are accepted to effective March 1, 2010, as requested.

(B) First Revised Sheet Nos. 131 and 137A are accepted, subject to Southern LNG filing within 30 days of the issuance of this order to revise them as discussed in the body of this order.

(C) Original Sheet No. 137B through Original Sheet No. 137M are rejected as discussed in the body of this order.

(D) The negotiated rate agreements filed Southern LNG are accepted to be effective on March 1, 2010. Within 30 days of the issuance of this order, Southern LNG must file a revised service agreement with Shell for Rate Schedule LNG-3 service and the entire service agreement for Rate Schedule LNG-1 service as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX**Southern LNG, Inc.
FERC Gas Tariff, Original Volume No.1**Accepted, Effective March 1, 2010:

Third Revised Sheet No. 1	First Revised Sheet No. 39
First Revised Sheet No. 2	Third Revised Sheet No. 41
Twenty-Sixth Revised Sheet No. 5	Second Revised Sheet No. 41A
Original Sheet No. 6A	Original Sheet No. 41B
First Revised Sheet No.7	First Revised Sheet No. 43
Second Revised Sheet No. 10	First Revised Sheet No. 52
First Revised Sheet No. 11	First Revised Sheet No. 54
Original Sheet No. 11A	Second Revised Sheet No. 59
Original Sheet No. 11B	First Revised Sheet No. 60
First Revised Sheet No. 12	Original Sheet No. 60A
First Revised Sheet No. 13	Original Sheet No. 60B
First Revised Sheet No. 14	Original Sheet No. 60C
First Revised Sheet No. 16	Original Sheet No. 60D
First Revised Sheet No. 19	Original Sheet No. 60E
First Revised Sheet No. 22	Original Sheet No. 60F
First Revised Sheet No. 25	First Revised Sheet No. 61
First Revised Sheet No. 26	Second Revised Sheet No. 66
First Revised Sheet No. 28	Second Revised Sheet No. 68
First Revised Sheet No. 30	Second Revised Sheet No. 70
Original Sheet No. 32A	Fourth Revised Sheet No. 75
Original Sheet No. 32B	First Revised Sheet No. 86
Original Sheet No. 32C	Second Revised Sheet No. 105B
Original Sheet No. 32D	Second Revised Sheet No. 106
Original Sheet No. 32E	First Revised Sheet No. 106B
Original Sheet No. 32F	Third Revised Sheet No. 107
Original Sheet No. 32G	First Revised Sheet No. 125
Original Sheet No. 32H	First Revised Sheet No. 126
Original Sheet No. 32I	First Revised Sheet No. 127
Original Sheet No. 32J	First Revised Sheet No. 128
Original Sheet No. 32K	First Revised Sheet No. 129
Original Sheet No. 32L	Second Revised Sheet No. 130
Original Sheet No. 32M	Second Revised Sheet No. 133
Original Sheet No. 32N	First Revised Sheet No. 134
Original Sheet No. 32O	First Revised Sheet No. 135
First Revised Sheet No. 37	First Revised Sheet No. 136
Second Revised Sheet No. 38	First Revised Sheet No. 137

Accepted, Subject to Clarification
Effective March 1, 2010:

First Revised Sheet No. 137A

First Revised Sheet No. 131

Rejected:

Original Sheet No. 137B

Original Sheet No. 137C

Original Sheet No. 137D

Original Sheet No. 137E

Original Sheet No. 137F

Original Sheet No. 137G

Original Sheet No. 137H

Original Sheet No. 137I

Original Sheet No. 137J

Original Sheet No. 137K

Original Sheet No. 137L

Original Sheet No. 137M

