132 FERC ¶ 61,145
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

August 18, 2010

In Reply Refer To:
Gulf South Pipeline Company, LP
Docket No. RP10-978-000

Gulf South Pipeline Company, LP
9 Greenway Plaza, Suite 2800
Houston, TX 77046

Attention: J. Kyle Stephens
Vice President, Regulatory Affairs and Rates

Reference: Letter Order Accepting Tariff Sections Subject to Conditions

Dear Mr. Stephens:

1. On July 19, 2010, Gulf South Pipeline Company, LP (Gulf South) filed proposed tariff sections[1] to add section 6.20 to the General Terms and Conditions (GT&C) of its FERC Gas Tariff setting forth the conditions under which Gulf South may reserve capacity for an upcoming pipeline expansion/extension project. Gulf South also proposes to revise section 6.10 of its GT&C, the Right of First Refusal (ROFR), for interim shippers with limited-term service agreements associated with such expansion/extension projects. For the reasons set forth below, the Commission accepts the revised tariff sections effective August 18, 2010, as requested, subject to the conditions discussed herein.

2. Proposed section 6.20 sets forth the conditions under which Gulf South may reserve capacity for upcoming pipeline expansion/extension projects. Gulf South may reserve any unsubscribed or unallocated capacity and any capacity under expiring service agreements where such agreements do not have a ROFR, or the customer does not exercise its ROFR. Gulf South states that it may only reserve capacity for a future expansion project for which an open season has been held or will be held within one year

[1] GT&C, Right of First Refusal, 2.0.0; GT&C, Construction of Receipt & Delivery Facilities, 1.0.0, to Tariffs, FERC Gas Tariff Seventh Revised Volume No. 1.

of the date Gulf South posts the capacity as being reserved. In addition, Gulf South will post a notice on its Internet Website when it is reserving capacity for a future expansion/extension project, and will include in the notice the details of the project for which capacity is being reserved. Once capacity is reserved, Gulf South will make the capacity available on an interim basis without a ROFR. If the reserved capacity is insufficient to satisfy the requirements of an expansion project, then Gulf South will conduct a reverse open season for the turn back of capacity no later than 90 days after the close of an open season for the expansion project and reserve any capacity obtained through the reverse open season for the expansion project. Capacity reserved for any project that does not go forward for any reason shall be made generally available in accordance with Gulf South's tariff within 30 days of the date upon which the capacity becomes available.

3. Proposed section 6.20 also provides that Gulf South may reserve capacity for a future expansion/extension project up to 12-months prior to (i) requesting entry into the pre-filing process,[2] (ii) filing an application for a certificate of public convenience and necessity under section 7 of the Natural Gas Act where the pre-filing process is not necessary, or (iii) filing under the prior notice requirements available under its blanket construction certificate for approval of the construction, acquisition, or lease of the proposed expansion facilities. Gulf South recognizes that the Commission has required other pipelines proposing to reserve capacity for an expansion to file for a certificate application within 12 months of the reservation of such capacity. However, Gulf South asserts that the pre-filing process is an indicator of a realistic expansion plan and is therefore consistent with Commission policy as an appropriate modification of the established twelve month time limit. Gulf South also asserts that the inclusion of prior notice filings pursuant to section 157.210 of the Commission's regulations[3] is appropriate since reservations of capacity for these smaller projects also meets Commission policy objectives.

4. The proposed modification to section 6.10 of Gulf South's GT&C states that a right of first refusal will not be applicable to limited-term firm transportation agreements associated with expansion/extension projects.

5. Public notice of Gulf South's filing was issued on July 22, 2010, with interventions, comments and protests due as provided under section 154.210 of the Commission's regulations (18 C.F.R. 154.210 (2010)). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2010)), all timely

[2] *See* 18 C.F.R. § 157.21 (2010).

[3] 18 C.F.R. § 157.210 (2010).

motions to intervene and any motions to intervene out of time filed before the issuance date of this order are granted. BP America Production Company and BP Energy Company (BP) filed a limited protest.

6. BP objects to Gulf South's proposal to be able to reserve capacity up to twelve months in advance of filing either a pre-filing request or a blanket certificate prior notice. BP asserts that Gulf South's request to be able to reserve future capacity up to twelve months prior to pre-filing would effectively result in Gulf South being able to reserve capacity for a period significantly beyond the one year period that the Commission has found reasonable. BP further asserts that Gulf South's proposal is contrary to Commission precedent and could result in the exercise of market power and the removal of capacity from the market and is thus unjust and unreasonable.

7. On August 4, 2010, Gulf South filed an answer to the protest and comments (answer).[4] The answer is discussed below.

8. The Commission accepts Gulf South's revised tariff sections to be effective August 18, 2010, subject to the conditions discussed below.

9. Gulf South's proposal to reserve capacity for future expansions is consistent with Commission policy with the exception of its proposal to allow it to reserve capacity up to twelve months in advance of filing either a pre-filing review request or a blanket certificate prior notice. Gulf South is directed to file revised tariff sections, within thirty days of the date of this order, (1) eliminating the proposed language authorizing reservation of capacity up to twelve months in advance of requesting entry into the pre-filing process or filing pursuant to the prior notice requirements under its blanket certificate and (2) expressly stating that Gulf South is only allowed to reserve capacity for up to 12-months prior to filing of the certificate application for the expansion/extension project.

10. With respect to Gulf South's proposal concerning pre-filings, the Commission has stated that capacity may be reserved for only twelve-months prior to filing a certificate application.[5] As the Commission stated in *Transco*, because a reservation of capacity results in a waiver of any interim shipper's ROFR, the Commission has required the one-

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[4] Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2010), answers to protests are not accepted unless otherwise ordered by the decisional authority. The Commission will accept Gulf South's answer because it provided information that assisted in our decision making process.

[5] *Transcontinental Gas Pipe Line Corp.*, 118 FERC ¶ 61,234, at P 10 (2007) (*Transco*).

year limit to assure that "the reservation of capacity occurs only as part of a realistic expansion plan."[6] The Commission has further stated in *Transco* that allowing a pipeline to reserve capacity only for one year before filing for a certificate is a safeguard that ensures that the pipeline is not reserving capacity to exercise market power.[7] Accordingly, the Commission will not permit Gulf South to include in its tariff a provision authorizing reservation of capacity for a period which may exceed by an indeterminate length of time the 12-month time period now authorized.

11. In its answer (at 2), Gulf South argues that its proposal meets the goals of the 12-month limitation by explicitly tying the timeframe for reserving capacity to the commencement of the pre-filing process. Gulf South argues (answer at 3-4) that this case is distinguishable from *Transco* since the pipeline in *Transco* requested a blanket 24-month period to reserve capacity prior to the filling of a certificate and Gulf South's proposal would apply only when the pre-filing process occurs. However, the time period proposed by Gulf South between the pre-filing process and the filing of a certificate is vague and indeterminate and may be longer than a year prior to a certificate filing. Therefore, all the concerns expressed by the Commission in *Transco* remain in this case. However, if Gulf South believes that it needs an extension of time to file the certificate application for a particular project for which it has reserved capacity, then Gulf South may request that the Commission waive this one-year tariff limit for that project and the Commission will evaluate the waiver request based on the circumstances and the support which Gulf South provides for the requested waiver.[8]

12. A proposal similar to Gulf South's was rejected in *Kern River*[9] where the pipeline requested that capacity be reserved for up to one year prior to initiation of the certificate approval process. Gulf South contends (answer at 4-5) that Kern River's proposal was rejected as ambiguous and vague[10] and that, in contrast, Gulf South's proposal is

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[6] *Id.*

[7] *Id.*

[8] Gulf South argues (answer at 5) that the pre-filing process provides the certainty and transparency the waiver process lacks. Gulf South asserts that under its proposal, at the time of the capacity reservation open season, parties could accurately gauge a timeframe that the capacity would be reserved. However, Gulf South fails to explain how the pre-filing process provides any additional clarity and transparency over applying for waiver.

[9] *Kern River Gas Transmission Co.*, 119 FERC ¶ 61,210 (2007) (*Kern River*).

[10] *Citing Kern River*, 119 FERC ¶ 61,210, at P 6 (2007).

explicitly tied to the pre-filing process. However, as pointed out above, the time between the pre-filing process and a certificate filing proposed here is also vague and indeterminate. In any case, in *Kern River*, the Commission expressly rejected Kern River's proposal because it could allow a pipeline to reserve capacity for more than one year.[11]

13. Gulf South contends that allowing reservation of capacity twelve months prior to the pre-filing process is consistent with the Commission's recent policy revision allowing construction project-related costs incurred subsequent to the pre-filing date to be eligible for Allowance for Funds Used During Construction (AFUDC) accrual, citing *Florida Gas Transmission Co.* LLC, 130 FERC ¶ 61,194 (2010) (*Florida Gas*). Gulf South asserts that, in *Florida Gas* (at P 28), the Commission stated that "the date that the Commission approves a request to initiate the pre-filing process is a strong indicator of the initiation of construction project-related activities… Therefore, for the purposes of implementing this revised policy, construction project-related costs incurred subsequent to the pre-filing date will be eligible for AFDUC accrual. . . ." However, the AFUDC policy determination is not related to the application of the 12-month requirement for capacity reservation under consideration here. In *Florida Gas* (at P 28), the Commission went on to qualify its finding to apply only to cases where capital costs have been incurred and activities are underway to get the asset ready for its intended purpose and to exclude cases where there is a showing to the contrary. Further, unlike the capacity that would be reserved for the requested indeterminate period here depriving shippers of the opportunity to obtain the capacity with a ROFR, the AFUDC policy only affects the pipeline's shippers when and if the utility plant is placed into service. AFDUC cannot be charged to shippers until that time.[12]

14. Gulf South also contends that the Commission has previously found that initiation of a pre-filing process is an "indicator [ ] of a realistic expansion plan" and is, therefore, an appropriate modification of the traditional 12-month time limitation, citing *Northwest Pipeline GP*, 127 FERC ¶ 61,116, at P 12 (2009) (*Northwest*). However, the Commission's description of the initiation of a pre-filing review as one indicator of a realistic project in *Northwest* was made in the context of granting a request for waiver of 12-month requirement for a particular project, not approving a generally applicable tariff provision such as Gulf South proposes here.

15. Gulf South has also not supported its proposal concerning the reservation of capacity for smaller prior notice projects. Gulf South argues that this proposal is consistent with the policy goals expressed in *Midwestern Gas Transmission Co.*,

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[11] *Kern River*, 119 FERC ¶ 61,210, at P 7 (2007) (*Kern River*).

[12] *See Florida Gas*, 130 FERC ¶ 61,194, at P 19 (2010) (*Florida Gas*).

106 FERC ¶ 61,229 (2004) (*Midwestern*) at P 6. Those goals were the minimization of facility construction and associated environmental impacts, fuller utilization of capacity, and minimization of the rate impact. Gulf South also argues (answer at 6-7) that the notice provided pursuant to the prior notice requirements indicates a realistic expansion plan and, essentially, the prior notice filing is made in lieu of a certificate application. However, Gulf South has not adequately explained why capacity reservation and the loss of ROFR for interim shippers is necessary for these smaller projects. When the Commission adopted this capacity reservation policy in *Tennessee*,[13] it pointed out it would lead to the efficient use of the pipeline's existing capacity and accomplish the goal of encouraging properly sized construction of expansion projects. Gulf South has not presented a sufficient need for a new policy reserving capacity for construction, acquisition, or lease of these smaller projects. For instance, it is unclear the extent to which such a policy would lead to a more efficient use of a pipeline's existing capacity, or encourage the construction of appropriately sized facilities. In fact, such a policy might have no effect on the size or efficiency of these smaller projects and would only result in the loss of shipper's ROFR. Further, Gulf South has failed to address how the Commission can ensure that the prior notice process, which is easier to employ than the formal certificate process, will not be utilized to withhold capacity unnecessarily from the market.

16. Therefore, the Commission accepts the revised sections effective August 18, 2010, subject to the conditions discussed in this order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

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[13] *Tennessee Gas Pipeline Co.*, 82 FERC ¶ 61,288, at 62,115 (1998) (*Tennessee*).