

135 FERC ¶ 61,088
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 28, 2011

In Reply Refer To:
BHP Billiton Petroleum (Fayetteville)
LLC and Chesapeake Energy Marketing,
Inc.
Docket No. RP11-1940-000

Morgan Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

Attention: Mark R. Haskell
Council for BHP Billiton (Fayetteville) LLC

Reference: Temporary Waiver Request

Dear Mr. Haskell:

1. On March 31, 2011, BHP Billiton (Fayetteville) LLC (BHPB) and Chesapeake Energy Marketing, Inc. (CEMI) (collectively, the Petitioners) filed a request for temporary waiver of certain of the Commission's capacity release regulations and policies and the corresponding tariff provisions of Ozark Gas Transmission, LLC (Ozark), Texas Gas Transmission, LLC (Texas Gas), and Fayetteville Express Pipeline, LLC (Fayetteville), in order to allow a permanent release of CEMI's firm transportation agreements on these pipelines. The Petitioners request the waiver become effective April 29, 2011, and continue for 90 days following the issuance of a Commission Order granting waiver. For the reasons discussed below, and for good cause shown, we grant the requested temporary, limited waiver.

2. The Petitioners state that this release of capacity is an essential part of a Purchase and Sale Agreement transaction by which BHPB would acquire all of the upstream and midstream production and gathering assets in the Fayetteville shale area in Arkansas from Chesapeake Exploration and Arkansas Midstream Gas Services Corporation (AMG), two wholly-owned subsidiaries of CEMI. In addition, BHPB will acquire minority interests in certain leaseholds from Chesapeake Investments, Larchmont Resources, L.L.C., and Jamestown Resources, L.L.C. The transaction also provides that BHPB is to receive from Chesapeake Exploration's marketing affiliate, CEMI, the interests in several firm

interstate pipeline capacity contracts subject to maximum recourse rates on Ozark and negotiated rates on Fayetteville and Texas Gas.

3. Petitioners seek waivers to release capacity for five contracts, which in total provide 509,000 dekatherms (Dth) of firm transportation per day on the three pipelines. The subject contracts are as follows:

Pipeline	Contract Number	Expiration Date	Contracted Capacity (Dth/day)	Capacity Subject to Permanent Release (Dth/day)	Rate Type (Maximum or Negotiated)
Ozark Gas Transmission, LLC	1002571	3/31/2013	10,000	10,000	Maximum
Ozark Gas Transmission, LLC	1002607	6/30/2011	33,000	33,000	Maximum
Ozark Gas Transmission, LLC	1002622	10/31/2011	16,000	16,000	Maximum
Texas Gas Transmission, LLC	27553	12/31/2018	75,000	75,000	Negotiated
Fayetteville Express Pipeline, LLC	200001	12/31/2020	375,000	375,000	Negotiated

4. In order to permit the transaction, the Petitioners seek temporary waiver of the Commission's capacity release rules set forth in section 284.8 of the Commission's regulations,¹ as well as the prohibition on tying, the shipper-must-have-title policy, and the prohibition on buy-sell arrangements. The Petitioners state that the waiver would be temporary and would only be used to effectuate an expeditious transfer of CEMI's

¹ 18 C.F.R. § 284.8 (2010).

interstate pipeline capacity to BHPB. This would allow BHPB to integrate into its production business the interests in the Fayetteville shale field obtained from Chesapeake Exploration.

5. The Petitioners state that the requested temporary waivers are consistent with waivers previously granted by the Commission under similar circumstances,² as well as waivers granted to facilitate the permanent release of transportation capacity subject to negotiated rate agreements.³ Petitioners contend that they have provided the necessary information in accordance with Commission policy⁴ associated with capacity release rules, regulations and policies for natural gas marketers transferring transportation contracts on interstate pipelines as part of a complex and integrated transaction.

6. Public notice of the filing was issued on April 1, 2011. Interventions and protests were due on or before April 12, 2011. Pursuant to Rule 214,⁵ all timely filed motions to intervene and any unopposed 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. Ozark filed comments to the waiver proposal.

7. Ozark states that it does not oppose the Petitioners' request for waiver, provided that the order grants waiver of the specific regulations, policies, and tariff provisions described in the Petition and does not otherwise affect any other tariff or state law rights or obligations that a party may have with respect to the release of capacity contemplated in the Petition or the underlying agreements.

8. The Commission has reviewed the Petitioners' request for a temporary waiver and finds that the request is adequately supported and consistent with previous waivers that

² See *Total Gas & Power North America Inc. and Chesapeake Energy Marketing, Inc.*, 131 FERC ¶ 61,023 (2010); *Macquarie Cook Energy, LLC and Constellation Energy Commodities Group, Inc.*, 126 FERC ¶ 61,160 (2009); *Sempra Energy Trading Corporation, Sempra Energy Solutions LLC, Sempra Energy Trading (Calgary) Ltd., and the Royal Bank of Scotland plc*, 121 FERC ¶ 61,005 (2007).

³ See *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082 (2009).

⁴ *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106, at P 8 (2009) (Notice Terminating Proceeding).

⁵ 18 C.F.R. § 385.214 (2010).

the Commission has granted under similar circumstances. Our actions here are consistent with those decisions where the Commission granted similar limited, temporary waivers in order to facilitate the transfer of interstate pipeline transportation capacity tied to the transfer of production fields. As noted in *Transcontinental Gas Pipeline Corporation*,⁶ the Commission's policy is to only require a pipeline to allow a permanent capacity release where the pipeline will be financially indifferent to the release. These releases would be at the same negotiated or maximum rates as in CEMI's current contracts, thus the pipelines here can reasonably conclude that they are financially indifferent to the releases. Petitioners state that they have informed the affected pipelines, and that none of them oppose the waiver request. Denial of the requested waivers of the bidding requirements for a permanent release would unnecessarily inhibit the use of a permanent release to transfer capacity. In addition, the Petition states that BHPB will use the subject capacity in the same manner as the releasing shipper, that is, to transport natural gas from the Fayetteville shale production area.⁷

9. Accordingly, for good cause shown, the Commission grants the Petitioners' request for a temporary waiver, limited to the capacity release regulations, policies, and tariff provisions specified in the Petition, in order to allow the permanent release of the firm transportation service agreements with Ozark, Texas Gas, and Fayetteville from Chesapeake to BHPB. Specifically, the Commission grants a limited, temporary waiver of section 284.8(b)(2) of our regulations requiring that long-term releases not exceed the maximum recourse rate, as well as sections 284.8(d) and (e) regarding notice and bidding of capacity releases. The Commission also grants a limited, temporary waiver of the prohibition on tying, the shipper-must-have-title policy, and the prohibition on buy-sell arrangements, so that Petitioners can complete their transaction in an orderly and efficient manner within their time constraints. The Commission also grants a limited, temporary waiver of the relevant tariff provisions, only to the extent necessary to effectuate the permanent releases of capacity amounts specified in the Petition for the agreements described therein.

⁶ 126 FERC ¶ 61,086 (2009).

⁷ *See id.* P 6 (noting prior cases in which, in "granting the waivers, the Commission relied in part on the fact [that] the replacement shipper was going to continue to use the capacity for the same purpose as the releasing shipper had used it.").

The Commission orders:

The temporary, limited waivers requested by Petitioners are granted from April 29, 2011, until 90 days following April 29, 2011, as discussed more fully above.

By direction of the Commission.

Kimberly D. Bose,
Secretary.