

139 FERC ¶ 61,015
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 6, 2012

In Reply Refer To:
Eastern Shore Natural Gas Company
Docket No. RP12-458-001

Eastern Shore Natural Gas Company
1110 Forrest Avenue, Suite 201
Dover, DE 19904

Attention: Michele Piper-Afryie, Regulatory Analyst

Reference: Construction of New Facilities and Contract Extension Revisions

Ladies and Gentlemen:

1. On March 8, 2012, Eastern Shore Natural Gas Company (Eastern Shore) filed revised tariff records¹ to modify certain provisions in section 12 (Construction of Facilities) and section 13 (Right of First Refusal Procedures) of its General Terms and Conditions (GT&C). Eastern Shore also requests that the Commission grant any waivers it deems necessary so that Eastern Shore's tariff records may be accepted effective April 1, 2012. For the reasons discussed below, the Commission waives its 30-day notice requirement set forth in section 154.207 of its regulations,² and accepts Eastern Shore's revised tariff records effective April 1, 2012, as proposed, subject to the conditions set forth in this order.

2. Eastern Shore proposes four revisions to the GT&C or its tariff. First, in the Construction of Facilities provisions in section 12, Eastern Shore proposes to add "mainline facilities" and "compression facilities" to its list of facilities it may evaluate and construct in response to a shipper's request for service. Second, it proposes to make

¹ See Appendix.

² 18 C.F.R. § 154.207 (2011).

attendant and clarifying changes to the same tariff section. Third, it proposes to incorporate into this section the language that it may “on a non-discriminatory basis, negotiate a payment schedule with a Shipper that differs from the foregoing schedule, which schedule may include payments in accordance with financing arrangements applicable to contributions in aid of construction.” Finally, Eastern Shore proposes to include the following tariff language in its Right of First Refusal Procedures provisions: “Prior to the expiration of any Service Agreement(s), TSP and Shipper may mutually agree to renegotiate the terms of such agreement(s) in exchange for Shipper’s agreement to extend the term of its commitment to purchase some or all of the service provided under such restructured Service Agreement(s).” Eastern Shore states that these tariff revisions would not adversely affect existing shippers, and would provide clarification and additional flexibility to shippers.

3. Public notice of the filing was issued on March 9, 2012. Interventions and protests were due as provided in section 154.210 of the Commission’s regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure (18 C.F.R. § 385.214 (2011)), all timely filed motions to intervene and any unopposed motions to intervene out-of-time 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 party filed a protest. Easton Utilities Commission (Easton) filed comments. Eastern Shore filed a response to the comments.

4. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits answers to answers or protests unless otherwise ordered by the decisional authority. The Commission accepts the response filed by Eastern Shore because it provides information that assisted us in our decision-making process.

5. Easton expresses concerns over three elements of Eastern Shore’s proposal. First, Eastern Shore proposes to add the terms “mainline facilities” and “compression facilities” to the list of facilities that it may construct, own, and operate if a shipper satisfies the three requirements set forth in its tariff. Those requirements include a requirement that the shipper contribute a specified contribution in aid-to-construction (CIAC) payment.³ Easton contends that Eastern Shore’s proposed tariff language requires clarification. It points out that section 12(a) of Eastern Shore’s currently effective tariff provides that Eastern Shore will construct requested facilities “at new and/or additional Point(s) of

³ The other two requirements are: (1) the metering and regulating facilities will be installed at points which, in Eastern Shore’s reasonable judgment, are the most practical, convenient, and/or readily accessible location; and, (2) the shipper provides all information necessary to support the proposed service for any needed Commission proceeding.

Delivery and/or Delivery Point Area(s) or at new and/or additional Point(s) of Receipt.” Easton states that it is unclear whether this requirement concerning the location of the new facilities applies only to “metering and regulating facilities” and the listed subcomponents of such facilities “necessary to receive, monitor, measure, transport or deliver gas for the account of Shipper,” or whether the requirement applies to all facilities listed in section 12, including mainline and compression facilities. Further, Easton contends that the modifications to section 12 can be read either as obligating shippers to pay for any new compression or mainline facilities through a CIAC payment, or as only requiring such a payment if the facilities are installed in connection with service to new and/or additional points. Easton asserts that, regardless of which interpretation applies, a general rule that mandates a CIAC payment to pay upfront costs of mainline and compression facilities is inappropriate. It contends that traditionally the cost of expansions on Eastern Shore’s system that have involved added mainline or compression facilities have been paid for through either rolled in or incremental rates for the added service provided. It states that, if the revised tariff language changes that general approach by establishing a mandatory obligation to provide a CIAC payment for such facilities up front, subject to discretionary waiver of such payment, the Commission should find the tariff language inappropriate and unjust and unreasonable.

6. In its response, Eastern Shore states that its objective in making this tariff revision was to extend its construction policy, which was drafted when only measurement and regulation facilities and delivery laterals could be constructed under a blanket certificate, to include a broader category of facilities that are now allowed to be constructed under the blanket certificate.⁴ It states it had recently received or anticipates a number of new service requests that will require mainline looping and compression, with or without the need to construct new lateral, delivery point, or measurement and regulation facilities. Eastern Shore contends it is not proposing to change the approach it takes under section 12 of its GT&C in requesting or negotiating a CIAC relating to new facilities construction.

7. With regard to Easton’s comments, Eastern Shore states that it has been talking to Easton to clarify certain questions Easton has with its proposal. Eastern Shore states that, as a result of these discussions, it proposes to further modify section 12(a) of its GT&C to provide that Eastern Shore may construct new facilities at the request of shippers to deliver gas “in quantities in excess of those specified in the then-effective firm transportation service agreements between Shipper and TSP.” Eastern Shore contends

⁴ Eastern Shore cites 18 C.F.R. § 157.210 (2011), which authorizes blanket-certificate holders “to acquire, construct, modify, replace, and operate natural gas mainline facilities, including compression and looping, that are not eligible facilities under § 157.202(b)(2)(i).”

that this additional language, along with its previously submitted proposed changes, would make clear that Eastern Shore's intent is that the construction policy is to apply: (1) to new laterals, measurement, regulation, and related facilities; and, (2) to compression additions and mainline looping that are necessary to either provide service at new receipt and delivery points or to provide incremental service beyond volumes reflected in effective service agreements between Eastern Shore and a shipper.

8. We find that Eastern Shore's additional proposed tariff revision adequately clarifies its proposal and addresses the concerns raised by Easton. The proposed revisions to the tariff include mainline and compression facilities, as well as lateral and delivery facilities, in order to reflect the full scope of facilities that Eastern Shore may construct in response to a customer's request. Accordingly, we direct Eastern Shore to file revised tariff records, within 21 days of the date this order issues, setting forth this clarification. Further, in its transmittal, Eastern Shore states that the objective of its proposal is to establish which types of facilities it can construct under a blanket certificate. We believe that Eastern Shore should clarify in its tariff that the facilities it would construct pursuant to section 12(a) of its tariff, including the mainline and compression facilities in question, would be those allowed under its blanket certificate. Accordingly, we direct Eastern Shore to file revised tariff records, within 21 days of this date this order issues, setting forth this clarification.

9. Second, Easton expresses concerns that section 12 of Eastern Shore's GT&C provides Eastern Shore with the discretion of whether or not to build facilities if certain criteria are met.⁵ Easton asserts this tariff language⁶ contravenes Commission policy as set forth in *Southern*,⁷ where the Commission rejected a tariff provision that provided that a pipeline "may" agree on a non-discriminatory basis to construct interconnecting facilities to similarly situated shippers that met certain objective criteria. According to Easton, the Commission held in that case that use of the word "may" in this situation was

⁵ The criteria Easton cites are: (1) section 12(c) which provides that Eastern Shore "may" waive reimbursement for costs of facilities; (2) section 12(d) which provides that Eastern Shore "may" invest in facilities; (3) section 12(e) which provides that Eastern Shore "may" waive the requirement for ownership of facilities; and, (4) section 12(f) which provides that "nothing" set forth in Eastern Shore's tariff will require Eastern Shore to build or contribute to the construction of facilities.

⁶ The Commission notes that this tariff language identified by Easton is not language proposed in this proceeding, but rather existing tariff language set forth in section 12 of Eastern Shore's GT&C.

⁷ Easton Comments at 6 (*citing Southern Natural Gas Co.*, 95 FERC ¶ 61,354 (2001) (*Southern*)).

inappropriate as it would allow the pipeline to unreasonably decline to construct facilities at its expense. Easton asserts that the *Southern* decision applies with equal force to the instant proposal, and the Commission should require Eastern Shore to construct new facilities if a shipper meets the criteria.

10. In its response, Eastern Shore notes that the tariff language in question is existing tariff language, and it does not propose any changes to these provisions as part of its proposal. It also asserts that the language providing that it “may” agree on a non-discriminatory basis to construct interconnecting facilities to similarly situated shippers that met certain objective criteria is appropriate and reasonable, and does not believe any change to this language is warranted.

11. We agree with Eastern Shore. The tariff language in question is existing tariff language already approved by the Commission, and is reasonable and consistent with Commission policy on new facilities construction. We will not require any changes to these provisions. Easton cites to the Commission’s decision in *Southern* to show that this provision is impermissible. In *Southern*, the Commission explains its interconnection policy. Under the policy, a pipeline cannot deny interconnect access to a shipper if the shipper satisfies certain criteria. In that order, the Commission clarifies that this policy “relates only to the construction of new interconnections, does not require a pipeline to expand its facilities, to construct any facilities leading up to an interconnection, or even to construct the interconnection itself.”⁸ The Commission stated that the policy simply requires the pipeline to grant a shipper access to the interconnection point if the shipper meets the proper criteria. Since the Commission findings in *Southern* pertain to access to an interconnect and not to the construction of new facilities, it is not applicable to the instant proposal. Accordingly, we reject Easton’s concerns.

12. Finally, Eastern Shore proposes to add language to its ROFR provisions that would allow Eastern Shore and a shipper to mutually agree to renegotiate the terms of a service agreement in exchange for the shipper’s agreement to extend the term of its commitment to purchase some or all of the service provided under the restructured service agreement. Easton expresses concerns that this provision is too open-ended, and could result in Eastern Shore and a shipper negotiating improper terms and conditions of service. It requests that the Commission direct Eastern Shore to: (1) clarify which terms are subject to negotiation in connection with an extension; (2) specify that it is not seeking to use the general language to establish a general right to negotiate terms and conditions of service; and, (3) specify that the negotiation of extensions will be done in a non-discriminatory manner.

⁸ *Id.* at 62,360.

13. In its response, Eastern Shore states that its intention with this proposed tariff provision was only to allow Eastern Shore and a shipper to negotiate those terms and conditions of service that may be negotiated in accordance with the applicable provisions of its tariff and Commission policy. Eastern Shore also proposes a further tariff modification to clarify this point.

14. We find Eastern Shore's proposed tariff language acceptable. The proposed provision is similar to what the Commission recently approved in *Columbia*.⁹ In that order, the Commission found the tariff language acceptable because it allows a pipeline to use its business judgment regarding the sale of capacity so that if it determines that extending an agreement with an existing shipper gives it as much or more revenues as it could expect to obtain through marketing the capacity, it need not commit the capacity to a bidding process and may extend the contract instead. The Commission added that mutual negotiations, whether short-term or long-term, are within the scope of what the Commission has found permissible. In response to Eastern's concerns, this provision will not allow Eastern Shore and a shipper to negotiate terms and conditions of service that are impermissible under Commission regulations or policies. Also, since this provision is incorporated as part of Eastern Shore's generally applicable tariff, Eastern Shore must implement this provision in a non-discriminatory manner.

15. If any contract extension negotiated by Eastern Shore and a shipper includes any material deviation from Eastern Shore's form of service agreement, sections 154.1(d) and 154.110 of the Commission's regulations¹⁰ require Eastern Shore to file the contract for Commission approval.¹¹ Further, pursuant to section 284.13(b) of the Commission's regulations, Eastern Shore will be required to post all pertinent information regarding contracts, including all revisions to contracts. Thus, any agreement by Eastern Shore to extend a service agreement will be reflected in Eastern Shore's transactional postings. These postings should ensure adequate transparency for all contract extensions. Since Eastern Shore's proposed tariff language is acceptable, we will not require any further tariff revisions.

16. Finally, section 154.207 of the Commission's regulations requires at least a 30-day notice period for proposed tariff changes unless a waiver of the time period is granted by the Commission.¹² Eastern Shore has requested waiver of this 30-day notice provision so

⁹ *Columbia Gas Transmission, LLC*, 134 FERC ¶ 61,203 (2011).

¹⁰ 18 C.F.R. §§ 154.1(d) and 154.110 (2011).

¹¹ *See Columbia Gas Transmission, LLC*, 97 FERC ¶ 61,221, at 62,001-4 (2001).

¹² 18 C.F.R. § 154.207 (2011).

that its proposed tariff revisions may go into effect on April 1, 2012.¹³ Accordingly, the Commission grants a waiver of section 154.207 of the Commission's regulations and accepts the tariff records effective April 1, 2012, as proposed, subject to the conditions set forth in this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ The Commission notes that this request was not opposed by Easton.

Appendix

Eastern Shore Natural Gas Company
FERC NGA Gas Tariff
Third Revised Volume No. 1

[Sheet No. 116, GTC Section 12: Construction of Facilities, 0.0.3](#)

[Sheet No. 117, GTC Section 12: Construction of Facilities, 0.0.3](#)

[Sheet No. 118, GTC Section 12: Construction of Facilities, Continued, 0.0.3](#)

[Sheet No. 119, GTC Section 12: Construction of Facilities, Continued, 0.0.3](#)

[Sheet No. 128, GTC Section 13: Right of First Refusal Procedures, Cont, 0.0.5](#)