

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

March 24, 2006

In Reply Refer To:
Duke Energy Marketing America, LLC,
Gas Transmission Northwest Corporation,
El Paso Natural Gas Company,
Northwest Pipeline Corporation,
Questar Southern Trails Pipeline
Company, and Transwestern Pipeline
Company, LLC
Docket No. RP06-221-000

John & Hengerer
1200 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Attention: Gordon J. Smith
Counsel for Duke Energy Marketing America, LLC

Reference: Order Granting Waivers

Dear Mr. Smith:

1. On February 15, 2006, Duke Energy Marketing America, LLC (DEMA), Gas Transmission Northwest Corporation (GTN), El Paso Natural Gas Company (El Paso), Northwest Pipeline Corporation (Northwest), Questar Southern Trails Pipeline Company (Questar), and Transwestern Pipeline Company, LLC (Transwestern) (jointly, Petitioners) filed a joint petition for a limited waiver of certain Commission policies and regulations and certain pipeline tariff provisions. On March 10, 2006, Petitioners filed a clarification to its joint petition and a joint petition for expedited grant of limited waivers.¹ In sum, Petitioners request waiver of: (i) the Commission's policy espoused in

¹ In addition, in this clarification, DEMA stated that it required that its Prearranged Shipper and any third party bidder for the subject capacity meet all tariff requirements of each Non-host pipeline to enable the winning bidder under the auction process to become a permanent replacement shipper under all of the Non-host pipeline contracts in the

(continued...)

Order No. 636-A² prohibiting the tying of non-jurisdictional gas transmission contracts to released transportation capacity, and (ii) certain capacity release tariff provisions related to GTN and El Paso. As discussed below, the Commission will grant the requested waivers.

2. DEMA states that in 2005 its parent, Duke Energy Corporation, and Cinergy Corporation agreed to merge and then restructure various business units within the merged company. In anticipation of these merged operations, DEMA is divesting itself of various natural gas transportation, storage, supply, and delivery operations associated with certain merchant generation plants that will not remain in the asset base of the merged company. DEMA states that it is taking a structured approach to winding down its operations to ensure the continued performance of its contractual obligations while maximizing the value of its assets. DEMA indicates that it has conducted a “data-room” process to allow interested parties (subject to the execution of appropriate non-disclosure agreements) to examine and bid upon portions of DEMA’s nationwide “book” of business assets. In certain instances, DEMA has packaged groups of logically and operationally associated assets into a discrete portfolios.

3. DEMA states that a single Prearranged Replacement Shipper is willing to accept a permanent release of two of DEMA’s asset portfolios, designated as the Northwestern Portfolio³ and the Southwestern Portfolio,⁴ subject to bid and the Prearranged Replacement Shipper’s right to match.

subject capacity portfolios. Moreover, DEMA also clarifies that Trailblazer Pipeline Company (Trailblazer) does not oppose the instant petition.

² Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,939 at 30,446-48 (April 8, 1992); order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,950 (August 3, 1992); order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); reh'g denied, 62 FERC ¶ 61,007 (1993); aff'd in part and remanded in part, *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

³ DEMA states that the Northwestern portfolio currently consists of five firm transportation agreements with GTN, one firm transportation agreement with Trailblazer, one firm storage and one associated Rate Schedule TF-2 non-conforming transportation contract with Northwest, two firm transportation agreements with Nova Gas Transmission, Ltd., and twenty-six other related gas supply and delivery contracts and amendments, with twenty-one other non-pipeline counterparties.

4. DEMA states that it has recently executed two Purchase and Sale Agreements with this qualified, creditworthy, Prearranged Replacement Shipper. DEMA states that its Agreements bind DEMA and the Prearranged Replacement Shipper to effectuate the sale, release, and assignment of all assets within each respective portfolio, as an intact package of contracts to be effective April 1, 2006, with a contingency effective date of May 1, 2006, with no change in the contract rates or terms of the contracts within the portfolios. The Commission-jurisdictional interstate transportation contracts in each portfolio will be permanently released at the applicable maximum rate, for the full remaining term of the contract, with the exception of one transportation contract with GTN, which will be released at a discounted contract rate below the maximum rate. DEMA states that because of current market conditions, it has agreed to make a payment (Reverse Auction Payment) to the instant Prearranged Replacement Shipper as consideration for the Prearranged Replacement Shipper acquiring the portfolios.

5. DEMA asserts that because the Commission-jurisdictional contracts within the portfolios cannot be released without being subject to the Commission's capacity release bidding process, DEMA has requested that GTN and El Paso (Host pipelines) treat the capacity portfolios as prearranged deals, and post them for competing bids, with the bids to be evaluated on the basis of which shipper will require the smallest payments by DEMA to the shipper in order to consummate the transfer of the portfolios (a "reverse auction" bidding process).⁵ DEMA states that because the bidding process will take place only on the host pipelines internet websites, each of the other regulated pipelines (Non-host pipelines) that has capacity included in the subject portfolio will be requested to post an informational notice on its internet website to alert interested parties. DEMA states that it will afford all interested bidders a twenty-day evaluation period in which to submit bids. DEMA states that at the end of the open season it will post the requisite information on each of the affected pipelines to alert all parties of the permanent release transactions.

6. The Petitioners state that the waivers requested herein are necessary to effectuate the permanent transfer, consistent with the Commission's capacity release policies and

⁴ DEMA states that the Southwestern Portfolio currently consists of four firm transportation agreements with El Paso, one firm transportation agreement with Questar (currently held by Duke Energy Trading and Marketing, L.L.C.), three firm transportation contracts with Transwestern, two firm transportation agreements with Pacific Gas and Electric Company, and eight various other gas supply and delivery contracts and amendments, with three other non-pipeline counterparties.

⁵ See *Northwest Pipeline Corp. and Duke Energy Trading and Marketing, L.L.C. (Northwest)*, 109 FERC ¶ 61, 044 at P12 (2004) (describing the reverse auction process in general terms).

regulations, of the capacity portfolios to DEMA's Prearranged Replacement Shipper (or any successful third-party bidder that may later emerge), using a consolidated, reverse auction bidding process. The Commission will address the requested waivers below.

7. Public notice of the instant filings was issued on March 14, 2006, with interventions and protests due on or before March 20, 2006. Pursuant to Rule 214 (18 C.F.R. § 154.210 (2005)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

8. In *Northwest Pipeline Corporation*⁶ and *Duke Energy*⁷ the Commission considered similar requests for various waivers from DEMA. As discussed in the orders, the Commission's view is that a releasing shipper that is attempting to exit the gas transportation business, should, within certain limitations, be permitted to exit in a rational and orderly fashion, if such action is open and will not unduly discriminate against other shippers. Here, DEMA has proposed to aggregate capacity to be released, and has arranged to accept bids on the capacity on GTN's and El Paso's websites through a reverse auction procedure, subject to match by a prearranged shipper. The Commission finds that DEMA has proposed an open and transparent manner in which to undergo the process of divesting itself of its natural gas obligations. Accordingly, the Commission will grant the necessary waivers to permit DEMA to accomplish its goals as discussed below.

9. Petitioners request waiver of the Commission's "tying prohibition" which holds that a releasing shipper cannot tie the release of its capacity to any extraneous conditions.⁸ Petitioners request waiver of this policy, so that DEMA may include in its capacity release portfolios, a number of non-jurisdictional transportation, sales, and supply assets, in addition to jurisdictional transportation contracts. Petitioners assert the inclusion of these non-jurisdictional contracts in the portfolios will permit DEMA to exit the gas business in a more orderly manner, preserve all parties' contractual rights, and

⁶ 109 FERC ¶ 61,044 (2004), *order on clarification*, 112 FERC ¶ 61,187 (2005) (*Northwest*).

⁷ *Duke Energy Marketing America, LLC, et al.*, 114 FERC ¶ 61,198 (2006) (*Duke Energy*).

⁸ The Commission articulated this prohibition against the tying of capacity in Order No. 636-A, where it stated that: The Commission reiterates that all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions. Order No. 636-A at p. 30,559.

meet the Commission's policy goal of ensuring the efficient transfer of capacity under an open and transparent bidding process.

10. Here as in *Northwest* and *Duke Energy*, DEMA is attempting to divest itself of variously natural gas transportation, storage, supply and delivery operations in anticipation of the merger of its parent company. Consistent with *Northwest* and *Duke Energy*, the Commission finds that the petitioners have shown good cause for the waiver request. Therefore, the Commission waives its policies concerning the tying of capacity to permit DEMA to include, in its capacity release portfolios, the non-jurisdictional contracts.

11. DEMA proposes to release its capacity portfolios using GTN's internet website and El Paso's electronic bulletin board (designated sites). To do so, Petitioners request limited waiver of certain capacity release provisions set forth in Paragraph 28 of the General Terms and Conditions (GT&C) of GTN's tariff and section 28 of the GT&C of El Paso's tariff. First, Petitioners contend that GTN's and El Paso's capacity release tariff provisions or designated sites are not designed to accommodate an en masse permanent release of portfolios of contracts both on and off the GTN and El Paso systems, or a reverse auction bidding/awarding process. Petitioners seek waiver of all applicable tariff provisions to allow GTN and El Paso to respectively release each multi-contract portfolio as a single package.

12. Second, Petitioners assert that GTN's and El Paso's capacity release tariff provisions only contemplate the posting of capacity releases associated with either the GTN or El Paso systems. DEMA's capacity release portfolio includes service agreements for capacity on other pipelines. Accordingly, Petitioners request waiver to allow DEMA to post capacity releases for service on Non-Host pipelines on the GTN and El Paso designated sites.

13. Third, the tariffs of GTN and El Paso require capacity releases to be implemented electronically. GTN requests waivers in the event that it may need to impose a manual posting and bidding process if it will not be able to implement the auction electronically. El Paso requests waivers because it has determined that its computer system cannot process the proposed portfolio release to effectuate the capacity release, and instead, El Paso states it intends to use a manual posting and fax bidding system.

14. Fourth, GTN capacity release tariff provisions contemplate parties providing bid prices in the form of volumetric rates or on a demand charge basis. Likewise, El Paso's capacity release tariff provisions contemplate bid prices being submitted in the form of reservation charges and surcharges. Petitioners request waivers of these provisions so parties can bid a lump sum amount in the reverse auction. Fifth, GTN's tariff allows parties to bid on a portion of the capacity being released. Petitioners request waiver of this provision because parties will be required to bid on the entire portfolio.

15. The Petitioners also assert that GTN's tariff identifies three bid-evaluation methodologies from which the releasing shipper may choose. However, DEMA's proposed reverse auction methodology is not one of the three identified methods. Petitioners also state that El Paso's capacity release tariff provisions broadly permit the releasing shipper to designate the criteria for selecting the winning bidder so long as the criteria are "objectively stated, applicable to all potential bidders and not unduly discriminatory." Petitioners state that El Paso intends to comply with DEMA's proposal and that El Paso will evaluate any bids, subject to the Prearranged Replacement Shipper's matching rights, and award the capacity release to the bidder that submitted the smallest lump sum reverse auction bid. Petitioners request waiver of this and any other pertinent provisions of GTN's and El Paso's tariffs to permit DEMA to implement its reverse auction.

16. Finally, DEMA states it will comply with the standard evaluation, bid match, and award timelines in GTN's and El Paso's respective tariffs. However, Petitioners are concerned that the assets awarded to either the Prearranged Replacement Shipper or a winning third-party bidder by a stated effective date are contingent upon the execution of a standard Assignment and Novation Agreement, which may not permit strict conformance to these timelines. Accordingly, the GTN and El Paso respectfully request the Commission waive these requirements, if necessary.

17. DEMA states that all Non-host pipelines have agreed to: (1) allow DEMA to include its capacity in its portfolios and be subject to bidding on GTN's and El Paso's websites; and, (2) post on its own website information regarding release of the portfolios. DEMA asserts that several of the Non-host pipelines have identified potential issues that may require Commission authorization.

18. First, the winning replacement shipper will receive the capacity for each contract in the portfolios under that contract's stated rate. The Petitioners state that several Non-host pipelines are concerned the Commission may deem the contracts in the portfolios to be discounted and thus, the portfolios would be required to be posted for bidding. Accordingly, the Petitioners request that the Commission waive the tariff posting and bidding provisions of the Non-host pipelines, as well as any other capacity release tariff provisions, to allow DEMA to effectuate its consolidated bidding process.

19. The Commission has determined that capacity obtained under the reverse auction methodology is to be considered discount capacity, because the replacement shipper is receiving payment from the releasing shipper and, therefore, is not truly paying the maximum rate for the capacity.⁹ Therefore, such capacity, even if subject to a

⁹ *Pacific Gas Transmission Co. and Southern California Edison Co.*, 82 FERC ¶ 61,227 (1998).

prearranged deal, must be subject to the bidding requirements. However, as in *Northwest*, and *Duke Energy*, the Commission finds that the proposed reverse auction procedure provides a transparent manner in which the value of the transportation capacity to a replacement shipper may be ascertained. Therefore, for good cause shown, the Commission will grant the requested waivers to permit the consolidated bidding process.

20. Second, Order No. 2004 requires interstate pipelines to report, on a dedicated portion of its website, all instances where it has used discretion under its tariff (18 C.F.R. § 358.5(c)(4) (2005)). Several Non-host pipelines express concern that their participation in the proposed consolidation bidding process may constitute an exercise of discretion that requires such a posting. DEMA requests clarification as to whether Non-host pipelines participating in the consolidated bidding process must post the proposed portfolio release notification in both the capacity release section of their respective websites and in their respective Order No. 2004 waiver postings. Consistent with its findings in *Duke Energy*, the Commission finds that posting of the capacity in the capacity release sections of the pipeline's website will be adequate to satisfy the waiver posting requirements in this circumstance.

21. Finally, section 19 of Transwestern's GT&C requires the posting of capacity release offers on its Internet website. Likewise, section 7 of Questar's GT&C contains posting and bidding requirements with regard to its capacity. Because all bidding for the Southwestern portfolio will be done on El Paso's website, the Petitioners assert that Transwestern and Questar seek waiver of these provisions of their tariffs. For good cause shown, the Commission grants the requested waivers. The Commission finds that DEMA has proposed an open and transparent manner to divest itself of its natural gas obligations. Therefore, the Commission, for good cause shown, will grant waiver of these requested tariff provisions in order to accomplish the proposed process.

By direction of the Commission.

Magalie R. Salas,
Secretary.