

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

ProGas USA Inc.

v.

Docket No. RP06-360-000

Iroquois Gas Transmission System L.P.

ORDER ON COMPLAINT

(Issued July 14, 2006)

1. On May 16, 2006, ProGas USA Inc. (“ProGas”), submitted a complaint against Iroquois Gas Transmission System L.P. (“Iroquois”) requesting that the Commission direct Iroquois to (1) immediately provide written notice of the Competing Offer submitted in response to the first Open Season held for its capacity and the terms that ProGas must decide whether to match under its right-of-first-refusal (ROFR); and (2) immediately rescind both the second Open Season for the capacity posted for bid subject to ProGas’ ROFR and Iroquois’ May 2, 2006 notice that invalidated all bids in response to the first Open Season. As discussed below, the Commission grants the Complaint to the extent set forth below. The Commission directs Iroquois to give notice that the second Open Season and bids received in that open season are invalidated and to re-evaluate Bid No. 4 received in response to the first Open Season so that ProGas is only required to match the net present value (NPV) of the bid calculated using the maximum recourse rate applicable to its contract and capacity path.

I. Background

2. Iroquois is divided into two rate zones: Zone 1 runs from Waddington, New York (NY) on the Canadian border to Wright, NY in the eastern section of the state, and Zone 2 runs from Wright, NY to South Commack, NY, located in north-central Long Island. In addition, Iroquois’ tariff includes separately stated incremental maximum rates for service on the Eastchester Expansion. The Eastchester Expansion extended Iroquois’ pipeline from Northpoint, NY (on the coast of Long Island just north of South Commack) west through Long Island Sound to Hunts Point, NY, which is located in the Bronx, NY.

The Eastchester Expansion also increased the capacity of Iroquois' system in Zones 1 and 2 through the addition of compression and piping.¹ The incremental Eastchester rates apply to all firm shippers with (1) contracts that specify Hunts Point as a primary delivery point or (2) contracts whose primary path capacity is provided by the compression or piping installed as part of the Eastchester Expansion.²

3. ProGas holds approximately 29,275 Dth/day of capacity on Iroquois and has held this capacity since November 1, 1998. Almost half of the capacity held by ProGas on Iroquois is pursuant to Contract No. CR-1140-05, Gas Transportation Contract for Firm Reserved Service With Replacement Shipper, effective November 1, 1998 to November 1, 2006, for 13,115 Dth/day with a primary receipt point at Waddington and a primary delivery point at South Commack. ProGas has a ROFR for this capacity because the contract is a maximum rate, long-term contract. The maximum rate applicable to ProGas' contract is the Zone 1 to Zone 2 maximum rate. ProGas is not subject to the incremental Eastchester maximum rate, since that rate does not apply at the South Commack delivery point.

4. Section 29.6 of the General Terms and Conditions of Iroquois' tariff describes the ROFR. It states that upon the expiration of a Long-Term Gas Transportation Contract for Firm Reserved Service, the Existing Shipper shall have a right of first refusal. Upon receipt of a Notice of Election from the Existing Shipper, the Transporter will hold an open season for third parties to bid on the Existing Shipper's capacity, and to the extent the Existing Shipper either satisfies the Bid Matching Procedures or reaches mutual agreement with the Transporter, the Transporter will continue service to the Existing Shipper upon execution of a Gas Transportation Contract. It further states that to the extent the Existing Shipper fails to satisfy the Bid Matching Procedures or reach mutual agreement with the Transporter, the Transporter has the authority to abandon the Existing Shipper's service upon the termination date of the Long-Term Gas Transportation Contract for Firm Reserved Service.

5. On April 30, 2004, ProGas alerted Iroquois that upon termination of its contract, it would be exercising its ROFR. Accordingly, Iroquois announced an Open Season for the

¹ *Iroquois Gas Transmission System*, 95 FERC ¶ 61,335, at 62,199, *reh'g and issuing certificates*, 97 FERC ¶ 61,379 (2001), *reh'g*, 98 FERC ¶ 61,273 (2002).

² Section 2.27 of Iroquois' General Terms and Conditions. Iroquois' tariff also includes "Eastchester Secondary Access Rates" for non-Eastchester shippers that move gas on the Eastchester Expansion, for example through the use of Hunts Point as a secondary delivery point. Those rates equal the difference between the recourse rates ordinarily applicable to non-Eastchester shippers and the incremental Eastchester maximum rates. *See* Article 1.2(c) of the settlement in Iroquois' Docket No. RP03-589-000 section 4 rate case. *Iroquois Gas Transmission System*, 105 FERC ¶ 61,121 (2003).

expiring ProGas capacity, with all third party bids due by April 1, 2006. Iroquois stated that it would not accept discounted rate bids. Iroquois received four bids in response to the Open Season. Bids No. 1 and 2 were for capacity between Waddington and South Commack for 13,115 Dth/day. Bid No. 1 had a contract term of five years and Bid No. 2 had a contract term of six years and five months. Bid No. 3 was for 7,500 Dth/day of capacity between Waddington and South Commack for a contract term of two years and five months. Bid No. 4 was for 13,115 Dth/day of capacity for transportation from Waddington to South Commack from April to October and from Waddington to Hunts Point from November to March for a seven and a half year term. Accordingly, Bid No. 4 was based on the higher incremental Eastchester maximum rate. ProGas states that, on April 4, 2006, as revised on April 7, 2006, Iroquois formally notified ProGas that it had identified the “highest NPV competing offer” (“Competing Offer”) as Bid No. 4 that ProGas would need to match to retain its capacity. ProGas states that, while Iroquois correctly identified Bid No. 4 as the Competing Offer, it erroneously calculated the NPV of the Competing Offer.

6. Specifically, ProGas states, Iroquois stated that in order to match the Competing Offer’s NPV, ProGas would need to agree to a contract with the following terms – 13,115 Dth/day at the maximum rate from November 1, 2006 through November 1, 2018 from Waddington to South Commack, irrespective of the fact that the Competing Offer was for 13,115 Dth/day at the maximum rate from November 1, 2006 through May 1, 2014. ProGas states that Iroquois determined the NPV of the Competing Offer based on the maximum rate for the bid’s transportation path, which was longer than the transportation path set forth in ProGas’ terminating contract because it included points on the Eastchester Expansion, and therefore commanded a higher maximum rate. Because ProGas’ terminating contract only includes transportation from Waddington to South Commack, Iroquois stated that ProGas would have to agree to a twelve year term in order to match the Competing Offer’s NPV.

7. ProGas asserts that Iroquois recognized that it had mistakenly calculated the NPV that ProGas was required to match. However, it continues, instead of simply re-calculating the appropriate NPV of the Competing Offer, Iroquois informed ProGas that it (Iroquois) should have been more clear in its posting for the first Open Season regarding the valuation and submission of bids containing different delivery points from those in the terminating contract, and therefore was invalidating the entire first Open Season and conducting a completely new one. On the same day, Iroquois announced a second open season for the expiring ProGas capacity with third party bids due by June 2, 2006. The notice for that open season stated that third party bids with receipt and/or delivery points other than Waddington and South Commack would not be accepted. Otherwise, the second open season notice included the same substantive terms as the first open season notice.

8. ProGas states that it informed Iroquois that it disagreed with its course of action and attempted to exercise its ROFR to match the correctly-determined NPV of the Competing Offer from the first Open Season. ProGas states that Iroquois rejected this response and informed ProGas that it would advise it of the second Open Season's Competing Offer, which ProGas could then elect to match within thirty days.

II. Notice, Interventions, and Answers

9. Notice of this complaint was published in the *Federal Register*, 71 Fed. Reg. 29,935 - 29,936 (2006), with the answer and interventions due on or before May 31, 2006. Motions to intervene were filed by The Peoples Gas Light and Coke Company and North Shore Gas Company, Central Hudson Gas and Electric Corporation, PSEG Energy Resources and Trade, LLC., KeySpan Delivery Companies, ANE Shipper Group, Hess Corporation, and Consolidated Edison Company of New York, Inc. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.14 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Iroquois filed its answer to ProGas' complaint on May 31, 2006. On June 9, 2006, ProGas filed a motion for leave to answer, answer, and motion for expedited Commission order. Iroquois filed an answer to ProGas's motion to leave for answer, answer, and motion for expedited Commission order on June 12, 2006. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Iroquois' and ProGas' answers because they have provided information that assisted us in our decision-making process.

11. In its May 31, 2006 answer, Iroquois requested that the Commission dismiss the complaint and allow the second Open Season to resolve what it sees as a unique and ambiguous situation. Iroquois argued that a second Open Season was not expressly prohibited by its tariff, and that it believed ProGas was wrong in its belief that it only had to match bids for its transportation path. Iroquois pointed out that in its tariff, in section 29.3(g) of the General Terms and Conditions, a "best bid" is defined as one "that Offering Shippers have offered for capacity available under the terminating Contract," but that nothing in the tariff precludes an Offering Shipper from seeking additional capacity that encompasses the capacity within the Existing Shipper's contract path.

12. ProGas responded to Iroquois' May 31, 2006 answer in its motion for leave to answer, answer, and motion for expedited Commission order. ProGas stated that Iroquois informed it on June 5, 2006, that the second open season had resulted in a best third party bid with a contract term of 12 years and five months, as compared to the first open season best bid's contract term of seven and a half years. ProGas asserted that this

showed that allowing Iroquois to hold a second open season is clearly unfair to ProGas and also may penalize the prospective shippers that bid in the first open season.

13. ProGas also repeated the arguments made in its initial complaint, and emphasized that the fact that the Commission allows a prospective shipper to request service at different primary points does not mean that the existing shipper must then be required to match the entire bid or the exact NPV of the prospective shipper's bid. ProGas stated that the existing shipper's requirement to match competitive bids is limited to those up to and including the area in which the existing shipper's last receipt point was located.³ ProGas also noted that in the Commission's *Policy Statement on Certification of New Interstate Natural Gas Pipelines Facilities*, the Commission states that only under limited circumstances can a pipeline require an existing shipper to match the highest competing bid up to a maximum rate that is either an incremental rate or a rolled-up rate in which costs for expansions are accumulated to yield an average expansion rate.⁴ ProGas stated that, even when those circumstances are present, a pipeline can only implement an incremental rate (thus requiring an existing shipper to match a maximum rate higher than the historic maximum rate applicable to its capacity) when the pipeline's tariff includes the appropriate, pre-approved rate mechanism. ProGas argued that, since Iroquois has no tariff mechanism governing the applicability of incremental expansion-related pricing to existing ROFR shippers, Iroquois cannot require an existing shipper to match an incremental rate associated with an expansion.

14. Iroquois submitted its answer to ProGas' June 9, 2006 answer on June 12, 2006. In its answer, Iroquois stated that it does not oppose acceptance of ProGas' answer, and it asserted that the second open season produced a higher value for the capacity than the first, since now ProGas will be required to match a term of 12 and a half years instead of a term of only 12 years.

III. Discussion

15. We find that Iroquois incorrectly invalidated the first Open Season and incorrectly calculated the NPV of Bid No. 4 that ProGas was required to match. ProGas should have only been required to match an NPV calculated using the maximum recourse rate applicable to its contract and capacity path. Iroquois correctly identified Bid No. 4 as the Competing Offer, but incorrectly calculated the NPV for matching purposes based on the maximum incremental rate applicable to the bid's transportation path, which was higher than the maximum rate applicable to ProGas' transportation path.

³ Citing, *Williams*, 81 FERC ¶ 61,350, at 62,629 n. 25, discussing Order No. 636.

⁴ Citing, *Certification of New Interstate Natural Gas Pipeline Facilities*, 92 FERC ¶ 61,094, at 61,374 (2000).

16. Section 284.221(d)(2)(ii) of the Commission's regulations⁵ provides that an existing shipper with ROFR rights may retain its capacity by "match[ing] the longest term and highest rate for its firm service, up to the applicable maximum rate under § 284.10, offered to the pipeline" by a third party. As both Iroquois and ProGas recognize, the Commission's ROFR policy permits the pipeline to accept third party bids using different primary points from those used by the existing shipper,⁶ including third party bids for a transportation path that is subject to a higher maximum rate than that currently paid by the existing shipper. This has raised the issue whether the rate the existing shipper must match under § 284.221(d)(2)(ii) is capped at the maximum rate applicable to the existing shipper's capacity or the maximum rate applicable to the third party's bid.

17. The Commission has generally held that the existing shipper need only match a rate up to its own existing maximum rate. For example, in Order No. 636 the Commission stated that, while a third party desiring to use an additional rate zone could bid up to the maximum rate for the zones it desires to use, the existing shipper need only bid up to the maximum rate for its zone in order to retain its capacity.⁷ The Commission has only allowed an existing shipper to be required to match a bid up to a maximum rate higher than its current maximum rate in "certain very limited circumstances, *i.e.*, where a shipper has a right of first refusal on a pipeline that has vintages of capacity and thus charges different prices for the same service under incremental pricing, the pipeline is full, and a competing shipper bids a rate for the capacity that is above the existing shipper's current maximum rate. In addition, in order to charge a higher rate than the previous maximum rate, the pipeline must have in place an approved mechanism for reallocating costs between the historic and incremental rates so all rates remain within the pipeline's cost of service."⁸

18. Applying these policies to the instant case, we find that Iroquois' conduct of its first open season was consistent with Commission policy, with the sole exception of its adjustment of the term that ProGas must match to reflect the higher incremental Eastchester maximum rate. Iroquois' acceptance of a third party bid (Bid No. 4) with a

⁵ 18 C.F.R. § 284.221(d)(2)(ii) (2006).

⁶ *Fidelity Exploration and Production Co.*, 106 FERC ¶ 61,231, at P 24-26 (2004).

⁷ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation under Part 284 of the Commission's Regulations*, FERC Stats. & Regs., Regulation Preambles January 1991-June 1996 ¶ 30,939, at 30,449 (1992).

⁸ *Regulation of Short-term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, FERC Stats. & Regs., Regulations Preambles ¶ 31,589, at 31,636 (2000)(Order No. 637-A).

different primary delivery point and longer transportation path than ProGas' expiring capacity was clearly consistent with Commission policy extending back to Order No. 636. In choosing which of the four third party bids provided the highest NPV, and thus should be presented to ProGas for matching, Iroquois was entitled to take into account the additional NPV provided by the fact that Bid No. 4 included service on the Eastchester Expansion. In any event, since that bid also contained the longest term of any of the four third party bids, it provided the highest NPV even without taking into account the incremental Eastchester maximum rate.

19. Iroquois' only violation of Commission policy came when it presented Bid No. 4 to ProGas for matching and required ProGas to bid a longer term than contained in Bid No. 4 so as to provide the same NPV as Bid No. 4's incremental Eastchester rate provided.⁹ This effectively required ProGas to match a higher rate than its current maximum Zone 1 to 2 rate. However, Iroquois has not satisfied the conditions necessary under Commission policy to require ProGas to match an incremental rate higher than its current rate, since it does not have in place an approved tariff mechanism for reallocating costs between the historic and incremental rates so all rates remain with the pipeline's cost of service.

20. In these circumstances, we see no reason for Iroquois to conduct a second open season for ProGas' expiring capacity. All interested third parties had an opportunity to participate in the original open season and bid either ProGas' expiring path or the longer path included in Bid No. 4. Three third parties did submit bids for ProGas' existing path, but all of them bid for shorter terms than included in Bid No. 4. The fact that another shipper apparently is now willing to bid a higher NPV for ProGas' expiring capacity than included in any of the bids in response to the first open season, including Bid No. 4,¹⁰ does not justify nullifying the results of a properly conducted earlier open season. Absent extraordinary circumstances, allowing a pipeline to invalidate the results of one open season in order to seek a higher NPV in a second open season would undermine the legitimacy of the open season process. Iroquois has provided no reason why any ambiguity in the bid evaluation method to be used in the first open season should have caused the highest bidder in the second open season not to participate in the first season. There was certainly no ambiguity that bidders in the first open season could bid for

⁹ The Commission has held, with reference to the ROFR, that "when a tariff does not include facets of the Commission's policies or if the tariff is ambiguous on matters of Commission policy pertaining to the ROFR, the tariff should be interpreted as consistent with Commission policy." 101 FERC ¶ 61,127, at P 35 (2002). The bid matching provisions of Iroquois' tariff are silent, or at best ambiguous, on the bid matching issue in this case. Therefore, we are applying general Commission policy in this case.

¹⁰ In its June 12th answer, Iroquois stated that the second open season had resulted in a higher NPV than any of the bids submitted in the first open season.

ProGas' existing capacity path, the path included in the highest bid in the second open season. Moreover, that bid appears to provide the highest NPV under any possible bid evaluation methodology.

21. Accordingly, the Commission directs Iroquois to re-calculate the NPV of Bid No. 4 from the first Open Season so that ProGas must match an NPV using the maximum rate applicable to the contract path as described by the primary points of its existing contract for the contract term of the bid. The Commission also directs Iroquois to notify its customers that the second Open Season and all bids received in response to it are invalidated and that the bids received in the first Open Season are valid. The first Open Season was valid, there was a legitimate Competing Offer received which should be re-evaluated as discussed above, and there were no ambiguities that warranted a second Open Season.

The Commission orders:

(A) The Complaint is granted to the extent set forth above.

(B) Within 7 days of the date of this order, Iroquois must give notice to its customers that the second Open Season and bids received in that open season are invalidated and that the bids received in response to the first Open Season are valid, consistent with the discussion above.

(C) Within 7 days of the date of this order, Iroquois must re-evaluate the NPV of Bid No. 4 from the first Open Season consistent with the discussion above and inform ProGas of the NPV it must match in order to retain its capacity. Iroquois must then give ProGas the same amount of time that an Existing Shipper has to elect to match a Competing Offer under its tariff.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.