

125 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tarpon Whitetail Gas Storage, LLC

Docket No. CP08-46-001

ORDER GRANTING REHEARING AND ALLOWING TARIFF REVISION

(Issued October 14, 2008)

1. On December, 21, 2007, Tarpon Whitetail Gas Storage, LLC (Whitetail) filed an application in Docket No. CP08-46-000 for authorization under NGA section 7(c) to construct, own, operate and maintain a high-deliverability, multi-cycle depleted reservoir natural gas storage facility, the Whitetail Gas Storage Project, to be located in Monroe County, Mississippi. In that application, Whitetail sought authorization to provide open-access firm and interruptible natural gas storage services on behalf of others in interstate commerce at market-based rates and submitted a *pro forma* FERC Gas Tariff that will govern Whitetail's provision of services.
2. The Commission approved Whitetail's application by order issued June 19, 2008.¹ The June 19 Order found that Whitetail's *pro forma* FERC Gas Tariff generally complies with the Commission's regulations. However, the June 19 Order directed Whitetail to modify section 17.2 of the General Terms and Conditions (GT&C) to exclude the reference to certain "orders, decisions or rulings of any government or regulatory agency" from the GT&C's definition of force majeure.

¹ *Tarpon Whitetail Gas Storage, LLC*, 123 FERC ¶ 61,274 (2008) (June 19 Order).

3. Whitetail states that its proposed definition of force majeure reflects standard commercial and natural gas industry practice and Commission precedent.² Whitetail also states that language similar to that it proposed in its *pro forma* tariff has been approved in the current tariffs of pipeline companies,³ and storage companies.⁴ Whitetail requests that the Commission grant rehearing of the order to accept the language regarding governmental action in Whitetail's original proposal for section 17.2 of the GT&C.

4. Whitetail contends in the alternative that, should the Commission decline to permit Whitetail to reinstate the force majeure definition originally proposed, the Commission should permit Whitetail to revise section 17.2 to duplicate language that the Commission requires to be used in the standardized large generator interconnection agreements, as approved in Order 2003. Accordingly, should its request to reinstate the force majeure definition originally proposed not be granted, Whitetail would amend the relevant portion of section 17.2 of the GT&C as follows:

The term "Force Majeure" as employed herein and in Customer's Storage Service Agreement shall mean any cause, whether of the kind enumerated herein or otherwise, not reasonably within the control of WHITETAIL, such as acts of God; strikes, lockouts and industrial disputes or disturbances; inability

² Citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs., Regs. Preambles ¶ 31,146 at 30,576 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs., Regs. Preambles ¶ 31,171, *clarified*, 106 FERC ¶ 61,009 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs., Regs. Preambles ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) (emphasis added); Open Access Transmission Tariffs ("OATT") issued under the Federal Power Act. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs., Regs. Preambles ¶ 31,241, *order on reh'g and clarification*, Order No. 890-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,261 at Appendix C, section 10.1 (Original Sheet Nos. 37-38) (2007).

³ Citing Texas Eastern Transmission, LP, FERC Gas Tariff, Seventh Revised Volume No. 1, section 17.1 (Sheet No. 634); Natural Gas Pipeline Company of America LLC, FERC Gas Tariff, Seventh Revised Volume No. 1, section 27.2 (Sheet No. 479).

⁴ Citing Egan Hub Storage, LLC, FERC Gas Tariff, First Revised Volume No. 1, section 17.2 (Sheet No. 146); Petal Gas Storage, L.L.C., FERC Gas Tariff, Original Volume No. 1, section 17.2 (Sheet No. 125).

to secure or delays in obtaining labor, materials, supplies, permits, easements or rights-of-way; including inability to secure materials by reason of allocations promulgated by authorized governmental agencies; arrests and restraints of governments and people; interruptions by government or court orders; ~~present and future valid orders; decisions or rulings of any government or regulatory entity having proper jurisdiction; any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities;~~ acts of the public enemy; vandalism; wars; riots; civil disturbances; sabotage or terrorism

Discussion

5. The Commission has recognized that an appropriately designed force majeure provision should complement a natural gas company's regulatory obligations,⁵ and that the actions of an administrative or regulatory agency may support declaration of a force majeure event. However, Whitetail's broad proposed definition of force majeure was drafted so as to include testing and maintenance of plant facilities either linked to and/or required by Commission and other agency orders, or as deemed necessary by Whitetail.⁶ It was in this context that the Commission, in P 56 of the June 19 Order, stated that "Commission orders, decisions or rulings of any government or regulatory agency . . . are not force majeure events." We also stated that testing and maintenance are part of Whitetail's duties under a certificate of public convenience and necessity and are not appropriately considered force majeure.⁷

6. However, if the reference to testing and plant maintenance as drafted is removed from the definition of force majeure, the language originally proposed regarding Commission or other agency action ("present and future valid orders, decisions or rulings of any government or regulatory entity having proper jurisdiction") would be consistent with Commission policy. Thus Whitetail may retain the language regarding governmental action as long as it deletes the reference to testing and maintenance from its definition of force majeure.

⁵ *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 32 (2004).

⁶ Section 17.2 of the pro forma tariff included as an example of force majeure "testing (as required by governmental authority or as deemed necessary by WHITETAIL for the safe operation of the facilities required to perform the services hereunder)."

⁷ June 19 Order at P 56.

The Commission orders:

Whitetail may revise its *pro forma* tariff in accord with the discussion in the text of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.