125 FERC ¶ 61,095
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Gas Transmission, LLC — Docket No. RP00-426-037

ORDER ACCEPTING NEGOTIATED RATE AGREEMENTS

(Issued October 27, 2008)

1. On June 30, 2008, Texas Gas Transmission, LLC (Texas Gas) filed tariff sheets[1] describing three negotiated rate agreements, one between Texas Gas and Louisville Gas and Electric Company (Louisville) and two between Texas Gas and Anadarko Energy Service Company (Anadarko). In addition, Texas Gas filed copies of the three negotiated rate agreements. Texas Gas states that, while the underlying service agreements contain no material deviations from the *pro forma* service agreements, Texas Gas has filed the Anadarko agreements as non-conforming because of the inclusion of certain elements in the negotiated rates of the Anadarko agreements.[2] Texas Gas requests an effective date of November 1, 2008. In this order, we accept the tariff sheets, effective November 1, 2008.

I. Details of Filing

2. The agreement with Louisville is under rate schedule STF, with a term of November 1, 2008 through October 31, 2013, and a right of first refusal (ROFR). The winter season contract demand is 100 MMBtu/day with a commodity rate of $0.5229 per MMBtu plus applicable surcharges and fuel retention. The summer season contract demand is 18,000 MMBtu/day at the effective maximum Zone SL to Zone 4 STF demand rate and the effective maximum STF commodity rate plus applicable surcharges and fuel retention.

[1] Original Sheet Nos. 55D, 55E, 55E.01, 55E.02, 55F, 55F.01, 55F.02 and Fifteenth Revised Sheet No. 56 to its FERC Gas Tariff, Second Revised Volume No. 1.

[2] The Anadarko FT agreement contains an annual minimal commodity revenue commitment, and the Anadarko STF agreement contains a winter season minimal commodity revenue commitment.

3. The agreements with Anadarko are for service under rate schedules FT and STF. The FT agreement has a term of November 1, 2008 through March 31, 2014. The contract demand is 90,000 MMBtu/day, with a demand rate of $0.20/MMBtu, and various commodity rates varying from $0.0104/MMBtu to $0.26/MMBtu depending on the delivery point. Anadarko will also pay Texas Gas's currently effective fuel percentages, and there is an annual minimal commodity revenue commitment. The STF agreement has a term beginning November 1, 2008, for each winter season[3] through March 31, 2014. The contract quantity is 15,000 MMBtu/day, with a demand rate of $0.20/MMBtu, and various commodity rates depending on the delivery point varying from $0.0104/MMBtu to $0.26/MMBtu. Anadarko will also pay Texas Gas's currently effective fuel percentages, and there is a winter season minimal commodity revenue commitment.

II. Public Notice, Interventions and Comments

4. Notice of Texas Gas's filing was issued on July 2, 2008. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2008), 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. National Energy & Trade, L.P. (NET) filed a timely protest.

5. On July 18, 2008, Texas Gas filed an answer to NET. On July 21, 2008, NET filed an answer to Texas Gas's answer. On July 25, 2008, Anadarko filed an answer to NET's answer. On July 31, 2008 NET filed an answer to Anadarko's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Texas Gas' and Anadarko's answers because they have provided information that assisted us in our decision-making process. We will not accept either of NET's answers as they essentially repeat the arguments made in NET's protest and have therefore not assisted us in our decision-making process.

6. NET states that while Texas Gas's January 2008 Index of Customers showed that the instant contracts were to expire October 31, 2008, its April 2008 Index of Customers reflected an extension of the term of these contracts. NET also asserts that these contracts appear to provide service at the maximum rate, not a negotiated rate. NET states that it appears that these contracts have been extended at negotiated rates lower than Texas Gas's maximum rates without allowing bidding for the capacity. NET further

[3] The winter season is November through March.

states that section 6.2 of the *pro forma* service agreements does not allow parties to "extend" an agreement with changed rates; therefore, changing the rates would produce a new agreement, not the extension of an existing agreement.

7. NET states that if Texas Gas and Anadarko entered into new agreements for the available capacity at rates less than the maximum rate, they did so without allowing other shippers to bid on the contract capacity, which is not supported by Texas Gas's tariff, or the Commission's policy of enabling shippers who value capacity the most to obtain it. NET requests that the Commission reject Texas Gas's negotiated rate filings, direct Texas Gas to make the contract capacities available for bidding, and award it to the shipper that values it the most. Alternatively, NET requests that the Commission suspend the negotiated rates and establish appropriate public procedures.

8. In its answer, Texas Gas counters that the Commission allows parties to negotiate extensions of agreements, including modifications in existing contracts, in lieu of exercising ROFR rights or rollover provisions.[4] Texas Gas argues that nothing in either the *pro forma* agreements or the tariff precludes Texas Gas from negotiating mutually agreeable contract extensions. In support, Texas Gas cites language from *Northern Natural Gas Co.*, in which the Commission stated the following:

> Northern and Flint Hills chose to mutually negotiate modifications in, and extensions of, the existing contracts, rather than exercise the ROFR or rollover portions of those contracts. This was permissible under Commission policy, and accordingly, whether the parties complied with ROFR or roll-over provisions is not relevant.[5]

9. Texas Gas states that its actions here are consistent with Commission precedent, and therefore the capacity need not be made available for bidding. Texas Gas also states that further investigation is unnecessary. Furthermore, Texas Gas states that Commission policy does not require it to have language specifically stating that it has the right to negotiate mutually agreeable contract extensions, but it has no objection to adding such language.

10. Texas Gas notes that even without the contract extensions, NET would not have the right to bid on the capacity at this time as Anadarko has a continuing, contractual right to utilize the capacity. Texas Gas disagrees with NET's assertion that Texas Gas

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[4] Texas Gas July 18, 2008 Protest at 3-4 (citing *Tennessee Gas Pipeline Co.*, 121 FERC ¶ 61,149, at P 20, 21 (2007)).

[5] *Northern Natural Gas Co.*, 118 FERC ¶ 61,053, at P 44 (2007) (*Northern*).

did not pursue the most economically attractive terms for this capacity. Texas Gas concludes that extending the contracts was the best decision at the time, and that nothing presented in this proceeding warrants disturbing that business decision.

11. In its answer, Anadarko argues that NET's principle assertion that the capacity should have been posted subject to competitive bidding is incorrect for two reasons. First, Anadarko had a right of first refusal, so even if NET bid the maximum rate, Anadarko would still be able to match the bid, negating NET's purported claim to the capacity. Second, Anadarko notes that the Commission has stated that allocative and productive efficiency (i.e., placing capacity in the hands of those that value it most highly), "is a necessary *but not the only*, objective considered by the Commission."[6]

12. Anadarko asserts that Commission precedent supports the instant agreements. Anadarko cites *TransColorado*,[7] where the Commission held that pipelines may negotiate extensions to existing contracts without offering the capacity to other shippers. Additionally, Anadarko notes that Texas Gas's tariff contains a provision similar to a provision discussed and approved by the Commission in the *TransColorado* order. That tariff provision states that "pipeline will agree to bilateral evergreen clauses (the exact length of which to be negotiated on a case-by-case basis) in all transportation service agreements."[8] Finally, Anadarko notes that the Commission allowed Northern to negotiate a discounted contract extension prior to the expiration of the contract, and without submitting that capacity for bidding, even though Northern did not have a tariff provision that explicitly allowed for such negotiations.[9] Anadarko further states that the Commission determined that its regulations permit a rate between the maximum and minimum on file for that service, and that the ROFR process is not violated by this agreement between the shipper and the pipeline.

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[6] Anadarko July 25, 2008 Answer at 3 (citing *Northern*, 118 FERC ¶ 61,053 at P 51 (emphasis added)).

[7] Anadarko July 25, 2008 Answer at 4 (citing *TransColorado Gas Transmission Co.*, 109 FERC ¶ 61,117, at P 10 (2004) (*TransColorado*) ("TransColorado should have the flexibility to offer discounts to non-affiliates if that is consistent with economic principles.")).

[8] Texas Gas, FERC Gas Tariff, GT&C § 32.2(a).

[9] *Northern Natural Gas Company*, 115 FERC ¶ 61,270 (2006).

III. **Discussion**

13. We find that Texas Gas has not violated its tariff or Commission policy by extending the Anadarko contracts at negotiated rates. In the 1989 Rate Design Policy Statement,[10] the Commission outlined its concerns with allocative and productive efficiency but stated that this is not the only objective to be considered. Additionally, the Commission noted that although it favors placing capacity in the hands of those that value it most highly, it also assumes that the pipeline will always seek the highest possible rate from non-affiliated shippers, since it is in its own economic interest to do so.[11] This permits pipelines a degree of business judgment regarding the sale of its capacity. If a pipeline reasonably determines that its agreement to extend contracts with an existing customer gives it as much revenue as it could expect to obtain through marketing the capacity to third parties, it need not commit the capacity to a bidding process and may extend contracts at discounted, or in this case, negotiated rates.[12] Mutual negotiations of contract extensions which may maximize pipeline revenue outside of a ROFR bidding process are, therefore, well within the scope of what the Commission has found permissible.[13]

14. In this case, Texas Gas chose to mutually negotiate modifications and extensions of the existing contracts, rather than exercise the ROFR or rollover portions of those contracts. Nothing in Texas Gas's GT&C requires it to use the ROFR or rollover provisions in the situation presented here. Therefore, because Texas Gas's tariff does not require the parties to utilize the ROFR or rollover provisions, the issue of whether they complied with these provisions is not relevant.[14] As discussed above, the contract extensions between Texas Gas and Anadarko are permissible under Commission policy. Accordingly, the absence of explicit language authorizing such extensions in Texas Gas's

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[10] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, *order on reh'g*, 48 FERC ¶ 61,122 (1989).

[11] *See, e.g.*, *Northern*, 118 FERC ¶ 61,053 at P 45, 51.

[12] *Id.* P 45.

[13] *Tennessee Gas Pipeline Co.*, 121 FERC ¶ 61,149 (2007).

[14] The ROFR process is designed to protect the long-term captive customers that rely on pipelines for service from the pipeline's use of its monopoly power, while at the same time, providing the pipeline with an opportunity to test the market value of its capacity. *Northern*, 118 FERC ¶ 61,053 at P 45. These concerns are not present here.

tariff does not render the contract extensions invalid. Therefore, we deny NET's protest, and accept Texas Gas's proposed tariff sheets and negotiated rate agreements, effective November 1, 2008.

The Commission orders:

The negotiated rate agreements and revised tariff sheets listed in footnote no. 1 are accepted, effective November 1, 2008.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.