129 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, and Philip D. Moeller.

Texican N. La. Transport, LLC, Docket No. RP09-1086-000

Complainant

v.

Southern Natural Gas Company,

Respondent

ORDER ON COMPLAINT

(Issued December 28, 2009)

1. On September 30, 2009, Texican N. La. Transport, LLC (Texican) filed a complaint (Complaint) against Southern Natural Gas Company (Southern) alleging that Southern violated the Natural Gas Act (NGA), Southern's FERC Gas Tariff and Commission precedent by awarding capacity in an open season pursuant to a purportedly new methodology that Texican claims is fundamentally flawed and that Southern did not timely reveal to potential bidders. For the reasons set forth below, the Commission dismisses the Complaint.

Background

2. Southern is a natural gas company engaged in the operation of an interstate pipeline system for the transportation of natural gas in the States of Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, Florida, and Tennessee. According to the Complaint, on May 12, 2009, Southern posted a notice of available capacity and an Open Season Preview for capacity on Southern's system west of its Bienville compressor

station.[1] The West of Bienville System is located at the upstream western end of Southern's North Main Pipeline System and straddles the border between Texas and Louisiana. More specifically, these facilities include approximately 135.9 miles of pipeline consisting of (i) approximately 33.6 miles of 10-inch pipeline (Carthage Line) extending from the Carthage field in Panola County, Texas to Southern's Logansport Compressor Station (Logansport Station) in DeSoto Parish, Louisiana, (ii) approximately 57.2 miles of 14-inch pipeline extending from the Spider/Benson Field in DeSoto Parish, Louisiana to the Bienville Station (14-inch Logansport Line) in Bienville Parish, Louisiana, (iii) approximately 45.0 miles of 16-inch pipeline extending from the Logansport Station east towards the Bienville Station (16-inch Logansport Line) (a loop of the 14-inch Logansport line that does not extend to the Bienville station), (iv) approximately 0.15 miles of 4-inch pipeline connecting the Bull Bayou field in DeSoto Parish, Louisiana to the 14-inch Logansport Line (Bunn Supply line), and (v) all of the facilities appurtenant thereto.

3. According to Texican, the Open Season Preview stated that Southern had incremental firm capacity available on its West of Bienville system including up to 230 MMcf/day delivered to Summit Hall, up to 65 MMcf/day delivered to Bienville and up to 45 MMcf/day delivered to Carthage. The Open Season Preview also indicated that a binding open season would be held from June 8, 2009, through August 7, 2009.

4. On June 8, 2009, Southern announced an open season seeking bids for available firm transportation capacity on its West of Bienville system (WOB Open Season) as discussed in the Open Season Preview.[2] The WOB Open Season stated that:

> Southern will award the capacity from bids received during the open season on the basis of net present value determined with reference to rate, volume, term, the date the service is to commence and the cost to Southern of any related facilities, if applicable. Southern will use a discounted cash flow factor of 10.24%. Southern will have the right to aggregate bids that generate the highest net present value to Southern.

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[1] A copy of Southern's Open Season Preview, which includes a map of Southern's system and a schematic of the West of Bienville system is attached as Appendix B to the Complaint.

[2] A copy of the WOB Open Season is attached as Appendix C to the Complaint.

5. The WOB Open Season also noted:

> Capacities at Hall Summit and Bienville are mutually exclusive. For instance, if 75,000 Mcf/d is awarded at Hall Summit, only 50,000 Mcf/d is available at Bienville. Available capacities listed above may vary with each receipt/delivery point combination.

6. The WOB Open Season also stated, as Texican quotes in the Complaint:

> Comparable bids that cannot be awarded in full will be awarded on a pro rata basis. Shippers should indicate in their bids the minimum volume of capacity they are willing to take in the event Southern must prorate the bids. Shippers should also indicate in their bids if their bid is contingent upon being awarded the full contract quantity of the bid or if they will accept a partial quantity. Shippers should indicate in their bids if their bid is contingent upon being awarded the full term of the bid or if they will accept a partial term.[3]

7. Texican states in the Complaint that in evaluating the WOB Open Season and developing its bidding strategy, Texican determined to bid for all the capacity referenced in the WOB Open Season as available for delivery to Bienville. Texican further states that because the WOB Open Season indicated that available capacity may vary depending on the receipt/delivery point combinations, it had several communications with Southern to confirm that Texican's desired receipt point combination would allow it to bid for the full amount available for delivery at Bienville. Texican also claims that Southern confirmed that available capacity would be awarded first to the bidder that produced the highest net present value (NPV), unless two or more other bids, when aggregated, produced a higher NPV than any single bid or combination of smaller bids.[4]

8. In response to the WOB Open Season, Southern received seven bids ranging from 5,000 Mcf/day to 75,000 Mcf/day and 13 months to 35 years and seven months. As relevant to this proceeding, Texican submitted a bid for 66,000 Mcf/day for 35 years and seven months at the maximum applicable tariff rate for delivery to Bienville. Shell Energy North America (US), L.P. (Shell) submitted a bid, also for deliveries to Bienville, of 65,000 Mcf/day, for 30 years. According to Texican, its maximum rate bid was for a

[3] Complaint at 6.

[4] *Id*. at 7.

longer term than any other bidder requesting deliveries at Bienville. Texican asserts that Southern calculated the NPV of Texican's bid to be $50.7 million and the NPV of Shell's bid to be $48.8 million.[5] Both Texican's and Shell's bids indicated that they were willing to accept a partial award of capacity.[6]

9. According to the Complaint, subsequent to the close of the open season but prior to the posting of capacity awards, Southern contacted Texican to inform Texican that Southern had determined that it could achieve the highest NPV from the bids received by awarding Texican a portion of the capacity it had requested and awarding another bidder a portion of the capacity it had requested.[7] According to Texican, as a result of its NPV calculation, Southern intended to award Texican 10,000 Mcf/day. Texican claims that when Texican challenged this "new" methodology, Southern represented to Texican that Southern acted in conformance with its tariff and realized that the bids by Texican and Shell allowed Southern the opportunity to increase the NPV to Southern if it aggregated portions of Southern's and Shell's bids.[8]

10. On August 21, 2009, Southern posted its capacity awards for the WOB Open Season on its internet website. That posting indicated that Shell (Shipper D) was awarded 63,000 Mcf/day for 30 years and that Texican (Shipper C) was awarded 10,000 Mcf/day for 35 years and seven months.

The Complaint

11. Texican challenges the validity of Southern's capacity award resulting from the WOB Open Season on several grounds. Texican argues that by piecing together portions of multiple bids in order to arrive at the highest NPV to Southern, Southern adopted a new, previously unused aggregation methodology without forewarning prospective bidders of such a change in the open season, and that such action was contrary to Commission precedent and Southern's tariff.

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[5] A copy of Southern's capacity award posting is attached to the Complaint as Appendix E. That posting identifies Texican as Shipper C and Shell as Shipper D.

[6] *See* Appendix D to the Complaint.

[7] Complaint at 9 (*citing Affidavit of Robert Blevins,* attached as Exhibit F to the Complaint).

[8] *Id*.

12. Texican asserts that while the Commission clearly allows pipelines to aggregate bids, Southern's aggregation methodology was contrary to the Commission's "definition" of acceptable aggregation. Texican argues that the Commission's decision in *Natural Gas Pipeline Co. of America*[9] defined acceptable aggregation as "a combination of smaller bids that, taken together, yield a higher NPV than one larger bid."[10] Texican contends that Southern's aggregation methodology ran afoul of what Texican deems to be the Commission's definition of aggregation because Southern did not select a combination of smaller bids over a larger bid but instead selected a portion of two large bids in a manner that resulted in the least amount of capacity being awarded to the bidder with the highest individual NPV.

13. Texican also asserts that Southern's aggregation methodology is at odds with the alleged Commission aggregation policy objective of allowing a combination of smaller bids to trump larger bids as a means for small customers to compete for available capacity.[11] Texican claims that smaller bidders are not in a position to bid for more capacity than they need to prevail over larger bidders and that the value of aggregation to such shippers as a means of collectively overcoming a larger bid would be eliminated if Southern and other pipelines were permitted to aggregate bits and pieces from multiple bids.[12]

14. Texican argues that the aggregation approach used by Southern would substantially increase pipelines' discretion in awarding capacity. According to Texican, if Southern is allowed to follow the aggregation approach adopted for the WOB Open Season, then Southern would be able to award capacity to any number of bidders in any amounts, all with unfettered discretion. Texican contends that if the aggregation methodology utilized by Southern is approved, then it would likely be adopted industry-wide with substantial impacts on the manner in which capacity is awarded.

15. Texican complains that even if the Commission determines that Southern's aggregation methodology is acceptable, Southern's tariff precludes Southern from using that methodology for the WOB Open Season.[13] According to Texican, Southern's tariff

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[9] 82 FERC ¶ 61,036 (1998) (*Natural).*

[10] Complaint at 11.

[11] *Id*. at 12.

[12] *Id*.

[13] *Id*. at 13-15.

requires Southern to identify at the time of posting all the criteria to be used for calculating the NPV of bids received.[14] Texican argues that Southern violated this provision because Southern decided to change its aggregation methodology after the WOB Open Season closed and thus did not identify all the criteria that it would use to evaluate the NPV of the bids until after bids were submitted. Texican states that neither the Open Season Preview nor the WOB Open Season posting identified the aggregation methodology used, and that Southern did not discuss the methodology in any of its conversations with Texican during the open season. Texican argues that Southern is not permitted by its tariff to change the NPV evaluation criteria after an open season announcement is posted and thus Southern was precluded by its tariff from using the unannounced methodology for the WOB Open Season.

16. Texican claims that Southern's use of a "new" aggregation methodology was not harmless error. Texican states that if it had known of the methodology prior to submitting its bid it would have taken steps to protect itself by increasing the value of its bid. Texican points to the fact that its bid had the highest NPV of any individual or combination of bids as support for its claim that it took care in drafting a bid that was likely to prevail under the known criteria at the time of the WOB Open Season Posting.[15] Texican estimates that the impact on the market of Texican not having been awarded all the capacity it requested is $170 million dollars, a significant portion of which it asserts is due to lost profits.[16]

17. Texican asserts that Southern's aggregation methodology will have detrimental impacts to Southern's operations on the West of Bienville system. Texican claims that the new Shell point will become a constraint point on the West of Bienville system, and as a result, the portion of the West of Bienville system located west of new receipt point will be used at a lower rate than in the past.[17] Texican also complains that Southern's

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[14] *Id*. at 13 and n. 20. Texican quotes section 2.1(b)(iii) of the General Terms and Conditions (GT&C) of Southern's tariff, which states:

> At the time of posting, [Southern] will identify the criteria to be used in calculating the Net Present Value, including, but not limited to, the weighing of each criteria, the method of calculating Net Present Value, and the discount factor to be used.

[15] *Id*. at 15-16.

[16] *Id*. at 20.

[17] *Id*. at 16-17.

award will harm producers and end users that have historically made use of the West of Bienville system capacity. Texican states that it intended to use the capacity for which it bid for further transportation on Southern to markets that had historically been served by gas produced along the West of Bienville system and that Southern's plans to construct an interconnect with Tennessee Gas Pipeline at Bienville would allow shippers to divert what it terms a "secure supply" to other markets, allegedly harming customers on Southern downstream of Bienville.[18] Texican further contends that Southern's capacity award will hurt natural gas production traditionally purchased by Texican because it is highly likely that some of that production will be shut in for some period of time. Texican argues that such a result would be contrary to the Commission's denial of Southern's request to abandon its West of Bienville system.[19]

18. Texican states that it does not request that the WOB Open Season be invalidated or that the Commission require Southern to redo the WOB Open Season. Texican requests instead that the Commission declare Southern's capacity awards to be void and order Southern to award the capacity to Texican.[20]

Notice of Filings and Responsive Pleadings

19. Notice of Texican's complaint was issued on October 2, 2009 with interventions and protests due by October 20, 2009. Pursuant to Rule 214, 18 C.F.R. § 385.214, 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.

20. On October 20, Southern filed an answer to the Complaint (Answer). Shell filed a motion to intervene and comments in response to the complaint on the same day. On October 26, 2009, The American Public Gas Association (APGA) filed comments generally in support of Complaint. Industrial Energy Consumers of America (IECA), XTO Energy (XTO), Dominion Gas LLC (Dominion) and Saint Mary Land & Exploration Company, Classic Hydrocarbons Operating, LLC and PetroHawk Energy Corporation (Joint Commenters) also filed comments in support of the Complaint. On October 4, 2009, Texican filed a Motion for Leave to Answer and Answer to Southern's Answer and to Shell's comments in response (Texican Answer). On that same day, Shell filed a motion to respond to the late filed comments of the APGA and XTO. On

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[18] *Id*. at 17-18.

[19] *See Southern Natural Gas Company*, 126 FERC ¶ 61,246 (2009).

[20] Complaint at 22.

November 19, 2009, Shell filed a Motion for Leave to Answer and Answer to Texican's Answer. On November 20, 2009, Southern filed a Motion to Answer and Answer to Texican's Answer (Southern 2nd Answer).

21. 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 all the responsive pleadings filed in this proceeding because they have provided information that assisted us in our decision making process.

Southern's Answer

22. Southern denies Texican's allegations set forth in the Complaint. Southern asserts that contrary to Texican's claims, Southern properly advised bidders in the WOB Open Season that it might aggregate bids under the open season, that this was not a new or undisclosed approach, and that such aggregation is consistent with the Natural Gas Act (NGA), Commission precedent and its tariff.

23. Southern's recitation of the factual background relating to the WOB Open Season generally coincides with that of Texican. Southern points to several items in the WOB Open Season to support its claim that it acted in accordance with its tariff and Commission precedent. First, it notes that the WOB Open Season specifically stated that "Southern will have the right to aggregate bids that generate the highest net present value to Southern."[21] Second, Southern points out that the open season notice contained a request form that included a space for shippers to check their requested receipt and delivery points or specify a new point. That form also allowed shippers to indicate if they were willing to accept a partial award of capacity and to indicate if they would accept a portion of their bid term. Southern states that both Texican and Shell indicated on their respective request forms that they would accept a partial award of capacity and that Southern verified with both parties prior to awarding the bids that they were willing to accept a volume lower than their bid.

24. Southern also notes that the WOB Open Season clearly stated that, "Available capacities listed … may vary with each receipt/delivery point combination,"[22] and that on August 4, 2009, prior to receiving any bids, Southern posted additional information regarding the available capacities at specific points on the north main line where the capacity was being offered.[23] Southern also attached a Bid Summary to its Answer that

[21] Answer at 2.

[22] Answer at 3.

[23] A copy of the "Open Season Addendum" is attached as Exhibit B to the

(continued…)

shows the possible range of aggregated bid awards and their respective NPVs.[24] The second page of that summary shows the awards of capacity to the shippers whose bids, in aggregate, created that highest NPV (i.e., Texican and Shell).

25. Southern states that both Texican and Shell executed the service agreements relating to the capacity awards. Southern also states that it is proceeding with the construction of the receipt point requested by Shell, for which Shell has agreed to pay. Southern notes that it is also making arrangements for a new interconnection with Tennessee at Bienville, and states that both Texican and Shell chose that point as a firm delivery point on their service agreements. Southern states that service under the agreements is expected to commence on or before February 1, 2010, depending upon completion of the facilities necessary to complete the service.

26. Based on the factual assertions above, Southern argues that its WOB Open Season and awards of capacity thereunder were conducted consistent with its tariff and Commission precedent. Southern states that the WOB Open Season clearly reserved the right to aggregate the bids received and that section 2.1(b)(i) of the GT&C of its tariff specifically allows Southern to utilize such practice.[25] Southern argues that Texican's claims that the aggregation of bids used by Southern was "new" or "arbitrary" is inconsistent with the WOB Open Season posting, which clearly stated at the outset that aggregation of bids was a possibility.

27. Southern also asserts that the right to aggregate bids is an accepted practice by the Commission.[26] Southern states that in *NET*, the Commission approved an analysis of bids that included many different factors, including how different bid combinations would maximize the use of capacity and the combination of bids that would result in the highest NPV to the pipeline.[27] Southern states that in *NET*, the Commission found that such an evaluation of different combinations of bids of different shippers to determine the

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Answer.

[24] A copy of the Bid Summary is attached as Exhibit D to the Answer.

[25] Section 2.1(b)(i) states, "For purposes of its NPV calculation, COMPANY[Southern] may consider the aggregate NPVs of two or more bids." Answer at 4.

[26] Answer at 5 (*citing National Energy and Trade, LP v. Texas Gas Transmission, LLC*, *Gulf South Pipeline Company, LP*, 121 FERC ¶ 61,064 (2004) (*NET*).

[27] Answer at 5 (*citing NET* at P 40).

highest NPV to the pipeline was appropriate, and that aggregation was permissible even if such aggregation procedure is not in the pipeline's tariff.[28] Thus, Southern claims, it is simply incorrect to state that Southern stated its intention to aggregate bids after the fact. Southern also claims that its Bid Summary demonstrates that it awarded the capacity based on the combination of bids that produced the greatest NPV to Southern over all the bids or any combination thereof, consistent with *NET*.

28. With regard to Texican's argument that Southern should have put shippers on notice of the precise manner in which it would aggregate the bids, Southern states that it had no way of predicting how bids might be aggregated until Southern received the bids. Southern states that it clearly stated that any aggregation of bids would have to result in the highest NPV to Southern and that this is a fair and accurate explanation of the methodology Southern would use to aggregate bids. Southern notes that providing more detailed information beyond that in its posting "could have unintentionally biased the outcome in favor of one bidder or the other."[29]

29. Southern also argues that Texican's claim that Southern's methodology gave no weight to the NPV of individual bids is mistaken. Southern notes that the Bid Summary shows the NPVs of all individual bids and combinations of bids considered by Southern. Southern asserts that the Bid Summary proves that Southern's analysis was proper and that Southern awarded the capacity based on the combination of bids with the highest NPV, as it stated it would in the WOB Open Season.[30]

30. Southern also challenges Texican's claim that a pipeline cannot aggregate bids when the individual bids awarded are less than the whole bid of any individual bidder. Southern asserts that adherence to such a rule in the instant case would have been virtually impossible absent collusion by two or more bidders and is inconsistent with Texican's suggestion that the purpose of aggregation was to help small bidders compete. Southern argues that such a result neither maximizes the capacity to be awarded nor does it provide for a non-discriminatory means of awarding capacity.[31]

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[28] *Id*. (*citing NET* at P 51*).*

[29] Answer at 6.

[30] *Id*.

[31] *Id*. at 7. Southern notes that the only way the two smaller bidders would be able to obtain the capacity under Texican's rule is if the parties colluded prior to submitting their bids or were lucky enough to both submit bids resulting in a perfect aggregation total of 75,000 mcf/day.

31. Southern also rebuts Texican's claim that the award of capacity under the WOB Open Season was arbitrary or discriminatory and provided Southern with unlimited discretion. Southern notes that its capacity award was based on the "financial calculation of the volume, rate and term of the bids received to arrive at an NPV" and the "physical ability of the pipeline to deliver the highest volume of incremental firm transportation capacity from the receipt points bid to the Tennessee interconnection."[32] Southern states that both principles are objective methodologies upon which it relied to arrive at the award conclusion.

32. Southern notes that the WOB Open Season clearly states the criteria it would use in arriving at an NPV, and, as demonstrated in the Bid Summary, Southern was consistent with its calculations regarding the NPVs of individual bids and bid combinations. Southern states that while the highest NPV of any individual bid was $50.7 million, it awarded the capacity to a combination of bids with an NPV of $55.0 million. Southern states that the revenue produced by the additional NPV of $4.3 million will ultimately benefit Southern's customers in its next rate case, which Southern states it is obligated to file on or before September 1, 2013. Southern also asserts that because it was consistent in its bid calculations for all bids it did not act in an arbitrary or discriminatory manner.[33]

33. Southern states that the available capacity offered in the WOB Open Season was determined by the physical parameters of the pipeline. Southern notes that because Texican and Shell chose the same delivery point, the hydraulic calculation to determine the amount of available capacity was dependent on the location of the receipt points. Southern explains that it was able to sell more incremental capacity to Shell because the new receipt point where Shell would deliver gas to Southern is further downstream than most of the receipt points bid by Texican and much closer to the Tennessee interconnection. Southern states that because Shell only bid 65,000 Mcf/day out of the possible 75,000 Mcf/day available from the Shell receipt point, Southern was able to award an additional 10,000 Mcf /day to Texican. Southern states that the converse is not true and that because of the receipt and delivery points selected by Texican, operationally it could only award Texican 63,000 Mcf/day of its requested 66,000 Mcf/day.[34] Southern states further that if it had awarded 63,000 Mcf/day to Texican, then that would have been the total award, as opposed to the 73,000 Mcf/day actually awarded. Southern

[32] Answer at 7-8.

[33] *Id*.

[34] *Id*. & n. 11.

claims that this mathematically and scientifically based award was not unduly discriminatory and was consistent with Commission policy requiring pipelines to award capacity in a manner that maximizes the sale of firm capacity.[35]

34. Southern also asserts that Texican's claim that Southern's aggregation methodology is contrary to Commission policy to award capacity to the shipper that values it the most is misplaced. Southern points out that both winning shippers bid the maximum rate for the capacity and thus each placed the same value on it. Thus, the deciding factors in the NPV analysis were the term and the volume, and Texican and Shell bid the longest terms, which is why they were the parties whose bids were aggregated.[36] Southern claims that it precisely awarded the maximum amount of capacity available based on objective NPV criteria while maximizing the value of such sale to its shareholders and customers. Southern argues that its bid aggregation method satisfies the Commission's policy of economic efficiency because it allocates capacity to the combination of shippers that produced the highest revenue to Southern and its customers and awards the maximum amount of unsubscribed capacity available.[37]

35. Southern also responds to Texican's alleged claim of harm as a result of the capacity awards. First, with regard to the claim of $170 million in lost profits, Southern notes that Texican's claim is based on the basis differential between moving gas on Southern's system and on other pipelines in the area. Southern states that such an analysis is "pure fiction" because it is impossible to predict the basis differential for any area of the country for 35 years and it is unreasonable to presume that an existing basis differential will remain the same for 35 years, especially in the area of Southern's system where there is continuing development of gas supplies and new pipeline interconnections. Thus, Southern concludes, Texican's estimate of potential damages is highly inflated.

36. Southern also argues that Texican's claims that the WOB Open Season capacity award will harm natural gas production in the area fails. Southern notes that by

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[35] *Id*. at 9 and 10 (*citing* Exhibit E (Aggregation Scenarios) to the Answer) and (*citing Tennessee Gas Pipeline Co*., 76 FERC ¶ 61,101, at p. 61,522 (1996) (*Tennessee)*; *Texas Eastern Transmission Corp*., 79 FERC ¶ 61,258, at p. 62,109 (1997)).

[36] *Id*. Southern also states that contrary to Texican's suggestion that if it had known of the "new" methodology it would have bid a longer term and won the WOB Open Season, increasing the term would not have changed the outcome, even if it bid 100 years. Such a bid would have resulted in an NPV of $52 million, still less than the combined bid of $55.0 million.

[37] *See* Southern's 2nd Answer at 7 and cases cited.

aggregating the Texican and Shell bids it maximized the available capacity that could have been awarded, and in fact awarded 10,000 Mcf/day more than if it had not aggregated the bids. Southern also states that the capacity referred to by Texican had been flowing on an interruptible basis, and thus, Southern has no obligation to not award firm capacity because interruptible capacity may get cut. Southern states that the Commission had held that a pipeline does not have to give a priority right to existing shippers in the NPV process if the result is having more capacity under long term firm contracts.[38]

37. Finally, Southern argues that Texican's argument that an award of capacity to Texican would benefit Southern's system because Texican planned to deliver gas to markets on Southern's system and Shell does not is unavailing. Southern points out that there is no way to determine whether the gas under the service agreements will stay on Southern's system or go off system. Southern notes that both Texican's and Shell's agreements have the Tennessee interconnect as a firm delivery point and both contracts provide for the same flexible receipt and delivery rights on Southern's system.

Intervenors' Comments

Intervenors' Comments in Support of Complaint

38. The APGA filed comments stating that as a policy matter, the Commission should reject the use of the methodology used by Southern in the WOB Open Season in any future auctions of pipeline capacity. APGA argues that according to the Complaint, no pipeline has previously used such a methodology and that the custom and practice has been to aggregate only entire bids. APGA notes that neither Southern nor Shell were able to cite to any Commission cases approving the methodology used by Southern and that the resolution of the Complaint will establish an important precedent for the industry.[39]

39. APGA argues that the "new" methodology contravenes the Commission's principal of allocative efficiency"[40] and will detrimentally impact the logic and transparency of the bidding process. APGA asserts that transparency requires that bidders know the criteria that pipelines will use to determine the NPV of the bids received, and, if pipelines are allowed to aggregate portions of bids, then it will be nearly

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[38] *Id*. at 12 (*citing Tennessee* at p. 61,522).

[39] APGA comments at 2-3.

[40] *Id*. at 3 (*citing Rate Design Policy Statement*, 47 FERC ¶ 61,295 at 62,053 (1989).

impossible for a bidder to frame a successful bid based on the criteria presented by the pipeline.

40. XTO, IECA, Dominion, and the Joint Movants also filed comments in support of the Complaint. XTO asserts that transparency is key to the Commission's open access policy and critical to the non-discriminatory sale of firm capacity by pipelines. XTO asserts that the WOB Open Season posting fails the transparency test because neither Southern's tariff nor its posting nor its past practices indicated that Southern could pick and choose among portions of bids to piece together capacity that produces the highest NPV to the pipeline.[41] XTO further claims that Southern's WOB Open Season lacked transparency because Southern did not make clear in its posting that a bidder could propose a non-existent receipt point downstream of existing receipt points.

41. XTO and the Joint Movants both claim that they will be harmed by Southern's capacity award because a shipper bringing gas into the system at a new downstream receipt point will restrict flow at the existing receipt points previously used by those parties, and as a result they will be unable to sell the same quantity of gas and may be shut in for some length of time.

42. IECA also supports the Complaint, claiming that it and its members have understood the Commission's open season policy as not allowing aggregation in the manner used by Southern. IECA suggests that Southern's approach stands aggregation on its head by awarding capacity on a piecemeal basis that ignores the NPV of shippers' bids and focuses solely on the economic advantage to the pipeline. IECA contends that this approach would defeat industrial end users' ability to use aggregation as a means of obtaining capacity and undermine the competitive bidding process.

Shell's comments

43. In Shell's comments in response to the Complaint, it argues that Texican has not met its NGA section 5 burden because it has not shown that Southern conducted the WOB Open Season in a manner inconsistent with Southern's tariff, the open season materials, or with applicable Commission policy or precedent. Shell also claims that Texican has not shown that Southern engaged in unduly discriminatory or preferential conduct. Shell contends that Southern's bid evaluation process was objective, applied consistently to all bidders in the WOB Open Season, and that the resulting awards maximized the capacity available to the marketplace and the NPV to Southern.[42]

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[41] XTO comments at 3-4.

[42] Shell response at 4.

According to Shell, Texican omitted and misstated crucial facts related to the WOB Open Season and ensuing awards, including most importantly the fact that Southern's award of the full amount requested by Texican to Texican would have prevented Southern from maximizing the amount of capacity it could make available to the market place.[43]

44. Shell also contends that Southern's actions were consistent with Commission policy and precedent. Shell states that a fundamental component of the Commission's open access policy is that pipelines should be allowed to maximize the value of their capacity.[44] Shell asserts that the Commission has consistently ruled that when a pipeline employs an NPV process to allocate capacity, it may aggregate bids because it "enables smaller bids to compete with larger bids and permits a pipeline to maximize its revenues."[45] Shell argues that while Texican raises the issue of the meaning of aggregation for bids for NPV evaluation purposes, Commission precedent accepts the right of a pipeline to aggregate bids to determine the highest NPV of the bids and indicates the Commission's preference for pipelines to aggregate bids in a manner that reflects the highest incremental revenues to the pipeline.[46]

45. Shell also claims that Texican's and Intervenors' assertions that the capacity award by Southern will shut in longstanding production in the area and reduce the utilization of the West of Bienville system is unsupported and irrelevant to the question of the fairness of the WOB Open Season. Shell makes similar arguments with regard to claims that end-users previously served by production moved on capacity located upstream of Bienville will be harmed by the award to Shell. It notes that Texican has made no showing that those end-users will not be able to obtain gas and that, in fact, more gas and capacity will be made available as a result of more efficient utilization of the affected part of Southern's system and new production being brought on line in that area.[47] Shells argues that if XTO or Joint Movants have firm capacity rights on Southern, or sell to customers with firm rights, then they will not be harmed. If those parties and their customers are relying on non-firm capacity, however, then they have not shown that

[43] Shell response at 5, 8-9.

[44] *Id*. at 9 (*citing Northern Natural Gas Co*., 108 FERC ¶ 61,044, at P 11(2004).

[45] *Id*. at 10 (*quoting NET* at P 50).

[46] *See* Shell response at 10, n. 13, and cases cited therein.

[47] *Id* at 13-15.

they have any right to rely on future service on Southern's system. Shell further asserts that Texican's monetary damage claim is vague and unverifiable.[48]

46. Shell argues that the Commission should not disrupt the capacity awarded in the WOB Open Season even it finds that Southern's aggregation methodology was inconsistent with the Commission's aggregation policy. Shell contends that such a determination does not warrant a finding that Southern violated its tariff or Commission policy or that the capacity award should be invalidated. Shell also asserts that it would be prejudiced if the Commission were to order Southern to hold a new open season because potential bidders would know in advance the basic parameters of Shell's and others' likely bids. Shell contends that the Commission has rejected calls for "do over" open seasons in similar situations. [49]

Reply Comments

Texican's Answer

47. On November 4, 2009, Texican filed for leave to answer and an answer (Texican Answer) to Southern's and Shell's answers. In its answer, Texican clarifies that the Complaint challenges the WOB Open Season on two grounds (1) that Southern chose, after the close of the WOB Open Season, to use an aggregation procedure for awarding capacity that it had not used previously; and (2) that Southern's award process was unjust, unreasonable, unduly discriminatory and contrary to Southern's tariff.

48. On the first point, Texican notes that neither Southern nor Shell contend that Southern had previously used the aggregation methodology. Texican claims that Southern and Shell assert instead that "aggregation" is vague enough to give the pipeline unfettered discretion to change the rules as to how bids may be evaluated from one open season to the next based solely on which method produces the highest revenue to the pipeline. Texican contends that such a defense is fundamentally inconsistent with the Commission's requirement to have tariffs, namely to constrain pipelines discretion to modify the terms and conditions of their service without prior Commission approval and notice to shippers.[50]

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[48] *Id*. at 17.

[49] *See id.* at 18, n. 28 and cases cited therein.

[50] Texican Answer at 2.

49. As to the second point, Texican argues that under Southern's new approach, the NPV of a shipper's bid does not determine to whom the capacity is awarded and thus there is no assurance that capacity will be awarded to shippers that value it the most. Texican states that Southern's contentions that its method did result in capacity being awarded to the bidders that valued it most highly is belied by the fact that most of the capacity was awarded to the second place bidder.

50. Texican reiterates its claim that Southern's capacity award was flawed because it was based on a methodology not used previously and not revealed in the open season and Commission precedent is clear that bid evaluation criteria must be determined and announce in advance of the bidding. Texican contends that Southern's claims that the capacity award methodology was "scientific" miss the mark. Texican claims that because Southern failed to divulge the evaluation criteria in advance, the flaw cannot later be cured by a claim that the flawed methodology was applied in a non-discriminatory manner but can only be remedied by awarding the capacity in accordance with its prior practice.

51. Texican also reasserts that Southern's aggregation methodology is not just and reasonable,[51] and that Shell's reliance on the fact that Southern's methodology allowed Southern to make more capacity available to the market is unsupported. Texican asserts that Shell's appeal to the *Northern* case is misleading because contrary to Shell's assertion the case does not stand for the proposition that a pipeline's right to maximize the value of its capacity is a fundamental component of the Commission's open access policy. Rather, states Texican, the fundamental component is a structure that ensures that capacity goes to the shipper that values it the most, and then, once that is established, in a manner that maximizes the value of capacity to the pipeline.[52]

52. Texican attempts to refute Southern's and Shell's assertion that Shell placed the same value on the capacity as Texican because they both bid the maximum rate by noting that every shipper in the WOB Open Season bid the maximum rate. Texican claims that the value a shipper places on capacity is measured by the entire NPV calculation, and not just the rate. Texican states that because of the maximum rate ceiling on bids, the only way to demonstrate that a shipper values capacity more is to bid for a greater volume or longer term, which it did in the WOB Open Season.

53. Texican also challenges Shell's assertions that Southern's award of capacity should be allowed to stand. Texican notes that Shell was on notice that Texican intended

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[51] *Id*. at 16.

[52] *Id*. at 17-18.

to file a complaint to challenge the award and so any actions taken or expenditures made by Shell were made at Shell's own risk. Texican also asserts that Shell's expenditures to date have been negligible and far less than the cost that the producers served by the West of Bienville system would occur if the award stands. Texican bases its assumption of negligibility on the fact that Shell did not specify the amount of its expenditures in Shell's answer.

54. Texican also argues that its concerns that as a result of Southern's awards longstanding production will be shut in and utilization of the West of Bienville system will be significantly reduced are not speculative but supported by the capacity awards that Southern made. According to Texican, Southern could award Texican no more than 10,000 Mcf/day because 63,000 Mcf day would be absorbed by the award to Shell. Thus, Texican argues, if the Shell volumes are flowing, they will displace upstream receipts. Finally, Texican argues that its financial impact estimate used conservative figures. Texican states that while it acknowledges that it is difficult to estimate the impact of losing a 35 year plus contract, Texican is confident that the "financial impact of not awarding the capacity to the bidder with the highest NPV would be greater than not allowing the capacity to be retained by a bidder that placed a lower value on the capacity."[53]

Shell's Responses

55. Shell filed two additional responses, a request for leave to answer and answer to Texican's answer and a motion to respond and response to the APGA and XTO comments. Shell asserts that Texican's answer repeats many of the allegations made in the Complaint but also asserts new facts and new arguments and thus as a matter of fairness Shell should allowed to respond.

56. Shell claims that Texican's arguments relating to Commission policy lack merit because they disregard Southern's right to aggregate bids to achieve the highest NPV for capacity that Southern was able to make available in the open season and ignore the Commission's policy of allowing pipelines to maximize the value of their capacity in open seasons, which principles Shell contends the Commission has consistently endorsed.[54] Shell states that the purpose of the NPV process is to allow a pipeline to determine the highest value for all of its available capacity. Shell also argues that the Commission should reject Texican's claims of undue discrimination because the WOB Open Season put all potential bidders on notice of the possibility that Southern would

[53] Texican Answer at 27.

[54] *See* Shell November 19 Answer at 3 and cases cited.

aggregate bids and there is nothing in Southern's tariff or Commission policy specifying that only whole bids can be awarded unless otherwise specified in advance.

57. Shell also challenges Texican's assertions that Shell lacks a significant stake in this proceeding and that Shell had no right to rely on Southern's awards. Shell notes that it does need the capacity as soon as the interconnection facilities are completed to ship new Haynesville Shale gas production and that Texican's suggestions that it has other viable options to ship such gas are incorrect. Shell notes that Texican points to no firm agreements to bolster its claims of reliance on existing transportation arrangements and that Texican's arguments in hindsight about how the parties could or should have bid in the WOB Open Season are irrelevant, especially in light of the fact that Texican does not seek a rerun of that open season. Finally, Shell argues that the notion that pipelines should be required to formulate open season processes to enable a shipper to know with some level of certainty its chances of winning is preposterous and contrary to the whole purpose of confidential blind bid auctions.

58. With regard to the comments in support of the Complaint, Shell asserts that XTO's comments reflect numerous misstatements of fact and law. Shell claims that XTO's argument that the WOB Open Season was not transparent because the new receipt point requested by Shell was not identified in the posting is misguided because the posting included an "Other" receipt point option, which is well-known in the industry to be for new receipt points.

59. With regard to APGA, Shell asserts that APGA incorrectly limits "allocative efficiency" as applying only to the value as perceived by individual bidders. Shell contends that historically the Commission has taken a broader view of the theory, namely that it pertains to the function of a market and the value derived for all market participants. Shell asserts that all Southern customers and ratepayers are participants in the market and that Southern is obligated to administer the market in a manner that provides the most efficient results for all those participants.

Discussion

60. For the reasons discussed below, the Commission dismisses the Complaint. Texican has not demonstrated that Southern failed to comply with its tariff or that the award of capacity pursuant to the WOB Open Season was otherwise unjust and unreasonable. To the contrary, we find that Southern acted in accordance with its tariff in awarding capacity pursuant to the WOB Open Season and that Southern's award methodology was consistent with Commission policy and was just and reasonable and not unduly discriminatory. Southern acted reasonably and in good faith in allocating capacity to the highest valued combination of bids, and shippers relied on that allocation of capacity. In these circumstances, we find that it would not be fair to shippers that have justifiably relied on the capacity awards to undo that allocation due to a potential

misunderstanding of the terms of the open season.[55] Accordingly, we uphold the results of the WOB Open Season.

61. Texican's Complaint essentially boils down to two issues: (1) whether Southern's aggregation methodology, combining portions of two separate bids, was unjust and unreasonable and contrary to Southern's tariff; and (2) whether Southern's procedure for awarding capacity was adopted in an improper manner, contrary to Commission precedent and policy.

Southern's Tariff

62. We find that Southern acted in accordance with its tariff with regard to the WOB Open Season posting and the award of capacity pursuant thereto. Southern's tariff provides it the authority to evaluate multiple bids under the same criteria, stating, "For purposes of its NPV evaluation, Company may consider the aggregate NPVs of two or more bids."[56] The WOB Open Season posting clearly stated that Southern retained the right "to aggregate bids in a manner that generates the highest net present value to Southern" and that "the capacity available to be awarded may vary with specific receipt and delivery point combinations." Southern also stated in the WOB Open Season that shippers should indicate if their bids were contingent upon being awarded the full contract quantity of their bid or whether they would accept a partial quantity. As shown in Appendix D to the Complaint, Texican indicated on its bid form that it was willing to accept a partial award of its Transportation Demand bid.

63. Southern properly followed the procedure set forth in its tariff to offer the capacity available in the WOB Open Season. We disagree with Texican's arguments that Southern violated its tariff because it did not notify bidders until after the close of bidding

[55] Even when the Commission has found that errors in capacity allocation have been made, the Commission, in exercising its remedial authority, has not re-allocated the capacity. *See PPL EnergyPlus v. N.Y. Indep. Sys. Operator Corp*., 115 FERC ¶ 61,383, at P30 (2006) (even when tariff violation occurred, Commission would not reallocate rights when the customer receiving those rights relied on them in good faith); *Pacific Gas Transmission Co*., 82 FERC ¶ 61,227 (1998) (despite a finding of violation, concluding that the public interest in market stability outweighs the need for reposting the five releases for bid); *Pan-Alberta Gas (U.S.) Inc*., 72 FERC ¶ 61,092 (1995), *reh'g denied*, 75 FERC ¶ 61,049 (1996) (despite violation in capacity allocation, Commission found it would not set aside the already consummated transaction, because it is a settled transaction and to do so would cause a disruption in the market).

[56] *See* GT&C section 2.1(b)(i) of Southern's tariff.

that it was going to use a "new" methodology of aggregation that Southern had not used before, and thus did not clearly explain its bid evaluation criteria in the posting. Southern's tariff permitted aggregation without any limitations on the type of aggregation. Moreover, Southern did state in its open season posting that it might aggregate bids and requested that potential bidders indicate whether they were willing to accept partial volume awards of the bids submitted. Texican agreed that it was so willing. Southern also noted in the WOB Open Season that the amount of capacity that would be available would depend on the particular receipt and delivery points bid. Thus, all potential bidders were made aware that aggregation of bids was a possible outcome and that the final volume of available capacity would not be known until after the bids had been received.

64. We do not find compelling Texican's arguments that Southern was required to state more specifically in the WOB Open Season or at a subsequent time that it intended to aggregate portions of the bids received. Texican's claim in this regard rests heavily on the assertion that Southern had not previously used this methodology nor had any other interstate pipelines. The fact that Southern had not used this particular methodology previously does not preclude it from using it in the WOB open season, so long as it complied with the contingencies established by the bidders in their bid submissions.

65. As noted, Southern did state that it might aggregate bids in a manner that would generate the highest NPV to the pipeline, and that is what it did in awarding capacity under the WOB Open Season.[57] Moreover, Southern stated in the WOB Open Season the pertinent criteria that it would use for evaluating the NPV and it followed that formula to identify the two individual shippers with the highest NPV. Southern then aggregated the bids of those shippers to award capacity in a manner that generated the highest NPV to Southern. Nothing in Southern's tariff precludes it from aggregating bids in the manner it did.

Commission Precedent and Policy

66. We also find that the aggregation methodology utilized by Southern is just and reasonable and consistent with Commission precedent and policy.[58] We reject Texican's

[57] The Bid Summary and FT Awards tables, attached as Exhibit D to the Answer, demonstrate that Southern evaluated the NPVs of all the individual bids and the combination of the highest bids to determine the highest aggregated NPV and awarded capacity accordingly.

[58] We also determine that Southern's aggregation methodology was not unduly discriminatory. Southern's capacity award was based on objective financial and

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argument the Commission has "defined" or limited aggregation of bids to mean only a combination of two or more "whole" bids. In the *Natural* case cited by Texican, we re-affirmed the ability of pipelines to aggregate bids finding that such methodology was consistent with the goal of ensuring that capacity is awarded "based on the highest economic value" and that aggregation "is an important means to allow small customers to compete for capacity."[59] Nothing in that order, however, states or implies that pipelines may aggregate only whole bids or that the sole purpose of allowing aggregation is to allow smaller customers to compete. In fact, in subsequent orders, the Commission has approved NPV analyses based on several factors including how different bid combinations would maximize the use of capacity and result in the highest NPV to the pipeline.[60] In *Northern Natural*, for example, the Commission approved a complicated bid evaluation structure that involved allowing a variety of multiple bids on different bid packages because the proposed procedure promoted fundamental components of the Commission's policy governing the allocation of capacity, namely, assuring that capacity will go to the shipper that values it the most and maximizing the value of capacity to the pipeline.[61] In *NET*, the Commission upheld a capacity award made pursuant to an aggregation methodology that awarded capacity based on the best bid or combination of bids that yield the highest NPV.[62]

67. Texican argues that Southern's capacity award runs afoul of the overriding policy for allocating capacity that capacity should be awarded to the party that values it the most because Texican had the highest individual NPV but did not receive all the capacity on which it bid. In allowing pipelines to aggregate bids, however, the Commission has by definition indicated that capacity need not be awarded to the individual shipper who bids the highest individual NPV. As discussed more fully below, there are other policy goals, including maximizing incremental revenue to the pipeline, attracting new shippers to the

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operational principles of which all bidders were notified. Moreover, Southern applied those principles uniformly to evaluate all the bids received in the WOB Open Season and relied upon those objective methodologies to award the capacity. The fact that Texican did not win its entire bid despite the fact that it had the highest individual NPV does not render Southern's method discriminatory.

[59] *Natural*, 82 FERC ¶ 61,036 at p. 61,140.

[60] *See Northern Natural* and *NET*.

[61] *Northern Natural* at P 11.

[62] *See NET* at P 50-51 (*citing Mississippi River Transmission*, 89 FERC ¶ 61,067 at p. 61, 220).

system and maximizing the capacity made available to market, which in turn maximize the value of the system to all users, that may dictate that capacity not be awarded to an individual bidder with the highest individual NPV.[63]

68. Moreover, Texican had full discretion to structure its bid so that it could avoid a partial capacity award. For example, had Texican wanted its bid evaluated based solely on its NPV, it could have restricted its bid to its full contract quantity. Southern would then have to determine whether other combinations of bids produced a higher NPV than Texican's bid or whether other bids could be aggregated with Texican's full contract quantity to produce a higher NPV. Texican's complaint is not that Southern only provided it with a partial quantity allocation but that it just so happened in this case that the quantity it received happened to be less than that received by Shell. Texican cites no Commission policy, however, stating that in determining partial quantity allocations, the bidder with the highest individual NPV necessarily receives the largest allocation of capacity. In fact, Commission policy is to permit pipelines to allocate capacity in such a way as to maximize the NPV of the contract(s) so as to lower rates for other customers to the maximum extent possible in subsequent rate cases.

69. In *Tennessee Gas Pipeline Co.,*[64] the Commission found that it was appropriate for the pipeline to allocate capacity according to an NPV methodology that would maximize incremental revenue to the pipeline. There, the Commission determined that the pipeline may give greater weight to bids of new shippers desiring access to the system than to existing shippers by requiring existing shippers to bid for primary point rights with new shippers and allowing the pipeline to assign a zero NPV to the existing shipper. The Commissioned determined that the NPV methodology at issue created "the greatest economic benefit to the pipeline, and by extension benefits all customers, including existing customers."[65] The Commission also noted that it is appropriate for a pipeline to maximize the opportunity to market unused capacity because by maximizing throughput the pipeline will have a greater number of units over which to spread its fixed costs in its next rate case. Maximizing revenue and the use of pipeline capacity will benefit all customers by increasing billing determinants and thereby lowering unit fixed costs. Here

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[63] *Northern Natural* supports this concept. There, pursuant to the complex evaluation structure that allows various combinations of bid packages, the individual shipper with the highest individual NPV will not necessarily be the winning bidder.

[64] 94 FERC ¶ 61,097(2001), *aff'd Process Gas Consumers Group, et al., v. FERC,* 292 F.3d 831(D.C. Cir. 2002).

[65] 94 FERC at p. 61,403.

there is record evidence to support Southern's assertion that its aggregation methodology resulted in an additional 10,000 Mcf/day being made available to the market than if it had awarded Texican the full volume of Texican's bid. Further, Southern's award resulted in an additional $4.3 million in revenue to the pipeline, which will ultimately benefit Southern's customers in its next rate case.

70. Contrary to Texican's assertions, allowing aggregation of partial bids is wholly consistent with allocating capacity to those that value it the most. The Commission did not approve aggregation of open season bids to provide advantages to only smaller bidders.[66] Another benefit of aggregation is creating a greater chance that more new shippers will be able to access and move gas on the pipeline's system. Maximizing incremental revenue to the pipeline will maximize the value of the system to all customers, including captive customers. The goal of the Commission's capacity allocation policy is not only to the allow those who value the capacity the most to win but also to ensure that the overall capacity is allocated to the bid or group of bids that produces the greatest net revenue to the pipeline. This may not necessarily be the "individual" bidder with the highest NPV.

71. Both parties make claims to the effect that the other party has not cited to Commission decisions either approving or rejecting the aggregation methodology utilized by Southern. In fact, the Commission had not ruled directly on this issue. Based on our policies as discussed above and orders approving aggregation and various aggregation scenarios, we find that it is a reasonable step to allow pipelines to aggregate portions of bids to determine the highest NPV to the pipeline and award capacity accordingly. Permitting such aggregation will not provide the pipelines with unfettered discretion to award capacity. The aggregation methodology used here was based on objective financial calculations to determine the NPV and an operational analysis to determine how much capacity could be made available based on the bids received. Further, any future use of any aggregation methodology must still conform to the Commission's capacity allocation goals and policies as discussed above.

72. The claims of market disruption and harm to existing shippers do not compel us to reach a different answer. Though several parties note that that the capacity award may create constraint difficulties with regard to their historical use of certain capacity to move

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[66] Indeed, it is not clear that Texican's whole bid aggregation proposal would work to the benefit of smaller bidders, because it would not permit small bids to be allocated partial quantities even if that were necessary to achieve the highest NPV. If the aggregation of small bids happened to exceed the amount of available capacity, and could not be divided, the small bidders might receive no capacity at all.

their gas to the market, none of those entities present any evidence that they hold firm capacity rights on Southern. Southern has no obligation to withhold firm capacity in order to protect existing interruptible customers. As discussed above, the Commission had held that a pipeline does not have to give a priority right to existing shippers in the NPV process if the result is having more capacity under long term firm contracts.

73. For the reasons discussed above, we find that Southern's award of capacity pursuant to the WOB Open Season is just and reasonable and should stand. We accordingly dismiss the Complaint.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.