

140 FERC ¶ 61,026
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 13, 2012

In Reply Refer To:
Arkansas Electric Cooperative Corporation
and Hot Spring Power Company, LLC
Docket No. RP12-754-000

Bracewell & Giuliani LLP
2000 K St., NW
Suite 500
Washington, DC 20006

Attention: D. Kirk Morgan II and Catherine P. McCarthy
Attorneys for Hot Spring Power Company, LLC

Miller, Balis & O'Neil, P.C.
1015 15th St., NW
Washington, DC 20005

Attention: John P. Gregg
Attorney for Arkansas Electric Cooperative Corporation

Reference: Temporary Waiver Request

Ladies and Gentlemen:

1. On May 25, 2012, Arkansas Electric Cooperative Corporation (AECC) and Hot Spring Power Company, LLC (Hot Spring) (jointly, Applicants) filed a request for temporary waiver of certain of the Commission's capacity release rules and related policies, as well as, to the extent necessary, a temporary waiver of CenterPoint Energy Gas Transmission Company, LLC's (CenterPoint) tariff provisions that implement the capacity release regulations and policies. Applicants state that they seek these waivers to facilitate the permanent release to AECC of the capacity associated with a single firm negotiated rate natural gas transportation agreement between Hot Spring and CenterPoint

(Service Agreement).¹ The capacity associated with the Service Agreement is used to supply natural gas to a 746 megawatt gas-fired combined-cycle power plant (Power Plant), which Hot Spring is selling to AECC, along with the associated interconnection facilities (Transaction). The Commission authorized the Transaction in Docket No. EC12-87-000.²

2. Applicants state that, to facilitate the Transaction, they seek Commission approval of their waiver request by July 15, 2012. Additionally, they ask the Commission to allow the waivers to remain effective for 90 days after closing of the Transaction, which they expect to occur on or before August 31, 2012. Applicants state that they will advise the Commission of the closing date of the Transaction.

3. As discussed below, for good cause shown, the Commission will grant the requested temporary waivers.

Description of the Filing

4. Applicants state that Hot Spring, which is an indirect, wholly-owned subsidiary of IPR-GDF SUEZ North America, Inc., operates and leases the Power Plant, the real property on which it is located, and the ancillary facilities, improvements, buildings, and other structures associated with the power plant. Applicants explain that Hot Spring has operated the Power Plant since the first commercial sales were made in July 2005 pursuant to a lease dated October 18, 2002.

5. Applicants further state that AECC is a non-jurisdictional electric generation and transmission cooperative incorporated under Arkansas law and having its principal place of business in Little Rock, Arkansas. They state that AECC provides wholesale electricity to its 17 electric distribution cooperative members, which in turn provide retail power to their roughly 490,000 members primarily located in Arkansas. Applicants add that AECC is a member of the Southwest Power Pool and is subject to wholesale rate regulation by the Arkansas Public Service Commission.

6. Applicants explain that, on January 31, 2012, they executed a Purchase and Sale Agreement in connection with the Transaction, pursuant to which Hot Spring will transfer the Power Plant to AECC. As part of the transaction, Hot Spring will

¹ Applicants state that the negotiated rate agreement is CenterPoint's Rate Schedule FT contract number 1002891, providing for a maximum daily quantity of 80,000 dth/d.

² *Hot Spring Power Co.*, 139 FERC ¶ 62,160 (2012).

permanently release the Service Agreement to AECC, so that AECC may transport natural gas to the Power Plant under the terms of the Service Agreement. Applicants state that the primary term of the Service Agreement extends through May 31, 2019, and that it establishes a negotiated rate which is currently less than the maximum rate under CenterPoint's tariff.³ Applicants specifically seek temporary waiver of (i) the Commission's prohibition against tying the release of pipeline capacity to extraneous conditions; (ii) the Commission's capacity release rules in section 284.8 of the Commission's regulations,⁴ including, but not limited to, the bidding and maximum applicable rate requirements; (iii) to the extent applicable, CenterPoint's tariff provisions related to the Commission's capacity release rules and policies, including, but not limited to provisions related to prior notification, bidding procedures and applicable maximum rate; (iv) the shipper must have title rule; and (v) the prohibition on buy-sell transactions. Applicants state that the temporary waivers will be utilized only for the limited purposes of releasing the Service Agreement capacity to AECC in an efficient and timely manner and consummating the Transaction.

7. Applicants contend that waiver of section 284.8(b)(2) capping the rate for capacity releases of more than one year at the pipeline's maximum rate is needed to ensure that AECC will be able to operate under the Service Agreement at the same negotiated rate that Hot Spring currently pays, thereby assuring CenterPoint that it will remain financially indifferent as a result of the release. Applicants state that the negotiated Reservation Charge rate under the Service Agreement is lower than CenterPoint's current maximum recourse Reservation Charge rate for firm transportation. However, Applicants explain that, if CenterPoint were to lower its recourse rates before the Service Agreement's primary term expires on May 31, 2019, the negotiated Reservation Charge rate under the Service Agreement would exceed the recourse rate on CenterPoint, and AECC would be unable to release the Service Agreement capacity at the negotiated rate for the remaining term of that agreement without violating the maximum rate ceiling (or, alternatively, receiving a waiver from the Commission). Additionally, continue Applicants, because the Service Agreement includes negotiated rates, waiver of the competitive bidding requirement is essential to ensuring that the Service Agreement is permanently released to AECC at the contract rates so that Transaction can proceed as contemplated. Applicants add that information about the permanent release of the Service Agreement will be posted.

³ Applicants explain that the negotiated rates consist of fixed reservation and usage rates for certain delivery points, with index-based usage rates applicable to certain other delivery points.

⁴ 18 C.F.R. § 284.8 (2012).

8. Applicants assert that the Commission routinely grants waivers to allow capacity to be released on a permanent basis at the negotiated rate in the releasing shipper's contract.⁵ Additionally, they state that grant of the waiver request would be consistent with cases in which the Commission has granted waivers of its capacity release rules and policies to facilitate the transfer of natural gas assets as part of larger transactions involving other related assets, including electric generating assets.⁶ The Applicants contend that the Commission has explained that its decisions in *Macquarie*, *Bear Energy*, and *Barclays* reflect its policy to permit broad waivers of the capacity release requirements "so that the parties could consummate the transfer of an entire business unit."⁷ Further, continue Applicants, the Commission stated that, in adopting the capacity release requirements in Order No. 636:

The Commission did not contemplate that the capacity release posting and bidding requirements would necessarily apply in cases of the merger or sale of entire business units as part of a corporate restructuring, including the transfer of transportation contracts, supply contracts, employees, data systems, and technology. Moreover, given the financial difficulties that many energy related companies are facing, and the difficult environment facing U.S. and international credit and capital markets, the Commission needs to be able to respond to requests for waivers related to complex business transactions in a flexible and expedited manner.⁸

⁵ Applicants cite *Transcontinental Gas Pipe Line*, 126 FERC ¶ 61,086 (2009); and *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082 (2009).

⁶ Applicants cite, *inter alia*, *PPL Generation, LLC*, 133 FERC ¶ 61,122 (2010). *Conectiv Energy Supply, Inc.*, 132 FERC ¶ 61,247 (2010); *Nexen Marketing U.S.A. Inc.*, 131 FERC ¶ 61,282 (2010); *Calpine Energy Services, L.P.*, 131 FERC ¶ 61,261 (2010); *TotalGas & Power North America, Inc.*, 131 FERC ¶ 61,023 (2010); *Wisconsin Electric Power Co.*, 131 FERC ¶ 61,104 (2010); *Macquarie Cook Energy, LLC*, 126 FERC ¶ 61,160 (2009) (*Macquarie*); *Barclays Bank PLC*, 125 FERC ¶ 61,383 (2008) (*Barclays*); *Bear Energy LP*, 123 FERC ¶ 61,219 (2008) (*Bear Energy*).

⁷ Applicants cite *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106, at P 8 (2009) (Notice Terminating Proceeding).

⁸ *Notice Terminating Proceeding*, 127 FERC ¶ 61,106 at P 8.

9. The Applicants note that, in the Notice Terminating Proceeding, the Commission directed applicants seeking such waivers to (i) identify the regulations and policies for which waiver is sought; (ii) identify the pipeline capacity at issue; (iii) describe the overall transaction and its claimed benefits with sufficient detail to permit the Commission and other interested parties to determine whether granting the requested waivers is in the public interest; and (iv) file the request as much in advance of the requested action date as possible.⁹ The Applicants assert that the instant waiver request fully satisfies those filing requirements.

10. Applicants submit that good cause exists for the Commission to grant the waiver request because it will (i) provide uninterrupted access to natural gas for the Power Plant and allow Applicants to consummate the Transaction as contemplated; and (ii) ensure that Applicants will not be in violation of the Commission's rules, policies, and orders, or CenterPoint's tariff in connection with the consummation of the Transaction. Further, continue Applicants, approval of their waiver request would be consistent with Commission precedent granting such waivers in similar circumstances.

11. Applicants request that the Commission (i) grant the waiver request for the limited purposes of permanently releasing the Service Agreement to AECC and effectuating the Transaction, for a period running from the date of a Commission order granting the waiver and continuing thereafter for ninety (90) days following the closing of the Transaction; (ii) grant any and all other authorizations or waivers deemed necessary; and (iii) issue an order granting this waiver request no later than July 15, 2012.

12. Public notice of the waiver request was issued on May 30, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.¹⁰ Pursuant to Rule 214,¹¹ all timely-filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

13. The Commission has reviewed Applicants' request for temporary waivers and finds that the request is adequately supported and consistent with previous waivers that

⁹ *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106, at P 10 (2009).

¹⁰ 18 C.F.R. § 154.210 (2012).

¹¹ 18 C.F.R. § 385.214 (2012).

the Commission has granted under similar circumstances. The transportation contract included in the Transaction appears to be essential for ensuring that the Power Plant, which Hot Spring is selling to AECC, continues to have uninterrupted access to natural gas supplies. The Commission's actions here are consistent with those decisions in which the Commission granted similar limited, temporary waivers in order to facilitate the transfer of interstate pipeline transportation capacity as part of a larger business transaction.¹²

14. This determination is also in accord with the Commission's orders granting waivers in connection with the permanent release of capacity at negotiated rates.¹³ The Commission only requires a pipeline to allow a permanent release where the pipeline will be financially indifferent to the release.¹⁴ The Commission has also recognized that, even in situations where a negotiated rate is currently less than the pipeline's maximum recourse rate, it is possible that the negotiated rate could be above the maximum recourse rate later.¹⁵ Therefore, the pipeline could conclude that a continuation of the existing negotiated rate is necessary for it to be financially indifferent to a permanent release of a negotiated rate agreement, whether or not the negotiated rate is currently above or below the maximum recourse rate. Therefore, the Commission has waived its capacity release regulations as necessary to permit permanent releases of negotiated rate agreements, in order to avoid unnecessarily inhibiting the use of permanent releases to transfer capacity the releasing shipper no longer needs or wants. Here, waiver will permit Hot Spring to permanently release its negotiated rate agreement to AECC, so that the negotiated rate agreement can continue to be used to supply the Power Plant Hot Spring is selling to AECC.

15. Accordingly, for good cause shown, the Commission grants the Applicants' request for a temporary waiver of the specified capacity release regulations, policies, and tariff provisions to allow the permanent release of the Service Agreement from Hot Spring to AECC. Specifically, the Commission grants a limited, temporary waiver of section 284.8 of its regulations, including the bidding and maximum applicable rate

¹² *E.g., Entergy Arkansas, Inc. and KGen Hot Springs LLC*, 138 FERC 61,065 (2012); *Conectiv EnergySupply, Inc.*, 132 FERC ¶ 61,247 (2010); *Nexen Marketing U.S.A.*, 131 FERC ¶ 61,282 (2010); *Macquarie Cook Energy, LLC*, 126 FERC ¶ 61,160 (2009); and *BarclaysBank PLC*, 125 FERC ¶ 61,383 (2008).

¹³ *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082 at PP 13-17.

¹⁴ *Transcontinental Gas Pipe Line Corp.*, 126 FERC ¶ 61,086 at P 7.

¹⁵ *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082 at P 14.

requirements. The Commission also grants a limited waiver of the prohibition on tying, the posting and bidding requirements for capacity release transactions, the shipper must have title rule, the prohibition on buy-sell transactions and, to the extent necessary, CenterPoint's relevant tariff provisions related to the Commission's capacity release rules, so that the Applicants can complete the specified Transaction in an orderly and efficient manner within their time constraints. The Applicants remain obligated to comply with any other applicable provisions of CenterPoint's tariff.

The Commission orders:

(A) The temporary waivers requested by Applicants are granted, effective as of the date of this order and continuing for 90 days following the closing of the Transaction, as discussed more fully above.

(B) Applicants must provide notice to the Commission of the closing date of the Transaction, within 30 days following the closing date.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.