

172 FERC ¶ 61,253
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

BP Energy Company

Docket No. RP20-481-001

v.

Natural Gas Pipeline Company of America LLC

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued September 17, 2020)

1. On May 26, 2020, the Commission denied a complaint filed by BP Energy Company (BP) against Natural Gas Pipeline Company of America LLC (NGPL) alleging that NGPL improperly required BP to take an unwanted service in order to exercise a Right of First Refusal (ROFR).¹ On June 25, 2020, BP sought rehearing.
2. Pursuant to *Allegheny Defense Project v. FERC*,² the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 19 (a) of the Natural Gas Act (NGA),³ however, we are modifying the discussion in the May 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁴

¹ *BP Energy Co. v. Natural Gas Pipeline Co. of America LLC*, 171 FERC ¶ 61,166 (2020) (May 2020 Order).

² *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³ 15 U.S.C. § 717r(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁴ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the May 2020 Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

I. Background

3. BP executed a contract for firm service (FT) with NGPL⁵ for the term April 1, 2018 through March 31, 2020 from NGPL Segment 9 to Segment 6 at maximum rates. BP's contract includes a System Wide service option (SW option) (FT-SW service) which confers the right to access all receipt and delivery points on NGPL's system as secondary points at a separate applicable maximum rate.⁶

4. BP's contract qualifies for the ROFR established by section 284.221(d)(2) of the Commission's regulations⁷ and NGPL's tariff.⁸ BP notified NGPL of its intent to exercise its regulatory ROFR. Pursuant to the ROFR procedures, NGPL conducted a capacity auction, notified BP of a competing bid,⁹ and informed BP that it would be required to match the Net Present Value (NPV) of the competing bid which included the SW service option. Initially, BP submitted a counteroffer at the non-SW maximum rate, with a lower NPV which was rejected by NGPL on the basis that BP's election without the SW option did not constitute a valid match of the best bid pursuant to the General Terms and Conditions of NGPL's tariff (GT&C) section 22.3(d)(4). BP ultimately matched the competing bid, exercising the ROFR, but stated that it would contest the SW option portion.

5. BP filed a Complaint with the Commission on January 31, 2020. In its Complaint, BP argued that NGPL violated GT&C section 22.3(d)(1),¹⁰ section 4(d) of the NGA,¹¹

⁵ NGPL Rate Schedule FTS, Contract 149384-FTSNGPL.

⁶ See NGPL Rate Schedule FTS section 5.2; GT&C section 5.5(a)(1).

⁷ 18 C.F.R. § 284.221(d)(2) (2020).

⁸ Natural Gas Pipeline Company of America LLC, FERC Gas Tariff, General Terms & Conditions, Part 6.22, PreGranted Abandonment & Rollover Rights, 0.0.0 (NGPL GT&C Part 6.22). The terms and conditions applicable to the ROFR are also specified in GT&C section 22 of NGPL's tariff.

⁹ NGPL February 20, 2020 Answer at 4.

¹⁰ Natural Gas Pipeline Company of America LLC, FERC Gas Tariff, General Terms & Conditions, Part 6.22, PreGranted Abandonment & Rollover Rights, 0.0.0.

¹¹ 15 U.S.C. § 717c(d).

and section 154.207 of the Commission's regulations¹² by requiring BP to take NGPL's SW option to retain capacity subject to a ROFR.

6. In the May 2020 Order, the Commission denied BP's Complaint. The Commission determined that NGPL did not violate its tariff by requiring BP to continue its existing firm transportation, FT-SW service, through the ROFR process.¹³

7. On June 25, 2020, BP sought rehearing. On July 8, 2020, NGPL filed a motion for leave to answer and answer to BP's rehearing request. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits answers to a request for rehearing. Accordingly, we deny NGPL's motion and reject its answer to BP's rehearing request.

II. Rehearing Request

8. On rehearing, BP challenges the Commission's finding in the May 2020 Order that NGPL did not violate its tariff and Commission policy by requiring BP to continue its existing FT-SW service by exercising the ROFR process. Specifically, BP contends that by rejecting BP's argument that the SW option was not a part of the original contract, the Commission: (1) failed to explain why the SW option is essential to BP's existing firm service; (2) inappropriately broadened the definition of "service" under the contract; (3) offered shippers no option to discontinue the SW option; (4) undermined price signals that should encourage pipelines to build new infrastructure; and (5) ignored auction postings, tariff provisions, and Commission precedent.

A. SW Option as Essential

9. BP disputes the Commission's finding that the SW option is an essential part of its service and argues that the Commission failed to support this determination.¹⁴ BP contends that the SW option only provides shippers a right to nominate to alternate points on a secondary out-of-path priority and the SW option does not equate to added capacity.¹⁵

10. Next, BP asserts that the May 2020 Order improperly bundles FT service with the SW option, in conflict with the Commission's policy prohibiting bundling of optional

¹² 18 C.F.R. § 154.207 (2020).

¹³ May 2020 Order, 171 FERC ¶ 61,166 at P 16.

¹⁴ Rehearing Request at 6.

¹⁵ *Id.* at 6-7.

services.¹⁶ While BP acknowledges that the Commission's prohibition of bundling optional services is rooted in the context of the capacity auction, BP nevertheless argues that the Commission does not explain why the bundling of services was permitted in the ROFR context.¹⁷

B. Change in Service

11. BP argues that the Commission's determination that the ROFR includes both the FT service and SW option broadens the term "service" beyond the right to continue a shipper's capacity rights as defined by its primary receipt and delivery points.¹⁸ By connecting the ROFR to "service," BP contends the Commission allows pipelines to act as monopolies, forever tying shippers to a system.¹⁹

12. BP argues that NGPL's tariff language does not include anything that would apply the ROFR language beyond the primary capacity path and does not reflect any requirement to retain an optional service allowing shipper nominations to alternate points. BP states that this interpretation is consistent with Order No. 637, which dictates that the ROFR is for a long-term customer to retain its capacity provided that it is willing to match the best competing bid for the capacity.²⁰ BP contends that removal of the SW option from BP's basic transportation service would have resulted in no reduction in its reserved capacity level.²¹

13. BP argues that *Williams Natural Gas Co.*,²² which the Commission cited in the May 2020 Order,²³ is inapposite. BP contends that there, the Commission did not permit a shipper to change its capacity by disaggregating firm no-notice service into two

¹⁶ *Id.* at 8 (citing *Nat. Gas Pipeline Co. of Am.*, 85 FERC ¶ 61,202, at 61,839 (1998), *order on reh'g and clarification*, 87 FERC ¶ 61,033 (1999)).

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ *Id.* at 11.

²¹ *Id.* at 12.

²² *Williams Nat. Gas Co.*, 65 FERC ¶ 61,221, at 62,013 (1993), *reh'g denied*, 66 FERC ¶ 61,315 (1994).

²³ May 2020 Order, 171 FERC ¶ 61,166 at P 14.

separate firm transportation/storage services. BP differentiates *Williams Natural Gas Co.*, because there, the shipper requested a modification that would result in impacts to usage, the underlying transportation and storage capacity levels, and would involve a change from one rate schedule to another. Here, however, BP argues it is not changing its capacity, but instead is trying to discontinue the optional SW service, which allows BP to make out-of-path transportation nominations.²⁴

14. BP asserts that the SW option only offers delivery point flexibility and not capacity because it does not guarantee such service will be scheduled to flow because it has a lower nomination priority (secondary out-of-path), below primary and secondary in-the-path nominations.²⁵

15. BP contends that the May 2020 Order departs from a prior focus of protecting a shipper's right to existing capacity and expands the definition of "historic service" to apply to more than a shipper's existing capacity level.²⁶ BP asserts that the May 2020 Order's determination transforms the ROFR into a mechanism that harms a shipper by forcing it to pay for an economically inefficient service adder it no longer wants or needs.

16. BP argues that the May 2020 Order departs from Commission precedent by failing to consider the fact that BP is forced to continue the SW option. BP contends that in *NUI Corp. v. Fla. Gas Transmission Co.*,²⁷ the Commission considered the harm caused to NUI Corporation (NUI) by the Commission's decision to restrict NUI from reducing its contract demand.²⁸ Specifically, BP notes that although the Commission denied NUI the ability to selectively reduce its contract demand, the Commission considered NUI's ability to release capacity it does not need. Here, however, BP contends that it cannot release the capacity from the SW option because it becomes invalid once any portion of the FT service capacity is released.²⁹ Thus, BP argues it cannot defray the cost of the SW option through a capacity release.³⁰

²⁴ Rehearing Request at 9-10.

²⁵ *Id.* at 12-13.

²⁶ *Id.* at 12.

²⁷ 92 FERC ¶ 61,044, at 61,120 (2000).

²⁸ Rehearing Request at 13.

²⁹ *Id.*

³⁰ *Id.* at 13-14.

C. No Option to Discontinue SW Option

17. BP argues that the Commission erred in the May 2020 Order by providing no path for a shipper to discontinue the SW option, once it has been elected.³¹ BP states that the ROFR process is the opportune time to allow a shipper to discontinue the SW option because the shipper is entering a new service agreement.³²

18. BP contends that the Commission has erred by interpreting the ROFR mechanism in a way that enhances a pipeline's monopoly power by tying an optional service to a basic service and forcing a shipper to retain an economically inefficient service option it no longer needs, contrary to Order Nos. 636 and 637 (which protect captive customers from pipelines' monopoly power while permitting them to continue receiving the service upon which they rely).³³

D. Price Signals

19. BP argues that the Commission has undermined the price signals that should encourage pipelines to build new infrastructure by allowing a pipeline to include factors other than capacity levels in the ROFR process.³⁴

20. BP states that capacity on NGPL's system is typically well-subscribed and, as a result, the secondary out-of-path nomination flexibility offered through the SW option has not been scheduled to flow.³⁵ BP contends that in a normal scenario, this would

³¹ *Id.* at 14.

³² *Id.* at 15.

³³ *Id.* (citing *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 (cross-referenced at 59 FERC ¶ 61,030), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (cross-referenced at 60 FERC ¶ 61,102), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in part, vacated and remanded in part*, *United Dist. Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997); *see also Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 (2000) (cross-referenced at 90 FERC ¶ 61,109) (Order No. 637)).

³⁴ *Id.*

³⁵ *Id.* at 17.

signal NGPL to expand its system and add capacity, but here, BP claims that NGPL has no incentive to build new capacity.³⁶

21. BP also argues that the May 2020 Order is inconsistent with *Natural Gas Pipeline Company of America*,³⁷ where the Commission rejected NGPL's proposal to factor in revenues for the rolled-in analysis, finding there should be no guaranteed revenues to this service option.³⁸ Further, BP contends that the May 2020 Order conflicts with Order No. 637's references for why pipelines may only charge cost-based rates.³⁹

E. Auction Postings, Tariff Provisions, and Commission Precedent

22. BP argues that the May 2020 Order ignores auction postings, tariff provisions, and Commission precedent, all of which suggest that BP should be permitted to remove the SW option.⁴⁰

23. First, BP contends that NGPL's auction posting states that "[t]he current capacity holder [BP] may elect to match the bid(s) either with or without the SW option."⁴¹ Next, BP points to NGPL's tariff, stating that "[i]n comparing bids hereunder or in assessing rollovers under Section 22.2, Natural shall not take into account as increasing the value of any bid any separate amount paid, or which a Shipper agrees to pay, for the LN and/or SW service option under Rate Schedule FTS, FFTS or FTS-G."⁴² BP asserts that the Commission incorrectly determined that this language ensures that a historical shipper without the SW option will not be compelled to add the SW option but does not allow shippers with the SW option to discontinue that option. Finally, BP argues that

³⁶ *Id.*

³⁷ *Nat. Gas Pipeline Co. of Am. LLC*, 170 FERC ¶ 61,147, at P 28 (2020) (stating that "[b]ecause there is no guarantee that a firm shipper will elect the SW Option and the negotiated rate is higher than the currently effective maximum recourse reservation rate, we find for the purposes of the roll-in analysis it is appropriate to use [NGPL's] currently effective maximum recourse reservation rate to calculate the project's projected revenues").

³⁸ Rehearing Request at 16.

³⁹ *Id.* at 16-17.

⁴⁰ *Id.* at 17.

⁴¹ *Id.* (citing Complaint, Exh. 2).

⁴² *Id.*

Commission precedent states that “companion services cannot be considered in a pipeline’s NPV calculations.”⁴³

III. Commission Determination

24. As described in the May 2020 Order, a ROFR permits a long-term firm transportation shipper with the right to *renew* its expiring contract to continue its *existing* service by matching the highest bid.⁴⁴ The historical, existing contract between BP and NGPL is for FT-SW service, and it is only for FT-SW service that BP has any ROFR rights.

25. On rehearing, BP claims it should be able to exercise the ROFR without including the SW option. We disagree. The ROFR only permits a shipper to renew the historical service, not change the character of its service.⁴⁵ BP alleges that it is not changing the character of the service because the SW option is a mere “companion service” which does not confer pipeline capacity, and only involves nomination to secondary delivery points. We are unpersuaded by this position. The SW option is an essential part of the contractual historical FT-SW service and BP’s FT-SW service confers upon BP additional capacity rights. As the Commission explained in the May 2020 Order, an FT-SW contract confers upon BP the right to secondary point access outside the zones for which it paid reservation charges.⁴⁶ Mere FT service shippers lack such rights and are limited to using secondary points within the rate zones associated with primary path movements. Reflecting these additional capacity rights, BP pays a higher maximum reservation rate for this service,⁴⁷ which is set by a formula that is specific for the FT-SW service and does not apply to FT service.⁴⁸ As explained in Order No. 637, Commission policy prohibits a shipper from exercising the ROFR to retain only select geographic

⁴³ *Id.* (citing *Nat. Gas Pipeline Co. of Am.*, 85 FERC ¶ 61,202, at 61,839 citing *N. Nat. Gas Co.*, 84 FERC ¶ 61,154, at 61,839 (1998)).

⁴⁴ May 2020 Order, 171 FERC ¶ 61,166 at PP 14-15.

⁴⁵ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,394 (2000) (“The Commission’s ROFR regulations provide that a shipper whose contract is expiring is entitled to renew that contract by matching the highest bid made for the capacity up to the maximum rate.”).

⁴⁶ May 2020 Order, 171 FERC ¶ 61,166 at P 15.

⁴⁷ *Id.* P 16.

⁴⁸ NGPL, FERC Gas Tariff, Part 5.2, Rate Schedule FTS, 0.0.0, Section 6.2(a)(3).

portions of its capacity.⁴⁹ BP's right under the FT-SW service contract to access out-of-path secondary points adds a geographic portion to the FT-SW service shippers capacity,⁵⁰ and FT-SW service shippers therefore cannot exercise a ROFR for service that does not include these FT-SW service rights to out-of-path secondary points. We also are not persuaded by BP's argument that the Commission's holdings in the May 2020 Order preclude a shipper from discontinuing the SW option. BP is not obligated to exercise the ROFR and renew its contract. If BP wishes to discontinue the SW option, it could compete for available firm capacity on the open market for a new contract, without exercising the ROFR or seeking the SW option.⁵¹ Thus, the SW option is not "bundled" or "tied" with FT service as it alleges. As a result, BP's arguments about being "forced" to continue the SW option and lack of ability to defray costs by releasing capacity are inapposite.⁵²

26. Likewise, we disagree with BP that the Commission's finding in the May 2020 Order will generate improper price signals that should otherwise encourage pipelines to build new infrastructure in the marketplace. Requiring the SW option to be part of the original contract is consistent with the Commission's posting and bidding requirements and policies for ROFRs and will ensure that NGPL's available capacity will be contracted to the shipper that values it the most. It therefore will not unacceptably distort pricing signals for new infrastructure. Nor will the Commission's determination result in rates that are not reflective of costs, as BP contends, because BP is not obligated to enter into a new contract opting for SW service.

27. BP seeks here precisely what the ROFR is not intended to do—preferential treatment for an existing shipper over a new shipper for different service.⁵³ As to the

⁴⁹ Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,339.

⁵⁰ Although this secondary point access is at a lower priority than primary point access, the ability to make such an out-of-path movement is unique to FT-SW shippers.

⁵¹ This ensures that existing capacity is awarded to those shippers that value it the most.

⁵² We further find that, contrary to BP's allegations, the determination in the May 2020 Order is consistent with *Nat. Gas Pipeline Co. of Am. LLC*, 170 FERC ¶ 61,147 at P 28. There, the Commission found that there is no guarantee that a firm shipper will elect the SW option and similarly here, we do not find that BP is obligated to exercise the ROFR and select the SW option.

⁵³ Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,339.

following issues, BP's arguments on rehearing restate the arguments in its Complaint that were addressed by the Commission in the May 2020 Order:

- general capacity auction procedures and the rollover and ROFR rights;⁵⁴
- consistency with NGPL tariff language;⁵⁵ and
- NGPL's capacity auction notice.⁵⁶

28. Accordingly, for the reasons previously articulated as to each of these matters, we deny BP's request for rehearing.

The Commission orders:

In response to BP's request for rehearing, the May 2020 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁴ Compare Complaint at 2-3 with Rehearing Request at 3, 8; see May 2020 Order, 171 FERC ¶ 61,166 at P 18.

⁵⁵ Compare Complaint at 7, 10-11 with Rehearing Request at 17-20; see May 2020 Order, 171 FERC ¶ 61,166 at P 16.

⁵⁶ Compare Complaint at 9-10 with Rehearing Request at 17; see May 2020 Order, 171 FERC ¶ 61,166 at P 17.