UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

CenterPoint Energy Gas Transmission Company Docket Nos. RP96-200-098
RP96-200-099

ORDER ON REHEARING, REQUEST FOR
CLARIFICATION AND COMPLIANCE FILING

(Issued May 23, 2003)

1. This order addresses several filings made in response to a Commission order dated January 24, 2003 (January 24 order) in the captioned proceeding.[1] The January 24 order conditionally accepted a volumetric negotiated rate agreement between CenterPoint Energy Gas Transmission Company (CEGT)[2] and TPS Dell, L.L.C. (Dell). However, the order disallowed certain aspects of a marketing services arrangement between those two parties and required CEGT to file copies of all agreements between CEGT and Dell related to the transportation of natural gas. On February 24, 2003, CEGT filed the documents required by the order and committed to include in CEGT's revenue crediting mechanism all interruptible and short term firm transportation revenue received from the sale of capacity not being used by Dell. Requests for rehearing were filed by CEGT and Dell. A request for clarification was filed by the Missouri Public Service Commission (MoPSC). The Commission denies the requests for rehearing by CEGT and Dell and the request for clarification by MoPSC. CEGT's compliance filing is accepted effective February 25, 2003.

Background

2. Dell is a partnership that is constructing a gas fired electric generating plant located in the state of Arkansas. Under a precedent agreement dated November 14, 2001, (November 14 agreement) which included a negotiated rate agreement, CEGT agreed to

[1] CenterPoint Energy Gas Transmission Company, 102 FERC ¶ 61,059 (2003).

[2] Formerly known as Reliant Energy Gas Transmission Company.

provide a 4,740 horsepower compressor station and appurtenant facilities on Line J of its system in Jackson County, Arkansas for Dell's proposed plant. On June 4, 2002, the Commission granted a certificate permitting the construction of the proposed facilities.[3] The Commission estimated that the incremental cost of the facilities would be approximately $12 million and that the revenues to be generated over the first seven years of the related Transportation Services Agreement would be approximately $45.3 million. Therefore, the Commission authorized CEGT to roll in the cost of the expansion in its next general rate case. However, the Commission found certain early termination rights that the parties had included in their negotiated rate agreement to be impermissible material deviations from CEGT’s Form of Service Agreement. CEGT was ordered to remove such provisions from the proposed Negotiated Rate Agreement. The November 14 agreement was renegotiated to that extent and was approved by an unpublished letter order issued September 27, 2002.

3. During the latter part of 2002 Dell determined that economic conditions required it to defer commercial operation of the new electric generating plant. A revised negotiated rate agreement executed on December 23, 2002 was filed with the Commission on December 27, 2002. The parties agreed that Dell would retain the capacity but be obligated to pay reservation charges only if it took physical deliveries of gas from CEGT. Further, Dell would pay CEGT a flat negotiated fee up front in return for CEGT serving as Dell's marketer to release the capacity to others. For a two-year period (with seven year extension at Dell’s option), Dell would pay to CEGT any and all proceeds from the sale of capacity released to other shippers. If the seven-year option was exercised, CEGT would receive 30 percent of the proceeds of sales of released capacity. The reservations charges to be paid beginning in 2005, and continuing for seven years, were also reduced.

4. In reviewing CEGT's filing, the Commission concluded that the arrangement whereby Dell paid only for volumes actually delivered was permissible, but that the capacity release arrangement between the parties was not. The Commission reasoned that since Dell was not paying a reservation charge during the first two years of the revised agreement, it had no capacity to release. The Commission also agreed with the Missouri Public Service Commission (MoPSC) that the marketing arrangement undercut the revenue crediting mechanism contained in CEGT's tariff, and as such discriminated against CEGT's recourse shippers. That mechanism, which was included in settlement of CEGT's (NorAm's) Docket Nos. RP94-343-013 and -014 rate case requires revenues for its interruptible and short-term firm service to its shippers.[4] Therefore, the Commission required that any interruptible or short term firm revenues earned from the sale of Dell’s

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[3] Reliant Energy Transmission Company, 99 FERC ¶ 61,271 (2002).

[4] NorAm Gas Transmission Co., 74 FERC ¶ 61,052 (1996).

capacity during the two-year period when the capacity was effectively under CEGT's control would be subject to the revenue crediting mechanism. The Commission also required CEGT to file all agreements between CEGT and Dell related to the transportation of natural gas, including any marketing agreements related to the sale of capacity.

5. On February 24, 2003, CEGT filed to comply with the Commission's January 24 order. The filing included a commitment to credit all revenue derived from the resale, on an interruptible or short term firm basis, of Dell's capacity to CEGT's revenue crediting mechanism subject to CEGT's request for rehearing. CEGT seeks to have these revenues treated as compensation for the marketing services it performs for Dell. CEGT also submitted copies of all agreements between CEGT and Dell. These included the November 14, 2001 Precedent Agreement, a Firm Transportation Service Agreement, a Rate Agreement, and a Letter Agreement dated July 3, 2002, and an Amendment to the Firm Transportation Agreement and a Marketing Services Agreement dated December 23, 2002. The compliance filing disclosed for the first time the amount of the one-time fee included in the marketing agreement - $8 million.

The Requests for Rehearing and Clarification

6. On rehearing, CEGT and Dell contend the Commission erred in rejecting the capacity release marketing aspect of the negotiated rate agreement. CEGT describes the choices it believes Dell faced once it decided to defer operation of its generation plant. CEGT states that Dell could have taken no action, permitting its transportation agreement to become effective as of January 1, 2003 and attempting to mitigate the expense of monthly reservation charges during the deferral period by exercising its capacity release rights. Alternatively, Dell could have exercised its buyout option included in the November 14 Precedent Agreement whereby Dell could terminate the transportation agreement in exchange for reimbursing CEGT for the costs of the expansion. Finally, Dell could seek an amendment to the agreement that would be mutually beneficial to both parties.

7. CEGT and Dell assert that the marketing arrangement was a mutually beneficial agreement that permitted Dell to reduce its exposure while obtaining greater certainty than if Dell had attempted to continue to pay a reservation charge and to release its capacity. CEGT argues that the Commission has held that pipelines may handle the release of capacity for a shipper and that the parties may negotiate a fee for that service. CEGT asserts that the Commission has stated that no one fee is appropriate and that the Commission will not insert itself in the negotiations of the parties.[5] It further states that

[5] Citing Kern River Gas Transmission Co., 62 FERC ¶ 61,191 at 62,271 (1993).

Dell retains ownership of the capacity and that the arrangement reflects the type of agency relationship contemplated by the Commission's prior decisions.

8. CEGT claims that reversing the Commission's prior order will have two benefits. It will reduce Dell's risk and administrative burdens since CEGT will market Dell's capacity. Second, it will afford CEGT an opportunity to recover the $5 million difference between the $8 million Dell will pay under the revised agreement and the $13 million that CEGT would have otherwise earned over a two-year period. CEGT concludes that absent the arrangement, there is little incentive for CEGT to have renegotiated Dell's contract.

9. MoPSC filed a request for clarification of the January 24 order. MoPSC does not seek to have the Commission reverse its acceptance of the volumetric rate Dell obtained as part of its renegotiated contract. However, it requests the Commission to clarify that this arrangement is appropriate only due to the unique circumstances involved here, i.e., that the operation of Dell's plant has been postponed. MoPSC asserts that in other cases involving volumetric rates the Commission has required some minimum throughput levels as a condition of approving a volumetric rate. It argues that absent such a commitment, volumetric rates become a super-interruptible service under which a shipper obtains a more senior claim on capacity but without having to make any financial commitment. MoPSC asserts such an arrangement discriminates against interruptible transportation shippers. It concludes the fact that the Commission required all short term firm revenues to be credited to CEGT's revenue crediting mechanism demonstrates that volumetric negotiated rate agreements are analogous to interruptible service.

Discussion

10. The Commission denies rehearing. The fact that CEGT will capture 100 percent of any revenue generated from the sale of released capacity and that Dell bears no risk during the first two years of the arrangement are the factors that place the so-called marketing agreement outside the scope of the Commission's capacity release program. CEGT correctly states that the Commission has permitted pipelines to market capacity on behalf of their shippers and collect a fee and that the Commission will not ordinarily intrude in those negotiations. However, the context of those statements is important. The Commission has allowed pipelines to negotiate fee-based arrangements for marketing of capacity the shipper wishes to release. The Commission's prior orders assume that if a shipper is dissatisfied with the fee or the quality of the service it can readily shift to another agent to provide a marketing service or perform the marketing service itself. This is possible because there is no tie between the marketing service to be performed and the terms of the transportation service agreement that defines that capacity to be released.

11. However, in the instant case the marketing arrangement is an essential term for obtaining release from the obligations of an existing transportation service agreement and retaining the capacity under the terms of another. As such, there is no ability for the shipper to shift to another provider of the service if the pipeline should fail to perform. Under competitive circumstances and the presence of a reservation fee, the shipper paying a reservation charge would be unlikely to pay an agent a fee of over 60 percent of the reservation charge (as is the case here), and agree to let the agent retain all revenues from marketing the capacity for two years as there would be no benefit to the shipper. The marketing arrangements previously accepted by the Commission occurred in a commercial context that is entirely different than the one presented here.

12. Therefore the instant situation is inconsistent with the Commission orders assuming there is an agency relationship that is subject to competitive pressure in negotiating a fee, that the shipper retains liability for the capacity, and that the benefits of the sale of the retained capacity flow to the shipper.[6] The practical reality of the proposal at issue here is that the capacity would be reassigned to CEGT, together with a one time payment of $8 million, in exchange for a release from liability for a two-year period. The situation here arose because, as CEGT itself implies, Dell has only limited leverage to persuade CEGT to reduce Dell's obligation below the buyout terms contained in the agreement the parties negotiated before Dell decided to postpone the project.

13. Independently of the practical nature of the renegotiated agreement between CEGT and Dell, the relationship between volumetric rates and the Commission's capacity release program was explicitly addressed in Order No. 636-B. The Commission stated:

> Because small shippers paying a one-part volumetric rate are not paying a reservation charge to reserve the capacity, the Commission clarifies that they cannot release that capacity under the capacity release mechanism.[7]

Order No. 636-B further states in footnote 63:

> The capacity release mechanism was designed so that payments from a replacement shipper will be credited to a releasing shipper's reservation charge. See [18C.F.R.] section 284.243(f).[8]

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[6] Kern River Gas Transmission Co., 62 FERC ¶ 61,191 at 62,271 (1993).

[7] Order No. 636-B, 61 FERC ¶ 61,272 at 61,998 (1992).

[8] Id.

Given this explicit statement, the result in the January 24 order is consistent with long-standing Commission policy reflected Order No. 636-B. While the Commission does not normally interfere in fee negotiations, it will do so when the "fees" reflect a transaction that is not congruent with the Commission's policies on capacity release transactions.

14. A second important factor is that the instant case involves a negotiated rate agreement and as such must not contain provisions that unduly discriminate against recourse shippers by impairing the rights such shippers would have under the generic provisions of the pipeline's tariff. In light of this general concern, it is important to evaluate what would have happened to the capacity at issue here absent the negotiated rate agreement before the Commission on rehearing. As CEGT notes in its rehearing request, Dell could exercise its right to be released from its agreement with CEGT upon payment of CEGT's out of pocket costs.[9] In that case, the capacity would revert to CEGT and CEGT could attempt to market it as either firm or interruptible transportation. Alternatively, if Dell retained its capacity, it could try to release that capacity in competition with CEGT's interruptible capacity.

15. If CEGT obtains the capacity, any short terms revenues will be subject to the revenue crediting mechanism. If Dell markets its capacity (or works with an agent that is subject to competitive pressure), the competition between Dell's capacity and that of the pipeline should result in downward pressure on rates. Either result benefits the recourse shipper and exemplifies how competition between pipeline and shipper capacity is a central goal of the capacity release program in Order No. 636-A.[10] Under the transaction here both benefits are lost. By returning effective control of Dell's capacity to CEGT, the agreement vitiates this element of the capacity release program as the capacity becomes subject to the pipeline's almost exclusive control without the benefit of the revenue crediting mechanism or competition between Dell and CEGT.

16. For the reasons just discussed the Commission concludes that the transaction at issue here does not involve a "marketing fee," but a partial reassignment of capacity to the pipeline for a two-year period subject to Dell's right to use it on a volumetric basis. In contrast, when Dell begins to operate its plant on a full time basis, at that point it must begin to pay a monthly reservation charge, albeit at a lower level given its earlier payment of $8 million. In essence, Dell has reduced its exposure through the payment of a partial

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[9]These are estimated at about $11 million: $8 million for the mainline expansions and about $3 million for the lateral and related valves and meters to serve Dell's plant.

[10]See Order No. 636-A, FERC Stats. & Regs. [Regulations Preambles], ¶ 30,950 at 30,553, 30,554, and 30,556. (1992).

exit fee in the amount of $8 million and has also retained the right to its capacity by permitting CEGT to recover whatever short term value that capacity may have.

17. CEGT itself states that this was the essential consideration for it to participate in the transaction. Moreover, by not forcing Dell out of its contract, CEGT also benefits by retaining a long term contract for capacity that has greater potential value than the risk of having to market the capacity over the nine-year period now covered by the parties' amended agreement. For these reasons if short-term firm or interruptible revenue result from this arrangement, CEGT's revenue crediting mechanism must apply. Otherwise, CEGT has almost total control over the capacity at the expense of recourse shippers that are not part of the CEGT-Dell negotiated rate transaction and obtains long term commercial benefits as well. This result is unduly discriminatory and will be rejected.

18. The Commission will also deny MoPSC's request for clarification. Volumetric rate transactions are a well-accepted practice under the Commission's negotiated rate policy statement and are acceptable absent the minimum volume requirement that MoPSC says should always be required. While the absence of such minimum volumes is appropriate in the circumstances here, as MoPSC acknowledges, the Commission will not limit the availability of negotiated rate transactions in the manner MoPSC has suggested.

The Commission orders:

(A) The requests for rehearing and clarification are denied for the reasons stated in the body of the order.

(B) CEGT's compliance filing in Docket No. RP96-200-098 is accepted, effective February 25, 2003.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.