

103 FERC ¶ 61,234
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP

Docket No. RP00-535-007

ORDER ON CLARIFICATION AND REHEARING

(Issued May 23, 2003)

1. On March 4, 2003, the Commission issued an order on a compliance filing¹ in this proceeding on Texas Eastern Transmission, LP's (Texas Eastern) compliance with Order No. 637.² Among other things, the Commission found in the March 4 order that Texas Eastern must revise its proposed provisions to eliminate the restriction of the right-of-first-refusal (ROFR) to service agreements with uniform service levels.³ Texas Eastern requests clarification or, in the alternative, rehearing of this requirement. For the reasons discussed below, the Commission denies this request. This order is in the public interest because it secures to shippers the regulatory right-of-first-refusal (ROFR) for eligible contracts.

Background

¹102 FERC ¶ 61,262 (2003).

²Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs. (July 1996 - December 2000) ¶ 31,091 at 31,337 (Feb. 9, 2000); Order on Rehearing, Order No. 637-A, FERC Stats. & Regs. (July 1996 - December 2000) ¶ 31,099 (May 19, 2000); Order on Rehearing, Order No. 637-B, 92 FERC ¶ 61,062 (July 26, 2000); aff'd in part and remanded in part, Interstate Natural Gas Association of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002); Order on Remand, 101 FERC ¶ 61,127 (2002).

³102 FERC ¶ 61,262 Ps 15 and 18 (2003). The proposed provisions that the Commission required Texas Eastern to revise were contained in Section 1.35A, Second Revised Sheet No. 507, and Section 3.13(B)(8), First Revised Sheet No. 528.

2. Briefly, the right of first refusal developed as follows. As part of its adoption of open-access transportation, the Commission provided in Order No. 436, and then in Order Nos. 500-H and 500-I, automatic pre-granted abandonment for all firm transportation service under Part 284 blanket certificates. But the court found that pre-granted abandonment left customers inadequately protected. American Gas Association v. FERC, 912 F.2d 1496, 1518 (D.C. Cir. 1990). Subsequently, in Order No. 636,⁴ the Commission adopted the ROFR to provide customers protection from the exercise of pipeline monopoly power at the end of a contract period. In adopting the ROFR, the Commission assumed that shippers' contracts expired unless they contained an evergreen or rollover provision and that such provisions gave shippers the opportunity to renew their contracts, but did not automatically extend their contracts.⁵ The Commission adopted the ROFR in the context of the creation of an active market for pipeline capacity and viewed it as a balancing of the needs of captive customers against those of other customers who might pay more for the service.⁶ In reviewing Order No. 636, the court stated that to make a finding of public convenience and necessity that would support pre-granted abandonment under Section 7, the Commission had to make appropriate findings that existing market conditions and regulatory structures protect customers from pipeline market power. United Distribution Companies v. FERC, 88 F.3d 1105, 1139 (D.C. Cir. 1996) (UDC) (the appeal of Order No. 636). It found that the ROFR provided this protection. The court stated that the "basic structure of the right-of-first-refusal mechanism provides the protections from pipeline market power required for pre-granted abandonment under § 7." UDC, 88 F.3d at 1139.

⁴Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13267 (April 16, 1992), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 30,939 at 30,446-48 (April 8, 1992); order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), FERC Statutes and Regulations, Regulations Preambles January 1991- June 1996 ¶ 30,950 (August 3, 1992); order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); reh'g denied, 62 FERC ¶ 61,007 (1993); aff'd in part and remanded in part, United Distribution Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996); order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

⁵Order No. 636, ¶ 30,939 at 30,445 n.252.

⁶Order No. 636 at 30,450-451.

3. In Order No. 636, the Commission defined long-term firm service for purposes of the ROFR as service for more than one year.⁷ In Order No. 637, the Commission revised its definition of long-term firm transportation and redefined it as service for twelve consecutive months or more. In Order No. 637-A, the Commission made one exception to this requirement.⁸ It recognized that some service is only offered by a pipeline on a seasonal basis, that is, for a period of less than twelve consecutive months and also that long-term firm customers may not have alternatives for such seasonal service. Consequently, the Commission determined in Order No. 637-A that seasonal service under a multi-year contract is also eligible for an ROFR. The Commission's current ROFR regulation, 18 C.F.R. § 284.221 (d)(2)(ii) (2002), thus provides that to be eligible to exercise the right of first refusal, "the firm shipper's contract must be for service for twelve consecutive months or more . . . except that a contract for more than one year, for a service which is not available for 12 consecutive months, would be subject to the right of first refusal."

4. It came to the Commission's attention that Texas Eastern's tariff did not provide shippers the ROFR rights created by the Commission's policies and regulations in Order Nos. 636 and 637.⁹ Texas Eastern's service agreements provide that its firm shippers' contracts continue beyond their initial term on an indefinite basis, until either the shipper or the pipeline gives the required notice of termination. The notice of termination must often be given two or five years in advance.¹⁰ Texas Eastern's tariff provided that a shipper only had ROFR rights if the pipeline serves notice of termination of a contract. If the shipper terminated the contract, or the contract expires of its own terms, the tariff provided that the shipper does not have ROFR rights. Unless Texas Eastern chose to terminate the contract, a firm shipper would not have the opportunity to review a third party offer accepted by the pipeline and determine whether to match that offer for all, or a volumetric portion, of its capacity.

5. The Commission established a tariff investigation pursuant to Section 5 of the Natural Gas Act (NGA) to determine whether Texas Eastern's current tariff affords its

⁷Order No. 636 at 30,445.

⁸Order No. 637-A, ¶ 31,099 at 31,630-31,631.

⁹The background of this case is given in detail in the Order on Investigation and is incorporated here by reference.

¹⁰Article II of Texas Eastern's firm service agreements provides that service will be provided for an initial term and then will continue on a term to term basis. See Notification Period column, Exhibit 5, Answer to Show Cause.

shippers the minimum ROFR protection and issued an order to show cause why its existing tariff should not be modified to afford a shipper the traditional right to declare, at a time period close to the expiration date of the contract, whether or not it wishes to renew the contract.¹¹

6. In its Order on Investigation, which was issued November 22, 2002, the Commission found that Texas Eastern's tariff was contrary to Order Nos. 636 and 637¹² and to its regulation at 18 C.F.R. § 284.221(d) (2002) because it did not permit shippers to exercise an ROFR when they terminated their contracts or when a contract expired of its own terms. The Commission stated that the Commission's regulations expressly grant ROFR rights to firm shippers paying the maximum rate on the expiration of a contract for more than one year or the termination of such a contract and have no provision limiting the ROFR to situations in which the pipeline terminates the contract. The Commission explained that, as the ROFR has been implemented, a reasonable period before a contract ends, normally six months to a year, a shipper would provide notice to the pipeline stating whether or not it was interested in renewing its contract. At that juncture, the shipper would not have to make a final decision, unless it was certain it had no further interest in renewing its contract. In that limited circumstance, the pipeline would be free to market the capacity without the existing shipper having any ROFR protection. Conversely, if the shipper expressed any interest in renewing the contract, the pipeline would solicit third party bids for the capacity. The pipeline would then present the best offer received to the shipper, which would then be afforded a window of opportunity to match the full amount or a lesser amount of the capacity.

7. The Commission held that Texas Eastern's tariff was inconsistent with this approach. It found Texas Eastern's tariff does not give a shipper any opportunity to express an interest in renewing its contract depending upon what offers from third parties it might have to match if the shipper terminates the contract or the contract expires of its own terms. Thus,

¹¹Order Granting Rehearing in Part, Denying Rehearing in Part, and Instituting Investigation, Algonquin Gas Transmission Co. Docket No. RP00-533-001, Texas Eastern Transmission Corp. Docket No. RP00-535-001, 94 FERC ¶ 61,383 (2001).

¹²Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,091 at 31,335-42 (February 9, 2000); order on reh'g, Order No. 637-A, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,099 at 31,629-47 (May 19, 2000); order denying reh'g, Order No. 637-B, 92 FERC ¶ 61,062 (2000); Interstate Natural Gas Association of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002) (INGAA); order on remand, 101 FERC ¶ 61,127 (2002).

the Commission found the shipper on Texas Eastern must make a final decision whether to give up its capacity without any opportunity to review the bids of third parties to see if it wants to retain the capacity at the rate offered by third parties. Consequently, Texas Eastern's ROFR tariff provisions were found to be unjust and unreasonable. The Commission required Texas Eastern to remove these provisions from its tariff and from its contracts and specified the just and reasonable ROFR provisions that Texas Eastern must include in its tariff and contracts. The Commission required Texas Eastern to revise its tariff and contracts by including provisions that permit long-term firm shippers to have and exercise an ROFR when a contract expires on its own terms and when a shipper gives notice to terminate a contract, as well as when the pipeline gives notice to terminate the contract.

8. On December 20, 2002, Texas Eastern filed a request for clarification or rehearing of the Order on Investigation. On May 7, 2003, the Commission issued an order denying Texas Eastern's request.¹³ The Commission affirmed that Texas Eastern's ROFR provisions violate the Commission's regulations by denying shippers an ROFR when they terminate their contracts. It also affirmed its requirement that Texas Eastern must adopt just and reasonable provisions that provide an ROFR for shippers when they terminate their contracts and when the contracts expire of their own terms, as well as when the pipeline terminates contracts. The Commission held it was applying its existing ROFR policies and regulations to Texas Eastern, not new ones. The Commission discussed the purposes of the ROFR including permitting the reevaluation of capacity in the marketplace when a contract expires or is terminated. It found that Texas Eastern's ROFR provisions did not allow for such reevaluation, contrary to Order No. 636. The Commission found it had made the necessary Section 5 findings with regard to Texas Eastern's ROFR provisions. It also noted that other provisions Texas Eastern had proposed with regard to the posting of capacity subject to an ROFR for bids eleven months prior to the effective date of the termination or partial reduction of capacity under an ROFR agreement are more in keeping with the manner in which the Commission has implemented the ROFR as they permit the shipper to determine within six months to a year of when the contract ends whether or not it is interested in renewing the contract.

9. On December 6, 2002, Texas Eastern filed proposed tariff sheets to comply with the Commission's Order on Investigation. Among other things, Texas Eastern proposed to define a service agreement with ROFR rights an agreement with uniform service levels. It proposed tariff language in Section 1.35A on Second Revised Sheet No. 507, which stated that an "ROFR Agreement shall mean a service agreement . . . contracted at the maximum rate . . . for uniform service levels."

¹³Order on Rehearing, 103 FERC ¶ 61,135 (2003).

10. Texas Eastern proposed similar language in its December 6 compliance filing in Section 3.13(B)(8) on First Revised Sheet No. 528. The proposed language stated: "Pipeline shall tender and Customer shall execute within 20 days of receipt, a new service agreement reflecting service for all or part of the contractual quantity at uniform service levels" The proposed language in Section 3.13(B)(8) applies when the pipeline does not receive any bids or there are no acceptable bids and the pipeline and the customer cannot agree upon the terms and conditions under which the customer will be entitled to retain its capacity. Texas Eastern proposed that, in these circumstances, the customer could elect, five months before the termination date, to have a new service agreement for "all or part of the contractual quantity at uniform service levels" for each consecutive month of the contract term to be specified by the customer. The rate would be the maximum rate, although Texas Eastern and the customer could agree on a discount.

11. On March 4, 2003, the Commission issued an order on Texas Eastern's December 6 compliance filing.¹⁴ The Commission accepted Texas Eastern's proposed tariff sheets, subject to modifications, effective March 4, 2003. The Commission rejected Texas Eastern's proposed uniform service levels. The Commission found that restricting the ROFR to agreements with uniform service levels was not required to comply with the Order on Investigation and, moreover, was inconsistent with the Commission's regulations and ROFR policies.¹⁵ It directed Texas Eastern to revise its proposals to eliminate the restriction of ROFR benefits based on uniform service levels.

12. On April 3, 2003, Texas Eastern made a request for clarification or rehearing of the March 4 Order on Compliance Filing. As discussed below, the Commission denies the request.

¹⁴Order on Compliance Filing, 102 FERC ¶ 61,262 (2003).

¹⁵102 FERC ¶ 61,262 P 18 (2003).

Discussion

Request for Clarification

13. Texas Eastern asks the Commission to clarify that its rulings in Order Nos. 637 and 637-A require that an ROFR must only be provided for contracts with uniform service levels.¹⁶ In its Request, Texas Eastern regards long-term firm service as service that consists of a uniform service level. Thus, according to Texas Eastern, if a shipper takes a non-uniform level of service, it has shortened the duration of its uniform level of service to fewer than twelve consecutive months. Texas Eastern argues further that the contract is thus no longer a contract for long-term firm service and is not entitled to an ROFR.

14. The Commission denies Texas Eastern's request for clarification. First, the Commission rejects Texas Eastern's definition of long-term firm service. For ROFR purposes, as it does generally, the Commission regards service as defined by the rate schedule under which a shipper has its contract. In addition, for ROFR purposes, the Commission has defined long-term firm contracts as those contracts that are for "service for twelve consecutive months or more,"¹⁷ with one exception for services that are only offered on a seasonal basis. The Commission has not included uniform levels of service in its requirements for an ROFR. In fact, in Order No. 637-A, the Commission expressly found that "[l]ong-term maximum rate contracts with increased CDS for seasons of peak demand meet the standards for ROFR protection and therefore are covered by the ROFR."¹⁸ Thus, in NUI Corporation (City Gas Company of Florida Division) v. Florida Gas Transmission Company,¹⁹ the Commission treated a contract with contract demand that

¹⁶Texas Eastern asserts, without citation, that the Commission provided that where a customer needed "the contractual protection of a ROFR," it could "take service at a uniform level" and "pay the additional expense associated with service that qualified for a ROFR." Request for Clarification, or in the Alternative, Rehearing at 4. This statement is both inaccurate and false. The ROFR is a regulatory right, rather than a contractual right negotiated between the parties like an evergreen clause. In addition, the Commission made no statement in Order Nos. 636, 637, or 637-A that a shipper must take service at a uniform level to have a ROFR.

¹⁷18 C.F.R. § 284.221(d)(2)(ii) (2002).

¹⁸Order No. 637-A, ¶ 31,099 at 31,631.

¹⁹92 FERC ¶ 61,044 (2000). The issue in this case was whether the shipper must reduce its contract demand by making uniform reductions in the contract demand for each

(continued...)

varied in each of four seasons, October, November-March, April, and May-September as entitled to ROFR protection.

15. Nor are uniform levels of service relevant to the purpose of the ROFR. The purpose of the ROFR has been and remains to protect the existing service of long-term firm customers, particularly captive customers. The Commission has placed no limitations concerning level of service or MDQ on what the existing service of long-term firm customers may be. If a long-term firm customer's level of service was 500 Dt/day during the summer months and 1,000 Dt/day during the winter months, then the ROFR protects 500 Dt/day during the summer months and 1,000 Dt/day during the winter months. The Commission repeatedly stated in Order Nos. 636, 637, and 637-A that the purpose of the ROFR is to protect the long-term firm shippers' service at the expiration of their contracts.²⁰ The Commission never limited that protection to contracts with uniform levels of service throughout the year, and it never required that the level of service be uniform throughout the year to obtain ROFR protection.

Request for Rehearing

16. Texas Eastern requests that the Commission relinquish its requirement that Texas Eastern eliminate the restriction of ROFR benefits based on uniform service levels. Texas Eastern reiterates that in firm contracts for non-uniform service levels, the shipper has chosen a duration of less than twelve consecutive months for the service consisting of a uniform service level and thus has chosen a short-term service. Texas Eastern asserts there is no exception in Order No. 637-A for service that is fewer than twelve consecutive months, unless it is service that is only offered seasonally. Consequently, according to Texas Eastern, "the contract should not qualify for ROFR rights where the service is available on a uniform, year-round basis" and the shipper has chosen not to take it on a uniform basis year-round.²¹ Texas Eastern insists its definition of service eligible for an ROFR does not impose a limitation on the ROFR.

¹⁹(...continued)

season or could selectively reduce the contract demand for some seasons and not others. The Commission held the shipper could reduce its contract demand, but must do so by making uniform reductions in the contract demand for each season. The reductions in each contract demand, as permitted by the pipeline, could be the same percentage or the same absolute amount.

²⁰See, for example, Order No. 636, ¶ 30,939 at 30,448-30,452; Order No. 637, ¶ 31,091 at 31,335-31,342; Order No. 637-A, ¶ 31,099 at 31,629-31,647.

²¹Request for Clarification, or in the Alternative, Rehearing at 7.

17. The Commission rejects Texas Eastern's arguments for rehearing for the same reasons it has rejected Texas Eastern's arguments for clarifications. Texas Eastern has grafted new provisions onto the Commission's ROFR regulation and policies. There is no requirement that to obtain an ROFR, a long-term firm contract must be for uniform service levels. It is sufficient if service under the contract for a firm rate schedule is for twelve consecutive months or more or if it is a multi-year contract for seasonal service.²² In addition, as stated above, the purpose of the ROFR is to protect existing service at the expiration or termination of a contract. The Commission has not limited the existing service that will be protected by an ROFR.

18. Texas Eastern also argues that eliminating its uniform service level requirement will have several adverse consequences including upsetting the allocation of risk between the pipeline and shippers by putting more risk for paying for pipeline facilities on the pipeline and preventing other shippers who might want uniform levels of long-term firm capacity from obtaining that capacity. As the Commission has stated previously, such arguments are collateral attacks on the ROFR which should have been made in the Order Nos. 636 and 637 proceedings and need not be considered in this proceeding.²³ The Commission has already taken into consideration the consequences of requiring an ROFR for all long-term firm service contracts and has already approved the resulting allocation of risk and of capacity in the Order No. 636 and 637 proceedings in which the ROFR was promulgated. No further change in the allocation of risk or capacity will occur because of the ruling in this order.

19. The Commission affirms its determination that Texas Eastern's requirement for uniform levels is contrary to the Commission's ROFR regulations and policies and must be removed from Texas Eastern's proposed tariff provisions.

²²This service must also now be at the maximum rate.

²³Order on Investigation, 101 FERC ¶ 61,215 P 22 (2002).

The Commission orders:

Texas Eastern's request for clarification or rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.