



conditions and regulatory structures protect customers from pipeline market power.<sup>3</sup> 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."<sup>4</sup>

3. Transco's filing in this proceeding brought to the Commission's attention that Transco's tariff did not provide shippers the ROFR rights created by the Commission's policies and regulations in Order Nos. 636 and 636-A. Transco's tariff provides that a shipper has ROFR rights only if the pipeline serves notice of termination of a contract. If the shipper terminates the contract, or the contract expires of its own terms, the tariff provides that the shipper does not have ROFR rights. Unless Transco chooses 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.

4. In Texas Eastern,<sup>5</sup> the Commission stated that the Commission's regulations expressly grant ROFR rights to firm shippers paying the maximum rate on either the expiration or termination of a contract for more than one year, regardless of how the termination occurs. Accordingly, the Commission found unjust and unreasonable a tariff provision that limited the ROFR to situations in which the pipeline terminates the contract. The Commission explained that, as the ROFR has been implemented, within 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 whether to renew its contract, 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, who would then be afforded a window of opportunity to match the full amount or a lesser amount of the capacity.

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<sup>3</sup>United Distribution Companies v. FERC, 88 F.3d 1105, 1139 (D.C. Cir. 1996) (UDC) (the appeal of Order No. 636).

<sup>4</sup>UDC, 88 F.3d at 1139.

<sup>5</sup>101 FERC ¶ 61,215 (2002) (Texas Eastern) (finding that similar tariff provisions were contrary to Order Nos. 636 and 637 and the Commission's regulations at 18 C.F.R. § 284.221(d) (2002)), clarification granted and reh'g denied, Texas Eastern Transmission, LP, 103 FERC ¶ 61,135 (2003).

5. In the November 27 Order, the Commission found that Transco's ROFR tariff provisions limiting ROFR rights to the situation where the pipeline terminated the contract were directly contrary to Commission policy and regulations, as clarified in Texas Eastern, and, thus, were unjust and unreasonable. Pursuant to Section 5 of the NGA, the Commission ordered Transco to adopt just and reasonable tariff provisions permitting shippers to have and to exercise a ROFR when they terminate a contract and when the contract expires, as well as when the pipeline terminates the contract, consistent with Texas Eastern.<sup>6</sup> The Commission also directed Transco to adopt just and reasonable tariff provisions permitting shippers to determine whether to request a continuation or a volumetric reduction in service after reviewing the best party bid, consistent with Texas Eastern.<sup>7</sup> The Commission deferred resolution of conversion buyer ROFR right issues to the proceedings in Docket Nos. RP01-245, et al.

6. On December 27, 2002, Transco filed proposed, revised tariff sheets<sup>8</sup> to comply with the November 27 Order. On that same date, Transco filed a request for rehearing of the November 27 Order.

## **II. Notice of Filing and Pleadings**

7. Notice of Transco's filing was published in the Federal Register, 68 Fed. Reg. 767 (2003), with comments, interventions and protests due on or before January 6, 2003.

8. The KeySpan Delivery Companies (KeySpan) and the Process Gas Consumers Group (Process Gas) filed timely protests. On January 8, 2003, Cherokee County Cogeneration Partners, L.P. (Cherokee) and Northeast Energy Associates and North Jersey Energy Associates (collectively, Energy Associates) filed a motion to intervene and protest out of time. On January 9, 2003, Algonquin Gas Transmission Company and Texas Eastern Transmission Corporation (collectively, DEGT Pipelines) filed a motion to intervene out of time.

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), we will grant the untimely, unopposed motions to intervene of Cherokee, Energy Associates and DEGT Pipelines given their interest in the proceeding

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<sup>6</sup>Texas Eastern at P 15.

<sup>7</sup>Texas Eastern at P 16.

<sup>8</sup>Second Revised Fourth Revised Sheet No. 374O and First Revised Sheet No. 374O.00 to its FERC Gas Tariff, Third Revised Volume No. 1.

and the absence of any undue prejudice or delay. We find good cause to accept the untimely protest of Cherokee and Energy Associates for these reasons as well.

10. On January 21, 2003, Transco filed a motion to file an answer and an answer in response to the protests. Under Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), no answer may be made to a protest or answer unless otherwise ordered by the decisional authority. We will allow Transco's answer in this case because it has provided information that has aided us in understanding the matters at issue in this proceeding. The protests and answer are addressed below.

### **III. Discussion**

#### **A. Request for Rehearing**

##### **1. Description of Pertinent Existing ROFR Provisions**

11. Article IV of Transco's pro forma service agreement for FT service provides that its firm shippers' contracts continue beyond their initial term on an indefinite basis, until either the seller or the buyer gives the required notice of termination.<sup>9</sup> The pro forma service agreement leaves blank the length of the notice of termination period. The parties must determine the length of this notice period in their contract negotiations.

12. In pertinent part, Section 48.1 of the GT&C indicates that the ROFR process is initiated by the seller (i.e., Transco) providing written notice of its intent to terminate the service agreement to the buyer (i.e., shipper) at least 180 days prior to the expiration of the service agreement. Section 48.7 of the GT&C states that if the shipper provides notice to terminate service to Transco then the shipper will forfeit its ROFR. Under Section 48.1 of the GT&C, upon receipt of Transco's notice to terminate, the shipper can provide written notice of whether it prefers to retain all or a portion of its service entitlement. The shipper's notice must be provided at least 120 days prior to the expiration of the service agreement.

13. Under Section 48.2, upon receipt of the shipper's "notice to continue service," Transco posts the shipper's capacity at least 90 days prior to the expiration of the service agreement. Section 48.4 explains how the buyer can match the best bid.

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<sup>9</sup>See Form of Service Agreement (For Use Under Seller's Rate Schedule FT), Substitute Fifth Revised Sheet No. 437; see also Section 44 of the General Terms and Conditions (GT&C), Fourth Revised Sheet No. 374I (Form of Service Agreement).

## **2. Shippers' Initiation of ROFR Process Upon Notice of Termination**

### **a. Argument**

14. Transco argues that the Commission erred in determining that the ROFR provision in Transco's tariff, which does not permit a shipper to initiate the ROFR process when a shipper provides notice to terminate its contract, is contrary to the Commission's ROFR regulation and policy and is unjust and unreasonable. Specifically, it states that in the November 27 Order the Commission did not cite to a specific regulation that expressly requires that a shipper may initiate the ROFR process when it provides notice to terminate its contract. Transco also contends that the ROFR, as first promulgated in Order No. 636 and carried forward on a narrower basis in Order No. 637, was designed solely to protect consumers subject to automatic pre-granted abandonment by permitting them to retain their capacity at the end of the term of their contracts, under certain circumstances. It concludes that, as a result, the Commission is not able to cite to a specific portion of Order Nos. 636 and 637 in which the Commission expressly requires the ROFR process to be initiated when a shipper provides notice of termination. Transco also asserts that the Commission fails to explain how a customer who provides notice to terminate its contract is a "captive customer" in need of ROFR protection. It argues that the Commission has failed to adequately demonstrate that an overriding "public necessity" exists to support the unilateral modification of contracts entered into by Transco and its customers.

15. It also states that the Commission's previous review and approval of ROFR provisions in several pipeline tariffs, including Transco's, which do not provide a shipper ROFR rights when the shipper provides notice to terminate its contract demonstrate that the Commission's ROFR regulation and policy do not require a pipeline to allow a shipper to initiate the ROFR process when the shipper terminates its contract. It argues that the Commission directive that Transco modify its tariff is unsupported and unreasonable because the Commission has not explained how it can now reject the previously approved ROFR provision which does not permit shippers to initiate the ROFR process when they provide notice of termination.

### **b. Commission Determination**

16. The Commission denies Transco's request for rehearing. The Commission is requiring Transco to revise its ROFR provisions because they are contrary to the Commission's regulations which require that a shipper have a ROFR when its contract

expires or is terminated. Transco's tariff does not give a long-term, maximum rate shipper a ROFR upon expiration of its contract, if the termination occurs pursuant to a notice of termination by the shipper.

17. Transco suggests that the Commission's ROFR regulation and policies do not require that shippers be given ROFR rights when they choose to terminate contracts pursuant to an evergreen provision such as that found in Transco's service agreements with its customers, as indicated in the pro forma service agreement in Transco's tariff. Transco also asserts that the Commission fails to explain how a customer who provides notice to terminate its contract is a "captive customer" in need of ROFR protection. Transco's reliance on its evergreen clauses as an adequate reason not to give a shipper a ROFR is also directly contrary to the Commission's holding in Order No. 637 that shippers should always have the regulatory right of first refusal given by Section 284.221(d) of the regulations, regardless of any evergreen clauses in their contracts.<sup>10</sup> In its order responding to the court's remand of Order No. 637 in INGAA v.FERC, 285 F. 2d 18 (D.C. Cir. 2002), the Commission clarified that the regulatory ROFR is not self-implementing, so that, where a pipeline's tariff is inconsistent with this requirement, it must be modified under NGA Section 5. However, the order on remand did not modify the substantive holding of Order

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<sup>10</sup>Regulation 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 31,341 (February 9, 2000) ("Under the right of first refusal conveyed by Section 284.221(d) of the regulations, shippers always have this regulatory right of first refusal, regardless of the provisions of their contract. . . . [A] pipeline and its shippers may agree to include a right of first refusal . . . evergreen clause in their contracts. If a contractual right of first refusal . . . or evergreen clause would allow the shipper to exercise a right of first refusal in situations where the regulatory right would not apply, the shipper may rely on its contractual rights in lieu of the regulatory right of first refusal. The choice is for the shipper to make. But, the shipper always has, at a minimum, the regulatory right of first refusal."); order on reh'g, Order No. 637-A, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,099 (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). See also North American Energy Conservation, Inc. v. CNG Transmission, 88 FERC ¶ 61,255 at 61,809 (1999), cited by Order No. 637.

No. 637 that shippers eligible for a regulatory ROFR must be accorded that ROFR regardless of any evergreen clause in their contracts.<sup>11</sup>

18. The Commission's ROFR policies as adopted in Order No. 636 have had several purposes and one of those purposes has been to permit the reevaluation of capacity in the marketplace when a contract expires or is terminated. This has always been a major purpose of the ROFR. In Order No. 636, the Commission envisioned a vibrant market for transportation capacity. It adopted the ROFR in this context.<sup>12</sup> The ROFR provided the customer with a means of retaining its capacity, but only if it could match competitive bids from third parties in the marketplace. It also gave existing shippers an opportunity to reduce their contract demands, if they no longer needed a portion of their capacity. The Commission never intended the ROFR to lock customers into contracts or to freeze amounts of subscribed capacity and keep them off the market indefinitely. In fact, the Commission stated in Order No. 636-A that "the intent of this provision is to ensure against the inefficient or unnecessary retention of capacity at the expiration of the contract."<sup>13</sup>

19. Transco's ROFR provisions, combined with its evergreen provisions, prevent the reevaluation of capacity at the expiration or termination of a contract. The evergreen clause in Transco's tariff does not give the shipper the same degree of protection provided by the ROFR required by the Commission's regulations. While the evergreen clause may be said to protect the customer from losing existing service it needs, the clause has a tendency to tie the shipper to Transco's system by hindering its ability to give up unneeded capacity, for example through the right to make volumetric reductions in its contract

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<sup>11</sup>Regulation of Short-Term Natural Gas Transportation Services, Regulation of Interstate Natural Gas Transportation Services, 101 FERC ¶ 61,127 at P 23-25, 33-37 (2002).

<sup>12</sup>Pipeline 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 30,450-451 (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 at 30,628-632 (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, UDC, 88 F.3d 1105; order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

<sup>13</sup>Order No. 636-A at 30,628.

demand upon contract termination accorded as part of the ROFR.<sup>16</sup> This is because Transco's evergreen provision provides that the contract is automatically renewed, while other tariff provisions provide that a shipper would lose its ROFR rights if it terminated the contract, and Transco's tariff leaves it free to insist on an extremely long notice period.<sup>17</sup> Since the only way shippers can terminate contracts is through such advance notices and since they will lose their ROFR rights with respect to all of their capacity if they do terminate their contract, they must make a final decision whether to terminate their contract demands possibly long before the termination will actually take place.<sup>18</sup> However, it is likely to be difficult for the shipper to project its capacity needs if far in advance. Therefore, the loss of ROFR rights for the terminating shipper coupled with the potentially long advance notice requirement discourages or significantly delays any reduction in contract demand.

20. By contrast, as discussed in the November 27 Order and not contested by Transco on rehearing, under the ROFR as implemented by the Commission,<sup>19</sup> a shipper need not make its final decision whether to retain all or a portion of its capacity until close to the time its contract terminates. Under the ROFR, 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

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<sup>16</sup>Order No. 637 at 31,341. Order No. 637-A at 61,646-7.

<sup>17</sup>The notice period is subject to negotiation, and captive customers may not be in a position to negotiate a reasonable notice period. See Form of Service Agreement.

<sup>18</sup>Transco's evergreen provision is different from that considered in Order No. 636. In Order No. 636, the Commission assumed that evergreen clauses gave shippers the opportunity to renew their contracts upon expiration of the contract terms and that shippers must give notice to renew the contract. The Commission stated that "[r]oll-over' and 'evergreen' clauses permit the customer at its option to extend the term of the contract. . . ." Order No. 636 at 30,445 n. 252 (emphasis added). Under that type of evergreen clause, contracts would still have set termination dates which would trigger a shipper's ROFR rights. By contrast, under Transco's evergreen provision, shippers will never get ROFR rights unless the pipeline terminates the contract.

<sup>19</sup>Transwestern Pipeline Co., 61 FERC ¶ 61,332 at 62,269-70 (1992); El Paso Natural Gas Co., 63 FERC ¶ 61,139 at 61,944-46 (1993).

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. That window of opportunity would be relatively close to the time the contract would expire. Thus, the ROFR gives the shipper an opportunity to decide whether and how much of its capacity to retain, not only in light of the current market value of the capacity as shown by the third party bids, as discussed in the November 27 Order, but also in light of a current assessment of its current capacity needs.

21. Transco's ROFR provisions are thus contrary to Order No. 636 because they do not allow reevaluation of shippers' needs for capacity based upon current circumstances and they decrease competition in the market. Consequently, Transco's tariff provisions denying shippers a ROFR right if they terminate a contract are contrary to one of the major purposes of the ROFR as adopted by the Commission in Order No. 636. The Commission's discussion of capacity reallocation when a ROFR right is exercised is a repetition of the discussion in Order No. 636-A,<sup>20</sup> not a new rationale for the ROFR. The Commission is applying existing ROFR regulations and policies to Transco in this proceeding, not new ones.

22. In the November 27 Order, the Commission acknowledged that it had erred in previously approving Transco's ROFR provisions because they did not provide for a ROFR when a shipper terminated its contract but stated that it was not obliged to continue that error once discovered.<sup>21</sup> The Commission stated that it may always reexamine the terms and conditions of pipeline service under Section 5 of the NGA.<sup>22</sup> We reassert that based upon a reexamination of the Transco's tariff ROFR provisions and the finding that the provisions are unlawful, for the reasons explained above, the provisions prohibiting a shipper from having and exercising a ROFR right when the shipper terminates a contract must be removed from Transco's tariff.

## **2. Shippers' Review of Third Party Bids**

### **a. Argument**

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<sup>20</sup>Order No. 636-A at 30, 628, 30,630, and 30,632. See also Order No. 636 at 30,450 (ROFR process compares the needs of existing customers to those of competitors for capacity).

<sup>21</sup>101 FERC at P 24.

<sup>22</sup>Id. (citing *Transcontinental Gas Pipe Line Corporation*, 94 FERC ¶ 61,362 at 62,321-22 (2001) (finding under Section 5 that a storage service must be unbundled even though it had been approved as a bundled service in Transco's restructuring proceeding)).

23. Transco argues that the Commission erred in determining that Transco's existing ROFR tariff provisions do not permit the shipper to find out the best third party bid for capacity before the shipper must decide how much, if any, of the capacity it wishes to retain, even when Transco gives notice that it is terminating the contract. Specifically, it states that, under Transco's existing ROFR provisions, when Transco terminates service subject to ROFR, Section 48.4 of the GT&C of Transco's tariff provides that the shipper has fifteen days from receiving notification of the best third party bid to inform Transco of how much capacity the shipper wishes to retain. It requests that the Commission find that, when Transco terminates service subject to the ROFR, Transco's existing tariff provisions permit the shipper to learn the best third party bid for capacity before the shipper determines whether to retain the capacity.

**b. Commission Determination**

24. The November 27 Order acknowledges that, under Section 48.4, the shipper has fifteen days after receiving notification of the best third party bid to notify Transco whether it will match that bid.<sup>23</sup> However, in the November 27 Order, the Commission found that Section 48.4 did not address its concerns. The Commission stated as follows:

Section 48.2 of the GT&C<sup>24</sup> provides that the auction designed to elicit bids that the shipper can match, and thus permits it to retain capacity through its ROFR, does not commence until after the shipper provides notice to Transco under Section 48.1 that it wishes to continue to receive all or a portion of its service. Accordingly, under the existing tariff, even when Transco terminates service, the shipper does not have the right to find out what the best third party bid for its capacity is before it must decide how much, if any, of its capacity it wishes to retain. The shipper cannot be expected to make a reasonable business decision about how much, if any, capacity it wishes to retain without knowing what the price of the capacity will be. This existing

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<sup>23</sup>Id. at P 26.

<sup>24</sup>Section 48.2 of the GT&C states that

Upon receipt of Buyer's notice to continue service, Seller shall post on its TRANSIT service at least ninety (90) days prior to the expiration of the service agreement all relevant provisions pertaining to such service agreement and solicit, for a minimum of fifteen (15) and a maximum of thirty (30) days following such posting, bids for service.

procedure is contrary to our holding in Texas Eastern<sup>25</sup> that the shipper must be permitted to determine whether to continue to receive all or a lesser amount of the capacity after the best third party bid has been obtained. The shipper should not have to express its intention to match all or a portion of the capacity until after it has been notified of the best bid in Section 48.4.<sup>26</sup>

25. We reiterate that for these reasons Transco's current ROFR tariff provisions are directly contrary to the Commission's policy and, thus, are unjust and unreasonable. Transco must adopt just and reasonable tariff provisions permitting shippers to determine whether to request a continuation or a volumetric reduction in service after reviewing the best third party bid, consistent with Texas Eastern.

## **B. Compliance Filing**

### **1. Description of Filing**

26. In response to the November 27, 2003 order, Transco has revised GT&C Sections 48.1(b), 48.2 and 48.7. Revised Section 48.1(b)<sup>27</sup> provides shippers with the option of

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<sup>25</sup>Texas Eastern at P 16.

<sup>26</sup>Section 48.4 of the GT&C states, in pertinent part, that "Buyer shall have the right to continue to receive service by notifying Seller in writing within fifteen (15) days of receiving Seller's notification of the best bid, that Buyer agrees to match the best bid."

<sup>27</sup>Proposed Section 48.1(b) of the GT&C states as follows:

For firm transportation service performed under a Part 284 Rate Schedule with a primary term of one (1) year or more and not subject to Natural Gas Act Section 7(b) abandonment requirements, Seller or Buyer may provide written notice of its intent to terminate the firm service agreement between Seller and Buyer consistent with the notice of termination provisions set forth in such service agreement. If Buyer provides notice of termination to Seller and Buyer may desire to continue to receive all or a portion of its service entitlement under such service agreement, then Buyer must include in its notice an express, affirmative statement that Buyer may desire to continue to receive all or a portion of its service entitlement under the service agreement. If Seller provides notice of termination to Buyer, and Buyer may desire to continue to receive all or a portion of its service entitlement under such service agreement, then Buyer must provide within fifteen (15) days of

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exercising a ROFR when either Transco or the shipper gives notice to terminate a service agreement consistent with the notice provisions in the individual service agreement. Upon such notice by either party, the provision provides that the ROFR posting and bidding procedures are initiated provided that the shipper gives Transco timely notice that the shipper may desire to continue all or a portion of its service. If Transco provides notice of termination to the shipper and the shipper may desire to continue to receive all or a portion of its service entitlement, then, within fifteen days of receipt of Transco's notice, it is proposed that the shipper must provide written notice to Transco that it may desire to continue to receive all or a portion of the entitlement. When a shipper provides such notice, it is proposed that the shipper have the option, after completion of the posting and bidding process under Section 48, to decide to continue to receive all or a portion of its service or to terminate its service, in accordance with the provisions of Section 48.

27. The revisions to Section 48.2 set forth the minimum timeline for posting capacity that becomes available under the ROFR provisions.<sup>28</sup> The revisions to Section 48.7 clarify that in the event Transco or a shipper provides notice to terminate service and the shipper

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<sup>27</sup>(...continued)

receipt of Seller's notice, written notice to Seller that Buyer may desire to continue to receive all or a portion of its service entitlement under such service agreement. If Buyer provides timely notification to Seller that it may desire to continue to receive all or a portion of its service entitlement, then the provisions set forth below shall apply. If Buyer fails to provide timely notification to Seller that it may desire to continue to receive all or a portion of its service entitlement, then the provisions of Section 48.7 shall apply.

<sup>28</sup>Proposed Section 48.2 of the GT&C states as follows:

Upon receipt of Buyer's notice pursuant to Section 48.1(b), Seller shall post on its TRANSIT service at least one hundred fifty (150) days, but no more than one year, prior to the expiration of the service agreement all relevant provisions pertaining to such service agreement; provided, however, if the service agreement provides for a notice of termination period that is less than one hundred eighty (180) days, then Seller shall post the relevant provisions relating to such service agreement within 30 days from the date Seller receives Buyer's notice pursuant to Section 48.1(b). Seller shall solicit, for a minimum of fifteen (15) and a maximum of thirty (30) days following such posting, bids for service.

does not provide Transco with timely notice of its desire to continue all or a portion of its service, then the shipper shall have forfeited its ROFR.<sup>29</sup>

28. Transco requests an effective date of February 1, 2003 for the proposed tariff sheets.

**2. Time Allotted for Shipper to Respond in the Event of Notice of Termination**

**a. Argument**

29. KeySpan and Process Gas protest Transco's proposed revision in Section 48.1(b) of the GT&C to the amount of time allotted for shippers to respond in the event of a notice of termination. KeySpan argues that shippers should continue to have at least 60 days<sup>30</sup> to provide notice to Transco of whether they wish to continue to receive service in the event of a notice of termination, rather than the proposed 15 days. Process Gas request that Transco be required to provide shippers a minimum of 30 days to respond to a notice of termination. Process Gas asserts that the 30 day time period is consistent with the practice of many interstate natural gas pipelines<sup>31</sup> and has been affirmed by the Commission.<sup>32</sup>

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<sup>29</sup>Proposed Section 48.7 of the GT&C states as follows:

In the event a Buyer or Seller provides notice to terminate service under a service agreement and Buyer does not notify Seller in accordance with Section 48.1(b) that Buyer may desire to continue to receive all or a portion of its service entitlement under such service agreement, then Buyer shall have forfeited its right of first refusal provided herein.

<sup>30</sup>Under existing Section 48.1 of the GT&C, Transco is required to give shippers notice of termination of any service agreement subject to the ROFR at least 180 days prior to the expiration of the service agreement. In turn, the shippers are required to give Transco notice of their desire to continue to receive service at least 120 days prior to the expiration of the service agreement. Therefore, shippers have at least 60 days to provide Transco with notice that they wish to continue to receive service.

<sup>31</sup>Citing Columbia Gas Transmission Corporation, FERC Gas Tariff, Second Revised Volume No. 1, Sixth Revised Sheet No. 280, GT&C Section 4.1(b); Columbia Gulf Transmission Company, FERC Gas Tariff, Second Revised Volume No. 1, Fifth Revised Sheet No. 144, GT&C Section 4.1(b); Natural Gas Pipeline Company of America, FERC Gas Tariff, Sixth Revised Volume No. 1, First Revised Sheet No. 323A, GT&C Section

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### b. Response

30. Transco notes that its revised Section 48.1(b) does not obligate a shipper to decide within 15 days whether to commit to a long-term firm transportation agreement but only requires a shipper to indicate that it "may desire to continue to receive all or a portion of its service entitlement under such service agreement." It argues that 15 days is a reasonable time for a shipper to notify Transco that it wishes to initiate the ROFR process and that lengthening the 15 day notice period increases the possibility of the original contract which is subject to the ROFR expiring before the ROFR process is complete (*i.e.*, leaving Transco at risk for firm unsubscribed capacity). It also contends that a longer notice period, as proposed by KeySpan and Process Gas, would unnecessarily delay the completion of the ROFR process.

### c. Commission Determination

31. Neither KeySpan or Process Gas has demonstrated that Transco's proposal does not comply with the November 27 Order or is otherwise unreasonable. The revised Section 48.1(b) does not obligate a shipper to decide within 15 days whether to commit to a long-term firm transportation agreement but only requires a shipper to indicate that it "may desire to continue to receive all or a portion of its service entitlement under such service agreement." The 15 day notice period is a reasonable amount of time for a shipper to notify Transco that it wishes to initiate the ROFR process and lengthening the 15 day notice period increases the possibility of the original contract which is subject to the ROFR

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<sup>31</sup>(...continued)

22.3(b) ("To exercise the [ROFR], Shipper must provide Natural with notice of its intent to do so in a form specified by Natural and must submit such notice on or before that later of: (i) 6 months prior to expiration of the existing Agreement; or (ii) **one month after receiving written notice from Natural that the Shipper may utilize these [ROFR] procedures . . .**") (emphasis added); Texas Gas Transmission Corporation, FERC Gas Tariff, First Revised Volume No. 1, GT&C 32.4(a) ("when either party provides notice of its intent to terminate the service agreement at the end of the primary term, or any succeeding extension of the primary term, **within 30 days of the issuance of such notice, Customer must notify Pipeline that it wishes to exercise its [ROFR] . . .**") (emphasis added).

<sup>32</sup>Citing ANR Pipeline Co., 100 FERC ¶ 61,214, P 6-7 (2002) (letter order approving revised tariff sheet modifying ROFR provisions) and ANR Pipeline Company, FERC Gas Tariff, Second Revised Volume No. 1, Second Revised Sheet No. 161A.03, GT&C Section 22.3(b).

expiring before the ROFR process is complete (*i.e.*, leaving Transco at risk for firm unsubscribed capacity). The Commission finds that the proposed 15 day period in which the shipper is to notify Transco that it "may desire" to continue to receive all or a portion of its service entitlement under its service agreement is reasonable. Therefore, we reject KeySpan's and Process Gas' protests.

### **3. Presumption of Shipper's Termination of Service**

#### **a. Argument**

32. Cherokee and Energy Associates argue that the proposed ROFR provisions place the onus on a shipper to affirmatively retain its ROFR rights by providing notice that the shipper may desire to continue to receive service. They claim that, absent a notice to continue service and the ROFR process, there is a presumption in the proposed tariff provisions that the shipper seeks to terminate service and its ROFR right and is deemed to have terminated its service pursuant to GT&C Section 48.7. They argue that this presumption is inconsistent with the Commission's intent, as stated in the November 27 Order, that a shipper's ROFR right would not elapse until the shipper made an affirmative statement that it had no further interest in renewing its contract. Cherokee and Energy Associates assert that the tariff provisions should be modified, in compliance with the November 27 Order and consistent with the outcome in Docket No. RP03-23, to indicate that a shipper's ROFR rights will continue until a shipper makes an affirmative statement of termination.

#### **b. Response**

33. Transco points out that the November 27 Order<sup>33</sup> recognized that a shipper would provide notice to the pipeline indicating whether or not it was interested in renewing its contract. It also notes that Section 48.1 of Transco's current FERC-approved tariff and the tariffs of other pipelines already require the shipper to initiate the ROFR process.<sup>34</sup> Transco concludes, therefore, that it is consistent with Commission policy to require a shipper to indicate whether it may want to retain its capacity, as set forth in revised Section 48.1(b). Transco also argues that the proceeding in Docket No. RP03-23 which involved

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<sup>33</sup>Citing November 27 Order at P 25.

<sup>34</sup>Citing Texas Gas Transmission Corp., FERC Gas Tariff, First Revised Volume No. 1, GT&C § 32.4(a).

the format of the form to be used in capacity release transactions is not on point with the issue Cherokee and Energy Associates raise here.

**c. Commission Determination**

34. The November 27 Order noted that the Commission has held that within a reasonable period before the 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.<sup>35</sup> We find, therefore, that it is consistent with Commission policy for Transco to require a shipper to indicate whether it may want to retain its capacity, as set forth in revised Section 48.1(b). Furthermore, we note that the holding in Docket No. RP03-23 is not applicable here since that proceeding addressed issues arising from the capacity releases<sup>36</sup> rather than the notice of termination at issue in this proceeding. Cherokee and Energy Associates have failed to demonstrate that Transco's proposed revisions are unreasonable or contrary to Commission policy; therefore, their protest is rejected.

The Commission orders:

(A) Transco's request for rehearing is denied, as discussed in the body of this order.

(B) Transco's Second Revised Fourth Revised Sheet No. 374O and First Revised Sheet No. 374O.00 to its FERC Gas Tariff, Third Revised Volume No. 1 are accepted, to become effective as of the date of issuance of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>35</sup>November 27 Order at P 25.

<sup>36</sup>See Columbia Gas Transmission Corporation, 101 FERC ¶ 61,179 at P 7-9 (2002).