

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. RP00-535-008

ORDER ON REHEARING

(Issued July 11, 2003)

1. The Commission issued an Order on Clarification and Rehearing on May 7, 2003¹ clarifying and denying rehearing of its previous order² with respect to Texas Eastern Transmission, LP's (Texas Eastern) implementation of the right-of-first-refusal (ROFR) for eligible firm shippers³ in its tariff. In the same order, the Commission denied Transcontinental Gas Pipe Line Corporation's (Transco) motion to intervene late so that Transco did not become a party to this proceeding and dismissed Transco's rehearing request. In this order, the Commission denies Transco's request for rehearing of its late intervention.

2. This order is in the public interest because it makes final determinations concerning ROFR rights for eligible shippers on Texas Eastern.

Background

3. On September 5, 2000, Algonquin Gas Transmission Co. (Algonquin) and Texas Eastern Transmission Corp. (Texas Eastern) made filings under Order No. 637 in Docket Nos. RP00-533-000 and RP00-535-000 that sought, among other things, to revise their tariffs to restrict the ROFR to shippers paying the maximum rate and to permit shippers to

¹Order on Clarification and Rehearing, 103 FERC ¶ 61,135 (2003).

²Order on Investigation, 101 FERC ¶ 61,215 (2002).

³In order to have a ROFR, a shipper must be a firm shipper with a contract for twelve months or more (or a multi-seasonal contract if the service is not offered for twelve consecutive months) and must pay the maximum rate for the service. 18 C.F.R. § 284.221(d) (2003).

terminate a volumetric portion of their capacity and exercise ROFR rights with respect to the portion they retained.

4. On October 5, 2000, the Commission issued orders on these filings.⁴ In reviewing these filings, the Commission found that the pipelines' existing tariffs, which had been approved under Order No. 636, appeared to be inconsistent with their proposed tariff provisions and with Order Nos. 636 and 637 because they provided that shippers could only exercise the ROFR when the pipeline served notice of termination and not when the shipper served notice of termination. The orders stated that the tariff provisions should be consistent in allowing the ROFR to apply whether the customer or the pipeline provides notice of termination and directed the pipelines to file revised tariff sheets providing for a ROFR when the customer gives notice of termination as well as when the pipeline gives notice of termination.

5. Algonquin and Texas Eastern requested rehearing of the October 5, 2000 orders. They argued that the Commission's requirements were contrary to its holdings in their Order No. 636 compliance filings, that they unlawfully expanded the ROFR rights of shippers, and that they constituted an inappropriate fundamental change in their contractual relationship with their shippers.

6. On March 29, 2001, the Commission issued one order on the rehearing requests in both proceedings.⁵ The Commission affirmed that the pipelines' existing tariff provisions appeared to be inconsistent with the ROFR protection mandated in both Order Nos. 636 and 637. The Commission noted that its regulations require pipelines to provide existing eligible firm shippers with ROFR protection upon the expiration of those contracts. Under this approach, the Commission stated, a shipper would provide notice to the pipeline stating whether or not it was interested in renewing its contract a reasonable period before the contract ends, normally six months to a year. The Commission noted that, at that juncture, the shipper would not have to make a final decision. If the shipper expressed any interest in renewing the contract, the pipeline would solicit third party

⁴Algonquin Gas Transmission Co., 93 FERC ¶ 61,014 (2000); Texas Eastern Transmission Corp., 93 FERC ¶ 61,016 (2000).

⁵Order 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). (There was a further order on rehearing--Order Denying Clarification and Rehearing, Algonquin Gas Transmission Co., Docket No. RP00-533-002, Texas Eastern Transmission, LP, Docket No. RP00-535-002, 95 FERC ¶ 61,303 (2001).)

offers for the capacity and then give the shipper the opportunity to match the offers.⁶ The Commission also noted that, if a shipper voluntarily notifies the pipeline that it no longer needs a volumetric portion of its capacity at the expiration of its contract, the shipper would not retain ROFR protection for that volumetric portion.⁷ The shipper would continue to have ROFR rights for the portion of its capacity that it retained, and the pipeline would have pregranted abandonment authority for the portion that the shipper terminated.⁸

7. The Commission stated in its March 29, 2001 rehearing order that it appeared that shipper contracts on Texas Eastern (and Algonquin) do not have fixed termination dates and that if the shipper gave the notice of termination required to terminate its contract, it must give up its ROFR. The Commission found this means that the shipper never has the opportunity to express an interest in renewing the contract and then to match the best offer the pipeline received from a third party, as required under the ROFR.

8. The Commission stated further in its March 29, 2001 rehearing order that it had previously found the pipelines' existing tariff provisions to be just and reasonable under Section 5 and that, therefore, additional findings were necessary under Section 5 if they were to be modified. The Commission established separate tariff investigations pursuant to Section 5 in the existing dockets, RP00-533-000 and RP00-535-000 to determine whether each pipeline's current tariff affords its shippers the minimum ROFR protection and issued orders to show cause to both pipelines why their existing tariffs 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. The Commission noted that if a shipper then stated an interest in renewing its contract, the pipelines would market the capacity to third parties and bring the best bid to the shipper and afford that shipper an opportunity to match that bid for some or all of the capacity.⁹

⁶94 FERC at 62,445.

⁷94 FERC at 62,444.

⁸94 FERC at 62,444-45 and n.13; Order No. 637 at 31,339-41.

⁹94 FERC at 62,446-47. The Commission directed the pipelines to discuss, *inter alia* (1) the continued propriety of a tariff provision requiring shippers to make a final election to terminate or renew their contracts at the time they give their notice of termination, which may have to be given up to five years prior to the date the contract is supposed to expire, and (2) the continued propriety of limiting shippers' ROFR rights to the circumstance where the pipeline provides notice of contract termination.

9. On April 30, 2001, Texas Eastern filed an Answer to the order to show cause in this docket. The following parties filed responses to the Answer: The Process Gas Consumers Group (Process Gas); Peco Energy Company (Peco); The New England Local Distribution Companies (New England); the KeySpan Delivery Companies and Public Service Electric and Gas Co. (collectively, KeySpan); NUI Utilities, Inc., Elizabethtown Gas Division (NUI/Elizabethtown); and the Providence Gas Company, a Division of Southern Union Company (Providence). On June 14, 2001, Texas Eastern filed a joint motion with Algonquin for leave to file an answer to these comments and an answer to the comments. The Commission granted the motion in accordance with its policy of accepting answers that assist the Commission in reviewing the facts and developing a complete and accurate record on which the Commission can make a decision.¹⁰

10. On November 22, 2002, the Commission issued an Order on Investigation in this docket on Texas Eastern's ROFR.¹¹ The Commission found that Texas Eastern's tariff provisions denying eligible shippers a ROFR if they terminated their contracts were contrary to the Commission's regulations and were, consequently, unjust and unreasonable. It also found these tariff provisions were contrary to Order Nos. 636 and 637. The Commission required Texas Eastern to remove these provisions from its tariff and its service agreements. It further required Texas Eastern to adopt just and reasonable provisions permitting eligible long-term firm shippers to have and exercise a ROFR when they terminate a contract and when a contract expires on its own terms, as well as when Texas Eastern terminates the contract.

11. On December 20, 2002, Transco filed a motion to intervene late in this proceeding. Transco asserted its intervention was only warranted after November 27, 2002. On that date, the Commission issued an order in Docket No. RP03-13-000 concerning Transco's ROFR provisions¹² which Transco asserted relied on the November 22, 2002 Order on Investigation in this proceeding. On December 23, 2002, Transco filed a request for rehearing of the Order on Investigation. The only party to request clarification and rehearing of the Order on Investigation was Texas Eastern.

¹⁰East Tennessee Natural Gas Co., 81 FERC ¶ 61,219 (1997); KN Interstate Gas Transmission Co., 74 FERC ¶ 61,054 (1996).

¹¹101 FERC ¶ 61,215 (2002).

¹²101 FERC ¶ 61,267 (2002) (Docket No. RP03-13-000).

12. On May 7, 2003, the Commission issued an Order on Clarification and Rehearing in this proceeding in which it affirmed its holdings concerning Texas Eastern's ROFR.¹³ The Commission denied Transco's motion to intervene late and dismissed its rehearing request. The Commission found Transco had not shown good cause for failing to intervene in a timely manner. The Commission found that its concerns regarding Texas Eastern's ROFR had been expressed in its October 5, 2000 order and that Transco had both actual and constructive knowledge of this order. In addition, the Commission stated, Transco had knowledge of whether its own ROFR provisions were similar to Texas Eastern's. The Commission also found that granting Transco's motion to intervene late would be disruptive as the proceeding had been ongoing for some time and it was late to admit a new party. Since Transco was not a party to this proceeding, the Commission dismissed its rehearing request as impermissible under its procedural rules.

Transco's rehearing request concerning its late intervention

13. No party requested rehearing of the May 7, 2003 Order on Clarification and Rehearing. Transco asks for rehearing of the Commission's denial of its motion to intervene late. The Commission denies Transco's rehearing request for the reasons stated in the Order on Clarification and Rehearing and for those discussed below.

Whether Transco had good cause to intervene late

14. Transco asserts it showed good cause for its failure to file its motion to intervene within the time allowed. Transco asserts that until the Commission's November 22, 2002 Order on Investigation, it did not know that the Commission's ROFR policy would be clarified in the show cause proceeding. Transco also claims it was not aware that this proceeding would be directly related to Docket No. RP03-13-000, the proceeding concerning Transco's ROFR. Finally, Transco asserts that the November 22, 2002 Order on Investigation was the sole rationale for the Commission's November 27, 2002 order in Docket No. RP03-13-000 and that Transco was not aware that this would be the case.

15. As it held previously, the Commission finds that the issues in this proceeding were stated in its October 5, 2000 order and that Transco had constructive and actual knowledge of these issues. In its rehearing request, Transco does not dispute the Commission's determination that it had constructive and actual knowledge of the issues. These issues clearly involved whether a shipper was entitled to a ROFR when it terminated a contract. The fact that Transco only decided that the issues in this proceeding might have a bearing on the issues in its own ROFR proceeding after the

¹³103 FERC ¶ 61,135 (2003).

order in its own proceeding was issued does not constitute good cause for granting Transco's late motion to intervene. Generally, pipelines bear the responsibility of determining when a proceeding is relevant to its interests and when it should file a motion to intervene. The Commission will not absolve Transco of that responsibility on the grounds presented here. The issues in this proceeding were clear and Transco knew of them. It had the opportunity to intervene in a timely manner, but chose not to. Consequently, the Commission affirms its prior determination that Transco has not shown good cause to permit it to intervene late in this proceeding.

16. The Black Marlin case on which Transco relies (see below) reinforces this view.¹⁴ Black Marlin stresses that interventions should be made early in a proceeding. It states the Commission's rules provide for interested persons to intervene at the beginning of a proceeding in order to preserve their rights. In Black Marlin the Commission stated that its procedural rules do not contemplate that a prospective party will make "a full analysis of the possible effects of a filing before deciding whether or not to intervene."¹⁵ The Commission further pointed out that waiting until a later stage of a proceeding involves a company in assuming risks that the case will be resolved in a manner contrary to what it would like.

17. In any event, the Commission has issued a rehearing order on the order on Transco's ROFR provision in Docket No. RP03-13-000.¹⁶ In the Docket No. RP03-13-000 rehearing order, the Commission fully addressed Transco's arguments on the merits concerning the ROFR on its system and did not simply dismiss Transco's contentions based on precedent in this proceeding.

Whether inadequate representation of Transco's interests is sufficient for late intervention

18. Transco asserts the Commission has not given proper weight to the individual elements in Rule 214(d)(1)¹⁷ in deciding whether to permit it to intervene late. In particular, it asserts that its interest is not adequately represented by the other parties in this proceeding, relying on Koch Gateway Pipeline Co., 70 FERC ¶ 63,024 (1995), which, in turn, cites Black Marlin, 67 FERC at 61,638.

¹⁴Black Marlin Pipeline Co., 67 FERC ¶ 61,205 (1994).

¹⁵67 FERC at 61,638.

¹⁶Transcontinental Gas Pipe Line Corp., 103 FERC ¶ 61,295 (2003).

¹⁷18 C.F.R. § 385.214(d)(1) (2003).

19. To begin with, Transco's interests were similar to those of Texas Eastern, a party to this proceeding. Both Transco and Texas Eastern had similar tariff provisions prohibiting a ROFR for shippers who terminated their contracts. Texas Eastern made arguments in favor of retaining its tariff provisions. To that extent, Texas Eastern represented Transco's interests.

20. In any event, an examination of Rule 214(d)(1) does not require that Transco's rehearing request be granted. By its terms, Rule 214(d)(1) provides that the Commission may consider a number of factors in determining whether to grant a motion for late intervention. These factors include whether the movant has shown good cause for failing to file the motion within the time prescribed; whether there will be any disruption of the proceeding from permitting the late intervention; whether the movant's interest is not adequately represented by other parties in the proceeding; any prejudice to or additional burdens upon the existing parties that might result from permitting the intervention; and whether the motion conforms to procedural requirements.

21. But while Rule 214(d)(1) enumerates factors which the Commission may consider in deciding whether to grant a late intervention, Black Marlin indicates that some factors may have greater weight than others in the circumstances of a case. In Black Marlin, the Commission considered the late interventions of two interruptible transportation (IT) shippers in a Section 4 rate case who pleaded their late interventions were justified because their interests were not adequately represented. The shippers intervened after discovery was completed and the parties had conducted preliminary negotiations and reached an agreement in principle of the outstanding issues. The shippers objected to the settlement when it was filed.

22. In considering whether to permit the late interventions of the IT shippers the Commission stated that interventions should be made early in a proceeding and, as indicated above, should not depend on detailed analysis. The Commission found that in allowing the late interventions, the ALJ had given too much weight to whether the interests of the interruptible shippers were adequately represented.¹⁸ The Commission considered the other factors in Rule 214(d)(1). It determined the shippers had not shown good cause for intervening late nor had they shown that their late interventions would not disrupt and delay the proceedings. The Commission held that lack of adequate representation alone was not a sufficient reason to allow the late interventions. The Commission pointed out that the shippers' interests had remained the same during the proceeding so that delay in intervening was not justified. Thus, in Black Marlin, the lack

¹⁸67 FERC at 61,639.

of good cause and the disruption to the proceeding outweighed adequate representation of the shippers' interests and lead to the Commission's denying the late interventions.

23. The Commission finds its determination here is consistent with its decision in Black Marlin. Here, as in Black Marlin, the movant is a sophisticated company with experienced counsel and had sufficient notice. Here, as there, the movant has not shown good cause why it did not intervene in a timely manner. In addition, here, as there, the movant's late intervention has caused delay by prolonging the proceeding.¹⁹ The Commission finds that here as there, the lack of good cause and the disruption to the proceeding outweigh adequate representation of the shippers' interests and require that the late intervention be denied.

24. For the reasons discussed in this order as well as those in the Order on Clarification and Rehearing, the Commission denies Transco's request for rehearing of its motion to intervene late in this proceeding.

The Commission orders:

The Commission denies Transco's request for rehearing.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁹It is not true, as Transco asserts (Request for Rehearing at 6, Docket No. RP00-535-008 (June 6, 2003)), that its motion to intervene late would not have been disruptive because it was filed five months before the Order on Investigation was issued. The Commission issued its Order on Investigation in this proceeding on November 22, 2002. Transco did not move to intervene until after this order was issued, on December 20, 2002.