

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

East Tennessee Natural Gas, LLC
(Formerly East Tennessee Natural Gas Company)

Docket No. RP97-13-011

ORDER ON COMPLIANCE FILING

(Issued November 26, 2004)

1. On December 1, 2003, East Tennessee Natural Gas, LLC¹ (East Tennessee) filed a tariff sheet,² narrative responses, a cross-reference table, and non-conforming letter agreements redlined against the form of service agreement for Rate Schedule FT-A, in compliance with the Commission's October 31, 2003 Order Accepting Tariff Sheets Subject to Conditions (October 31, 2003 Order).³ The Commission accepts the proposed tariff sheet and non-conforming letter agreements as in compliance with the October 31, 2003 Order, effective November 21, 2003, subject to conditions. This decision is in the public interest because it is consistent with the Commission's policy of allowing flexibility to meet the needs of a shipper, while at the same time ensuring that such flexibility occurs without undue discrimination.

I. Background

2. The October 31, 2003 Order accepted East Tennessee's proposed tariff sheet and the negotiated rate agreements with NUI Energy Brokers, Inc. (NUI), Public Service

¹On July 29, 2004 the Commission accepted East Tennessee Natural Gas Company's name change to East Tennessee Gas, LLC in Docket No. RP04-362-000 (unpublished letter order).

² Sub Fourth Revised Sheet No. 177 to FERC Gas Tariff, Second Revised Volume No. 1.

³ 105 FERC ¶ 61,162 (2003).

Company of North Carolina (PSNC), NJR Energy Services Company (NJR), Carolina Power & Light Company (CP&L), and Duke Energy Murray, LLC (DENA Murray), subject to conditions, effective the later of November 1, 2003, or in-service-date of the Patriot Project.⁴ Each negotiated rate agreement was made up of a non-conforming service agreement and a supplementary letter agreement (Letter and Service Agreement).

3. The October 31, 2003 Order found that East Tennessee had failed to adequately comply with the requirements established in the Commission's 2003 modification to its negotiated rate policy.⁵ Among other things, in that policy statement, the Commission stated that its experience with negotiated rate filings has shown that the filings lacked information necessary for the Commission's staff and the shippers to analyze any material deviations from the form of service agreement. In particular, on some occasions, parties had drafted the entire service agreement independently of the form of service agreement with the result that some provisions might be worded differently from the form of service agreement, but it was not immediately apparent whether the parties intended the provision to be substantively different. Accordingly, the policy statement established a new policy that the form of service agreement must be used as the starting point in drafting any negotiated rate agreement. The October 31, 2003 Order in this proceeding noted that, contrary to the Commission's new policy, East Tennessee had drafted the subject negotiated rate agreements independently of East Tennessee's form of service agreement. However, the Commission stated that the agreements were entered into before the issuance of the 2003 revised policy statement. Therefore the Commission stated that it would not reject the filing. Instead, the October 31, 2003 Order accepted the Letter and Service Agreements, subject to East Tennessee's filing supplemental information that fully complies with the Commission's 2003 Policy Statement.⁶ Specifically, East Tennessee was required to provide additional narrative identifying, explaining, and supporting all material deviations between the letter agreements and the currently effective form of service agreement, rate schedule or General Terms and Conditions (GT&C). In addition, East Tennessee was required to provide a cross-reference table identifying each provision of each letter agreement and service agreement cross-referenced to the corresponding provision, if any, in the form of service agreement, rate schedule or GT&C. Finally, the Commission directed East Tennessee to file a

⁴ On October 10, 2003, in Docket No. CP01-415-000, East Tennessee made a filing requesting approval to place the Patriot Project facilities in service on November 8, 2003.

⁵ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC § 61,134 (2003).

⁶ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 (2003) (Policy Statement).

revised tariff sheet that includes the DENA Murray agreement as a non-conforming agreement.

II. Details of the Instant Filing

4. To comply with the October 31, 2003 Order, East Tennessee filed: a) explanations of the terms of the letter agreements; b) a table cross-referencing each letter agreement provision to the corresponding provision in the form of service agreement, rate schedule or GT&C; c) Sub Fourth Revised Sheet No. 177, which identifies the DENA Murray negotiated rate transaction as a non-conforming agreement and removes the CP&L agreement which East Tennessee is no longer including in this filing; and d) red-lined letter agreements.

5. East Tennessee claims that it entered into the letter agreements and related firm service agreements to secure the anchor load necessary to support the development and construction of the Patriot Project. East Tennessee submits that the anchor shippers for the Patriot Project are making significant investments and incurring significant risks in order to serve their customers. East Tennessee contends that these negotiated rate transactions represent a negotiated allocation of the risks of the development and construction of the Patriot Project and the commitment that each Patriot shipper has made to the project.

6. Each of the agreements contains a mechanism to govern a situation in which the Commission or a court rejects, modifies or conditions any provision of the negotiated rate transaction in a manner that has a material adverse effect on either party. If such an event occurs, the parties are required to use reasonable efforts to renegotiate the agreement consistent with such ruling. East Tennessee states that the Commission permits this type of renegotiation provision in negotiated transactions because it does not present a substantial risk of undue discrimination against the recourse rate shippers and the shipper's service or service to others is not affected.⁷

A. Agreements with CP&L

7. East Tennessee proposes to withdraw the CP&L agreements, including both the transportation service agreements and the related negotiated rate letter agreements. East Tennessee has therefore removed these agreements from Sub Fourth Revised Sheet No.

⁷See *CenterPoint Energy Gas Transmission Co.*, 102 FERC ¶ 61,037 at P 5 (2003).

177. East Tennessee states that it is renegotiating certain provisions in these agreements with CP&L.⁸

B. Agreements with NJR

8. According to the NJR Letter Agreement and Service Agreement, East Tennessee will transport up to a maximum daily quantity (MDQ) of 80,000 Dth per day, of primary receipts from Saltville Storage Co. and primary deliveries to Transcontinental Gas Pipe Line Corporation (Transco). East Tennessee will also transport receipts and deliveries at other points within the primary path and direction of flow. The NJR Letter Agreement contains the following rates and quantities, excluding mandatory surcharges such as the Annual Charge Adjustment:⁹

a) For the months of November through March, a monthly reservation charge of \$9.125 per Dth and a commodity charge of \$0.00 per Dth will apply up to the MDQ of 80,000 Dth.

b) For the months of April through October:

i) a monthly reservation charge of \$3.042 per Dth and a commodity charge of \$0.00 per Dth will apply up to 10,000 Dth;

ii) a monthly reservation charge of \$0.00 per Dth and a commodity charge of \$0.26 per Dth will apply to the quantities in excess of 10,000 Dth and up to 45,000 Dth; and

iii) a monthly reservation charge of \$0.00 per Dth and a commodity charge of \$0.22 per Dth, will apply to the quantities in excess of 45,000 Dth and up to the MDQ of 80,000 Dth.

9. The NJR Letter Agreement contains a paragraph which states that it controls to the extent there is a conflict between the Letter Agreement, the Service Agreement and/or the rate provisions of East Tennessee's tariff. East Tennessee argues that since the Letter Agreement is a rate agreement, the paragraph does not affect the operational

⁸ On April 27, 2004, East Tennessee filed the CP&L renegotiated agreements in Docket No. RP97-13-013. On May 27, 2004, the Commission accepted the renegotiated agreements, subject to conditions. 107 FERC ¶ 61,197 (2004).

⁹ NJR is not charged any voluntary surcharges such as the GRI Rate Adjustment.

characteristics of service to NJR or any other shipper and does not present a risk of undue discrimination.¹⁰

C. Agreements with PSNC

10. According to the PSNC Letter Agreement and Service Agreement, East Tennessee is obligated to receive and deliver up to 30,000 Dth of gas at the primary receipt and delivery points. East Tennessee and PSNC agreed to the following charges (excluding any mandatory surcharges such as Annual Charge Adjustment) from the date service commences until and including the later of (i) October 31, 2018; or (ii) the last day of the month in which the fifteenth anniversary of the commencement of service under the agreement occurs:

- a. a monthly reservation charge of \$7.60 per Dth, and
- b. a commodity charge of \$0.00 per Dth.

11. The PSNC Letter Agreement incorporates, for firm transportation up to 30,000 Dth, a commodity charge of \$0.05 per Dth for all volumes that utilize a secondary receipt or delivery point outside the primary path between the interconnection with Saltville Storage Co. in Smyth County, Virginia and the interconnection with Transco in Rockingham County, North Carolina. The Letter Agreement also permits East Tennessee and PSNC to increase the Service Agreement MDQ to 100,000 Dth per day,¹¹ and to apply the same rates to the 100,000 Dth per day MDQ. East Tennessee states that this provision does not guarantee PSNC capacity on the Patriot Project. East Tennessee further states that it will comply with all Commission policies and regulations prior to implementing an increase in the MDQ level.

D. Agreements with NUI

12. The NUI Service Agreement primary term starts with the commencement of service and continues until and including April 30, 2023. The Service Agreement provides that a maximum of 50,000 Dth will be received at the following primary points: Texas Eastern Trousdale and Giles Counties, Tennessee; Saltville Storage Co. Smyth County, Virginia; and Transco Rockingham County, North Carolina. The primary

¹⁰ Similar language is also proposed in the other agreements tendered in the instant filing.

¹¹ The agreement allows two different dates to increase the capacity. Both notice dates have expired. The second one, which requires PSNC to provide East Tennessee with notice of its intent to increase its MDQ by July 1, 2004, to be effective November 1, 2005, expired subsequent to the date of the instant filing.

delivery points are Rockingham County, North Carolina and Smyth County, Virginia. The applicable rates, excluding surcharges, are as follows:

- a) a monthly reservation charge of \$7.85 per Dth of MDQ, and
- b) a usage rate of \$0.03 per Dth of MDQ, for any deliveries and receipts outside of the primary pathr, this rate will be \$0.08 per Dth from November through March.

13. The NUI Letter and Service Agreements state that if the Service Agreement rolls over for an additional five-year period following the primary term, the shipper will have the right to turn back up to 25,000 Dth per day of capacity, provided that quantities at the Texas Eastern, Saltville, and Transco receipt points are turned back in equal amounts. However, the shipper has to inform East Tennessee of its intent to turn back capacity one year prior to the expiration of the primary period. East Tennessee explains that this one time right to relinquish capacity can only be exercised at the end of the 20-year primary term. The rates will remain the same during the primary and roll-over terms.

14. Paragraph 11 of the Letter Agreement provides that East Tennessee and a shipper (NUI) may enter into an LMS-MA Service Agreement for an Operational Balancing Agreement (OBA) to resolve operational variances among all receipt and delivery points between the scheduled and actual receipts and deliveries of natural gas by East Tennessee.

E. Agreement with DENA

15. The primary term of the DENA Service Agreement begins on the date service commences and ends on the later of April 30, 2023, or the last day of the month in which the twentieth anniversary of the commencement of service under the agreement occurs. The Service Agreement provides that East Tennessee will receive and deliver a maximum of 50,000 Dth of gas per day for DENA, using the Rockingham County, North Carolina receipt point and the Bradley County, Tennessee delivery point.

16. East Tennessee and DENA agreed to the following rates, excluding any applicable surcharges:

- a) A monthly reservation charge of \$2.59 per Dth and a commodity charge of \$0.10 per Dth applicable to:
 - i) 50,000 Dth in May through September of the years 2004 through 2009,
 - ii) 40,000 Dth in May through September of the years 2010 through 2014,

- iii) 10,000 Dth in the months of October through April for the entire Primary Term, and
 - iv) the shipper, at its sole discretion, may increase the quantities to which ii and iii are applicable up to a maximum total quantity of 50,000 Dth, upon thirty days written notice to East Tennessee.
- b) For all gas transported in addition to the quantities stated above, up to the MDQ of 50,000 Dth per day, a monthly reservation charge of \$0.00 per Dth and a commodity charge of \$0.33 per Dth will apply. The agreement also states that “For service within the primary path Shipper shall not be charged for fuel if such service constitutes a backhaul.”

The provision that DENA not pay a fuel charge for backhaul service was on East Tennessee’s proposed Fourth Revised Sheet No. 4A filed in Docket No. CP01-415-016 and was protested by ETG in that docket. The Commission’s August 4, 2004 Order, in Docket No. CP01-415-016, accepted this filing subject to East Tennessee (a) showing that backhaul service causes East Tennessee to incur no gas losses; or (b) making an alternative proposal for assessing charges for lost-and-unaccounted-for gas; and (c) separately stating fuel percentage and lost-and-unaccounted-for gas percentage in its filings. 108 FERC ¶ 61,135 (2004).

III. Notice and Protests

17. Public notice of the instant filing was issued on December 4, 2003. Protests were due as provided in section 154.210 of the Commission’s regulations.¹² East Tennessee Group (ETG) protested the filing. NUI filed an answer to ETG’s protest and ETG filed a response to NUI’s answer.

A. ETG’s Protest

18. ETG’s protest is limited to Paragraph 11 of the Negotiated Rate Letter Agreement with NUI. Specifically, Paragraph 11 states that:

Transporter and Shipper shall enter into an LMS-MA Service Agreement that shall provide for Shipper to enter into an OBA and shall provide for the resolution of operational variances among all receipt and delivery points between the scheduled and actual receipts of natural gas by Transporter from Shipper and deliveries of natural gas by Transporter to Shipper.

¹² 18 C.F.R. § 154.210 (2004).

19. ETG argues that NUI is not a delivery point operator and therefore is not eligible for an operational balancing agreement (OBA). ETG points out that East Tennessee's tariff states that an OBA is only available to the operator of a pipeline interconnect or a party that is operating a delivery point.¹³ Therefore, East Tennessee could not enter into an Load Management Service - Market Area (LMS-MA) OBA with NUI without violating the LMS-MA Rate Schedule. ETG claims that the OBA with NUI will affect the substantive rights of other shippers and present a risk of undue discrimination. In addition, ETG notes that NUI's delivery points are already covered by OBA's between East Tennessee and their point operators. ETG further argues that an OBA is not offered to any other FT-A shippers. ETG states that an OBA is an extremely valuable service that East Tennessee cannot offer to NUI alone. ETG also states that Paragraph 11 does not comply with the Policy Statement,¹⁴ which prohibits negotiated terms and conditions of service. ETG therefore requests that Paragraph 11 be rejected.

B. NUI's Answer

20. In its answer NUI states that East Tennessee permitted NUI to become an OBA party and qualify for the imbalance management tools that are available to LMS-MA Rate Schedule shippers. NUI states that it bargained for this extremely valuable service and that it was an essential consideration when it agreed to enter into a long-term firm service agreement with East Tennessee. NUI claims that the relief that ETG seeks would affect its service relationship with East Tennessee and frustrate a basis for its agreement to enter into the long-term service relationship. NUI therefore urges the Commission to reject ETG's protest. NUI further states that ETG waited over three months to protest this issue. NUI argues that ETG's protest is untimely therefore it should be rejected.

C. ETG's Response to NUI's Answer

21. ETG argues that its protest is not untimely. The instant filing was not tendered to comply with the Policy Statement; it was tendered to comply with the October 31, 2003 Order. ETG further argues that when East Tennessee filed to comply with the Commission's Policy Statement, ETG filed a timely protest pointing out the conflict between East Tennessee's tariff and the Letter Agreement. ETG states that what NUI seeks would be uniquely available to it on a preferential basis over all other non-delivery point operators on the East Tennessee system. ETG claims that it would be unworkable under East Tennessee's OBA system to have OBA holders who are not operating a delivery point. ETG further claims that in order for this to happen the entire system

¹³ Second Revised Sheet No. 50 of Rate Schedule LMS-MA.

¹⁴ 104 FERC ¶ 61,134 (2003).

would have to be revamped. Furthermore, ETG states that NUI gives no hint as to how it expects this to be done. Finally, ETG argues that East Tennessee does not give any indication that it intends to change the eligibility requirements for the OBA's or the manner in which they operate. ETG reiterates its request that the Commission reject Paragraph 11 of the Letter Agreement.¹⁵

IV. Discussion

A. Agreements with NUI

22. East Tennessee's form of service agreement provides for it to roll over automatically for an additional five year period, absent notice of termination by either party one year prior to expiration of the primary term. Paragraph 1 of the NUI Agreement states that if the service agreement rolls over for an additional five year term following the primary term, NUI has the right to turn back up to 25,000 Dth per day of the 50,000 Dth per day MDTQ at the end of the primary term and East Tennessee will accept this turnback capacity. However, the shipper has to inform East Tennessee of its intent one year prior to the expiration of the primary period. Paragraphs 2 and 5 of the NUI Agreement state that the rates will remain the same during the primary and roll-over terms.

23. The turn back capacity language proposed by East Tennessee is a material deviation from the form of service agreement and is similar to the guaranteed increase in capacity in the PSNC Letter Agreement. However, in the NUI Letter Agreement the turn back right only occurs at the end of the primary term. Article X of East Tennessee's form of service agreement provides for automatic roll over and section 13.1 of the GT&C permits its shippers to request capacity increases or decreases. While other customers may request decreases in capacity, their requested decrease, unlike NUI's, is not guaranteed. Their only option, if the request was refused, would be to cancel the agreement at the end of the term. Therefore, the provision poses a substantial risk of undue discrimination. East Tennessee must either eliminate this provision from the NUI agreement or modify its tariff and form of service agreement to offer this type of provision to all of its customers.

24. Paragraph 11 of the NUI Agreement, which is protested by ETG, allows NUI to enter into an LMS-MA service agreement governing balancing services. ETG points out

¹⁵ While the Commission's Rules of Practice and Procedure generally prohibit answers to protests, the Commission will accept NUI's answer and ETG's response to the answer to allow a better understanding of the issues. *See* 18 C.F.R. § 385.213(a)(2) (2004).

that section 1 of Rate Schedule LMS-MA states that an OBA is only available to shippers who meet certain criteria. According to Rate Schedule LMS-MA, an OBA is only available to:

- a) the operator of connecting facilities at a delivery point (s) on Transporter's system;
- b) a pipeline operator whose facilities interconnect with Transporter's system; or
- c) a market aggregator who has obtained written consent from one or more delivery point operators authorizing an aggregator to operate the delivery points.

25. East Tennessee does not provide any support in its filing as to how NUI meets one or more of the above criteria. Based on the filing and East Tennessee's tariff, NUI is not eligible for an OBA. As ETG claims, the balancing flexibility afforded by an OBA is an extremely valuable service that cannot be offered to NUI alone. Accordingly, we reject the above-described provision that would allow NUI to enter into an OBA and direct East Tennessee to remove such provision from the agreement. If East Tennessee wishes to offer such rights to all of its shippers, it may propose a provision in its generally applicable tariff to offer such rights.

B. Agreements with NJR

26. The deviations from the form of service agreement in the NJR agreement fall into two categories. First, some provisions of the NJR agreement are worded differently than the corresponding provision of the form of service agreement, but, as East Tennessee explains, the variation in wording does not affect the substantive rights of the parties. For example, the form of service agreement provides that, in the event of a conflict of law, the law of Tennessee will govern. The NJR agreement has a similar provision worded differently. The Commission's revised policy covering the filing of negotiated rates agreements does not permit such variations of wording of standard provisions in order to ease the task of the Commission and other parties in reviewing negotiated rate and non-conforming agreements to determine whether they are not unduly discriminating.¹⁶ However, since the NJR agreement was negotiated and executed before the Commission issued its revised policy statement, the Commission will permit such variations in language in the instant agreement, based on East Tennessee's explanation that the variations in language were not intended to have any substantive effect.

¹⁶ *East Tennessee*, 105 FERC ¶ 61,162 at P 12-14 (2003).

27. Based on East Tennessee's explanation of the NJR agreement's remaining deviations from the form of service agreement, we find that they are limited solely to matters related to the implementation of the negotiated rates. On that basis, we hold that those deviations are acceptable. For example, paragraph 8 of the letter agreement provides that, if the Commission modifies the agreement in any way, the parties will use reasonable efforts to renegotiate a rate agreement that maintains the relative positions of the parties. The Commission has previously approved provisions for the renegotiation or termination of negotiated rate agreements if the Commission takes an action that requires modification of the negotiated rate.¹⁷

C. Agreements with PSNC

28. Paragraph 1 of the PSNC Letter Agreement states that, “if Shipper and Transporter amend the Service Agreement to increase the MDQ, such rates shall apply to a maximum MDQ of 100,000 Dth per day.” Paragraph 7 of the Letter Agreement states that, “Shipper shall have the sole option to increase its MDQ, at the rate stated in Paragraph 1, up to a maximum of 100,000 Dth per day commencing between November 1, 2004 and November 1, 2005 so long as the option election is received in writing with a minimum notice of 16 months as follows...” Section 13.1 of East Tennessee’s GT&C provides shippers the ability to modify their allocated capacity. However, section 13.1 merely permits shippers to request the MDQ modification. According to section 13.2 of East Tennessee’s GT&C, the requested MDQ modification is not guaranteed. Section 13.2 of East Tennessee’s tariff states:

Transporter will notify the requesting party of whether Transporter is able to grant the request. Transporter shall have no obligation to honor a request for an increase unless firm capacity is available, and no obligation to honor a request for a decrease unless another qualified party agrees to take the relinquished capacity. Transporter shall accord Shippers who were sales customers of Transporter on July 1, 1992 priority with respect to the granting of changes in capacity allocation hereunder.

29. The Commission determined in *ANR Pipeline Company (ANR)*¹⁸ that material deviations from the pro forma service agreement fall into two general categories: 1) those that must be prohibited because they present a significant potential for undue discrimination among shippers and 2) those that can be permitted without substantial risk of undue discrimination. The Commission determined in *ANR* that MDQ adjustment provisions present too much potential for undue discrimination, unless they are offered in

¹⁷ *CenterPoint Energy Gas Transmission Co.*, 102 FERC ¶ 61,037 (2003).

¹⁸ 97 FERC ¶ 61,224 (2001).

the pipeline's tariff pursuant to generally applicable conditions. Section 13 of East Tennessee's GT&C provides that MDQ adjustments can be obtained by any shipper through its ordinary procedures for awarding capacity. However, unlike Section 13 of the G&TC, the provisions proposed in Paragraphs 1 and 7 of PSNC's letter agreement guarantee the capacity increase without requiring PSNC to follow the ordinary procedures set out in section 13 of its GT&C to offer an increase in MDQ. Therefore, the Commission requires East Tennessee to eliminate Paragraphs 1 and 7 of the Letter Agreement.

D. Agreements with DENA

30. East Tennessee and DENA agreed that DENA, at its sole discretion, may increase the quantities up to a maximum total quantity of 50,000 Dth upon thirty days written notice to East Tennessee. The proposed language permitting increased capacity is a material deviation from the form of service agreement. The provision permitting the DENA capacity increase is similar to the PSNC capacity modification issue addressed above and, as we determined in our discussion of PSNC above, it is not a permissible deviation and may cause substantial risk and undue discrimination. If East Tennessee wants to guarantee an MDQ adjustment to its shippers, it should propose a provision in its generally applicable tariff to offer such rights to all shippers. This provision is therefore rejected and East Tennessee is directed to delete this provision from the DENA Agreement.

The Commission orders:

(A) Sub Fourth Revised Sheet No. 177 to East Tennessee's FERC Gas Tariff Second Revised Volume No. 1 is accepted effective November 21, 2003.

(B) The letter agreements tendered in the instant filing are accepted, subject to the conditions discussed in the body of this order and the ordering paragraph below.

(C) Within 30 days of the date of this order, East Tennessee must file revised agreements reflecting the changes discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.