

121 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tennessee Gas Pipeline Company

Docket Nos. RP07-396-001 and
RP07-396-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued November 15, 2007)

1. On May 23, 2007, Tennessee Gas Pipeline Company (Tennessee) submitted tariff sheets,¹ to be effective May 9, 2007, in compliance with the Commission's May 9, 2007 order (May 9 Order).² On June 7, 2007, the New England Local Distribution Companies (New England LDCs)³ filed a request for rehearing of the May 9 Order. In that order, the Commission conditionally accepted Tennessee's April 9, 2007 tariff filing which proposed to add additional contract flexibility to its tariff provisions applicable to extending long-term firm service agreements. We required Tennessee to file revised tariff language clarifying that any contract extension pursuant to proposed section 10.4.3 must take place before initiation of the right of first refusal (ROFR) procedure. As discussed below, the Commission denies rehearing and accepts the compliance filing subject to condition.

¹ FERC Gas Tariff, Fifth Revised Volume No. 1, Substitute Ninth Revised Sheet No. 324 and Substitute Fifth Revised Sheet No. 324A.

² *Tennessee Gas Pipeline Co.*, 119 FERC ¶ 61,126 (2007).

³ The New England Local Distribution Companies consist of Bay State Gas Company, the Berkshire Gas Company, Connecticut Natural Gas Corporation, Fitchburg Gas and Electric Light Company, City of Holyoke, Massachusetts Gas and Electric Department, the Narragansett Electric Company d/b/a National Grid, Northern Utilities, Inc., NSTAR Gas Company, the Southern Connecticut Gas Company, and Yankee Gas Services Company.

I. Background

2. Article III, section 10 of Tennessee's General Terms and Conditions (GT&C) implements the requirement in section 284.221(d)(2) of the Commission's regulations that open access pipelines provide firm shippers a ROFR in order to continue an expiring maximum rate contract with a term of one year or more. Section 10 also permits Tennessee to negotiate a ROFR with other firm shippers who do not qualify for the regulatory ROFR. Section 10.4.2 sets forth the posting and bidding procedures for third parties to bid on the capacity in the expiring contract and for the existing shipper to match the best third party bid. Among other things, Tennessee must post the capacity for third party bids at least 180 days before the contract expires.
3. Tennessee proposed a new section 10.4.3 which would allow it to mutually agree with an existing long-term firm customer to renegotiate the terms of its current service agreement in exchange for the shipper's agreement to extend the use of at least part of its existing service under the restructured agreement. Tennessee stated that the restructured agreement could include additional capacity not included in the original agreement.
4. Under Tennessee's proposal, if Tennessee and its customer mutually agree to this restructured arrangement, the underlying capacity does not have to be re-posted as available before the arrangement can be executed and the customer will not have to separately participate in the posting and bidding procedures for shippers exercising their ROFR under Article III, section 10.4 of the GT&C. Similarly, the customer would not have to separately go through the posting and bidding procedures of Article XXVIII, section 5 of the GT&C for any generally available, posted and previously unsold capacity that is made part of the restructured arrangement. Tennessee stated that the shipper's election to re-negotiate its long term firm service agreements under the proposed new section 10.4.3 is entirely optional and subject to mutual agreement. Tennessee also stated that the shipper will always have the right to avail itself of the ROFR procedures of Article III, section 10.4, if applicable, and if the shipper elects not to early extend or restructure its service agreement(s).
5. Tennessee asserted that its proposal is consistent with Commission policy and precedent where the Commission has previously approved other pipelines' tariff provisions that reflect a flexible approach to an existing long-term shipper's re-contracting with the pipeline. Tennessee also stated that the overall proposed enhancement to shippers' contracting options is beneficial to those shippers who may have been reluctant to renew their service on Tennessee on the same terms as in their existing contract. Tennessee also stated that it is beneficial to both Tennessee and the overall system in that it helps mitigate the marketing risk for turned-back capacity.
6. On April 23, 2007, several parties filed comments supporting the proposal because it would add flexibility to the contract negotiations. However, Hess Corporation (Hess) filed comments that sought to place limitations on Tennessee's proposal, and the

New England LDCs filed a protest and a request for a technical conference. Tennessee filed an answer. After reviewing the arguments of the parties, in the May 9 Order, the Commission found the proposed tariff revisions to be just and reasonable for the reasons stated by Tennessee in its filing and its answer, and accepted the tariff revisions to be effective May 9, 2007, subject to Tennessee filing revised tariff language clarifying that any contract extension pursuant to proposed section 10.4.3 must take place before initiation of the ROFR procedure.

7. The Commission rejected the arguments raised in New England LDCs' protest and denied its request for a technical conference. We also rejected Hess's request that Tennessee be required to modify its tariff to clarify that non-quantity, non-rate and non-duration contract terms may not be negotiated under the contract extension process. We rejected Hess's request that Tennessee be prohibited from negotiating contract extensions with affiliates under the proposed tariff provision. The Commission concluded that Tennessee's proposal provides customers flexibility that they did not possess before, without taking away any existing protections, at no additional cost and at their sole election.

8. On May 23, 2007, Tennessee filed its compliance filing. Public notice of the compliance filing was issued on May 31, 2007. Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., (collectively, ConEd) filed a limited protest on June 4, 2007. The details of ConEd's protest are discussed below.

9. On June 7, 2007, the New England LDCs filed a request for rehearing of the May 9 Order. The New England LDCs request, among other things, that the Commission: (1) direct Tennessee to remove the language from section 10.4.3 which states that the requirements of Article III, section 10.4.2 or Article XXVIII, section 5 of its GT&C do not apply; and (2) instruct Tennessee that it cannot use section 10.4.3 to enter into "package" deals for additional capacity when re-negotiating existing shipper agreements.

10. On June 20, 2007, Tennessee filed a motion for leave to answer and an answer to the New England LDCs' request for rehearing. Tennessee states that good cause exists to grant Tennessee leave to respond to the rehearing request because New England LDCs' continued opposition to Tennessee's proposal is based on incorrect, misleading and irrelevant arguments.

11. The Commission's rules of practice and procedure generally prohibit answers to rehearings.⁴ Accordingly, the Commission will not accept Tennessee's answer in this proceeding as it is not necessary to understand or clarify the issues in this case.

⁴ 18 C.F.R. § 385.713(d)(1) (2007).

II. Discussion

12. For the reasons discussed below, the Commission denies the requests for rehearing and accepts Tennessee's compliance filing, subject to a revision to clarify what constitutes the initiation of the ROFR process.

Rehearing

13. The New England LDCs argue that the May 9 Order ignored the concerns raised in their April 23, 2007 protest, namely, that (1) Tennessee's proposed tariff language is broader than that previously approved by the Commission⁵ and (2) Tennessee will be able to use this new broad authority to enter into "package" capacity deals that constitute tying arrangements contrary to Commission policy.⁶ New England LDCs contend that, the Commission, without any discussion, denied the arguments they raised in the protest and their request for a technical conference. The New England LDCs seek rehearing of our May 9 Order, raising the same two basic arguments they raised in their protest. In addition, the New England LDCs raise a new "posting" requirement objection to Tennessee's proposal.

14. Our review of the record reflects that many of Tennessee's customers filed comments in support of, or at least not in opposition to, proposed section 10.4.3 because they recognized the additional flexibility offered by the proposal. The New England LDCs were the only party protesting the filing because of their belief that Tennessee's proposal was broader than previously approved proposals and that it would somehow require shippers to enter into "package" capacity deals that constitute "tying arrangements." The Commission rejected the New England LDCs' protest for the reasons stated by Tennessee in its filing and its answer. Accordingly, we determined that Tennessee's proposal was just and reasonable and consistent with Commission policy and precedent. We therefore rejected the New England LDCs' request for a technical conference because we did not find that a technical conference was necessary in this case. On rehearing, the Commission addresses the specific arguments that New England LDCs raise. And, for the reasons discussed below, the Commission denies the request for rehearing.

1. Whether the Proposal Is Consistent with Previous Cases

15. The New England LDCs disagree with the Commission's statement that it has approved tariff provisions permitting pipelines and shippers to mutually agree to an extension of the term of a service agreement before expiration of the agreement and

⁵ See Rehearing Request at 5 (*citing* New England LDCs Protest at 5-6).

⁶ *Id.* (*citing* New England LDCs Protest at 9-10).

before posting the capacity under the pipeline's ROFR provisions. The New England LDCs argue that, contrary to the three cases the Commission cited as support for its statement,⁷ these cases (as well as those cited by Tennessee in its filing) approved tariff provisions considerably more narrow than Tennessee's proposal. The New England LDCs agree that other pipelines have included tariff language that permits a pipeline and its customer to renegotiate a service agreement prior to the expiration of the agreement. However, they maintain that Tennessee's proposed tariff provision goes beyond that which has previously been approved by the Commission.

16. The New England LDCs state that the last sentence of this proposed tariff section is what distinguishes Tennessee's proposal from others that have been approved by the Commission. They state that Tennessee's proposal references two separate and distinct provisions - the ROFR provision in Article III, section 10.4.2 of its GT&C and the open season capacity allocation provision in Article XXVIII, section 5 of its GT&C - that will no longer apply to any action, *i.e.*, "arrangement" taken under section 10.4.3.

17. The New England LDCs state that the ROFR provisions in Article III, section 10.4.2 and the open season capacity allocation procedures in Article XXVIII both set forth detailed posting and bidding requirements that govern extensions of existing contracted capacity through the ROFR process and the allocation of available capacity, respectively. They argue that the last sentence of proposed section 10.4.3 does not just limit the agreement from the bidding and posting requirements of the ROFR and the open season capacity allocation provisions of Tennessee's GT&C. Rather, they argue that Tennessee has exempted the entirety of any arrangement negotiated pursuant to section 10.4.3 from the ROFR and the open season capacity allocation provisions. As a result, the New England LDCs assert that Tennessee now has unfettered authority to secretly renegotiate a service agreement in a manner that fundamentally alters the existing agreement, *e.g.*, changing the geographic scope of the capacity that is covered by the service agreement or adding new services to the contract.

18. The New England LDCs argue that none of the cases relied upon by the Commission in the May 9 Order grant a pipeline such broad authority.⁸ They state that in *Texas Eastern*, the Commission approved tariff language allowing Texas Eastern and its customer to mutually agree to an extension of the term of the service agreement (the exact length of which is to be negotiated on a case-by-case basis, in a not unduly discriminatory manner).⁹ They maintain that the tariff language approved by the

⁷ Rehearing at 7 (citing to May 9 Order at P 19).

⁸ Rehearing at 9, note 4 (citing *Texas Eastern Transmission, LP*, 112 FERC ¶ 61,235 (2005) (*Texas Eastern*); *ANR Pipeline Co.*, 116 FERC ¶ 61,201 (2006) (*ANR*) and *Northern Natural Gas Co.*, 118 FERC ¶ 61,053 at P 44 (2007) (*Northern Natural*)).

⁹ Rehearing at 9, note 5 (citing *Texas Eastern Gas Transmission LP*, FERC Gas

Commission does not give Texas Eastern authority to add new capacity, or even to change the existing capacity, in the shippers' agreement. The New England LDCs further argue that in *ANR*, the Commission approved tariff language allowing ANR Pipeline Company (ANR) and its customer to mutually agree to an extension of the term of the service agreement for all or part of the underlying capacity on a case-by-case basis in a not unduly discriminatory manner.¹⁰ The New England LDCs state that, although this tariff language is slightly broader than that approved for Texas Eastern, it does not permit ANR to add additional new capacity to the existing service agreement and thus bypass the capacity allocation provisions of ANR's tariff.

19. Finally, the New England LDCs argue that *Northern Natural* is inapposite, as this case addressed a non-conforming service agreement that allowed a shipper to extend its capacity pursuant to a discounted contract without posting the capacity for bidding under the ROFR provisions of Northern Natural's tariff.¹¹ The New England LDCs state that *Northern Natural* did not address whether the shipper could contract for additional capacity under its agreement outside the confines of the ROFR process. In fact, according to them, one of the points the Commission relied on in *Northern Natural* was that no party had expressed any interest in obtaining the capacity Northern Natural allowed the shipper to retain at the discounted rate.¹² In sum, the New England LDCs submit that none of the cases the Commission relied upon in its order supports its approval of, what they allege is, Tennessee's extremely broad tariff language.¹³ Therefore, they request the Commission grant rehearing and direct Tennessee to remove the language from section 10.4.3 which states that the requirements of ROFR provisions in Article III, section 10.4.2 or the open season capacity allocation provisions in Article XXVIII do not apply to arrangements negotiated pursuant to section 10.4.3.

20. Once again, the Commission rejects the arguments of the New England LDCs on this issue because we have correctly applied our precedent and policies in finding Tennessee's proposal to be just and reasonable. In fact, we have addressed the very issue

Tariff, Seventh Rev. Vol. No. 1, GT&C, section 3.17).

¹⁰ Rehearing at 9, note 6 (*citing* ANR Pipeline Company, FERC Gas Tariff, Second Rev. Vol. No. 2, GT&C, section 2.12(b)).

¹¹ Rehearing at 10 (*citing* Northern Natural at PP 44-47).

¹² Rehearing at 10 (*citing* Northern Natural at P 46).

¹³ They state that where an agency departs from precedent without adequate explanation, its decision is arbitrary and capricious. *See, e.g., Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997), *cert. denied*, 540 U.S. 937 (2003), *ANR Pipeline Co. v. FERC*, 71 F.3d 987, 901 (D.C. Cir. 1995). Rehearing at 10.

that the New England LDCs raised in their protest and on rehearing. New England LDCs believe that Tennessee's proposal is too broad because it would allow contract extension negotiations to occur without also submitting the arrangement to an open season. What New England LDCs consider a "concept," the Commission has in fact approved as a policy and applied in other proceedings. For example, in *Northern Natural Gas Company*,¹⁴ we denied a rehearing request on the very issue New England LDCs continue to pursue here. In that case, the Commission stated :

In the instant case, Northern and Flint Hills chose to mutually negotiate modifications in, and extensions of, the existing contracts, rather than to exercise the ROFR or rollover portions of those contracts. ***This was permissible under Commission policy, and accordingly, whether the parties complied with the ROFR or roll-over provisions is not relevant.***

...If the pipeline is satisfied that its agreements to extend contracts with its existing customer gives it as much revenue as it could expect to obtain through marketing the capacity to third parties, it need not commit the ***capacity to a bidding process.*** (Emphasis added).¹⁵

21. The application of the Commission's policy in this regard also covers the extension of discounted agreements,¹⁶ as well as where the conditions of service differ.¹⁷ Mutual negotiations of contract extensions which may maximize pipeline revenue outside of a ROFR bidding process are, therefore, well within the scope of what the Commission has found permissible.

22. The fact that new section 10.4.3 allows the addition of previously posted and unsubscribed capacity as part of the negotiation of an extension of an existing contract does not render the provision overly broad, without precedent, or unjust and unreasonable. The Commission recently approved a similar proposal permitting the addition of unsubscribed capacity to an existing shipper's contract in *Columbia Gas Transmission Corp.*¹⁸ The Commission believes that, so long as the unsubscribed

¹⁴ *Northern Natural Gas Company*, 118 FERC ¶ 61,053 (2007).

¹⁵ *Id.* at PP 44 and 45.

¹⁶ *TransColorado Gas Transmission Company*, 109 FERC ¶ 61,117 (2004) (Protest rejected where discount extended without first affording opportunity for competitive bidding).

¹⁷ *Northern Natural Gas Company*, 113 FERC ¶ 61,188 at 61,768 (2005).

¹⁸ 120 FERC ¶ 61,289 at P 10-11, 13 (2007).

capacity to be added to an existing firm shipper's contract has previously been posted as available, the pipeline may reasonably offer that capacity to the existing shipper as a means of negotiating a mutually agreeable extension to its existing contract. The prior posting of the capacity as available would have given other shippers an opportunity to request the capacity, if they desired it.

23. Moreover, while the Commission has permitted pipelines to implement Net Present Value (NPV) open seasons to allocate capacity, it has not required them.¹⁹ Rather, as we stated in the May 9 Order, the Commission has allowed pipelines some degree of flexibility in how they market their capacity in order to accomplish the goal of enabling those who value capacity the most to obtain it, because the Commission assumes that the pipeline will generally seek the highest possible rate from those to whom it sells capacity, since that is in the pipeline's economic interest. If adding unsubscribed capacity to the existing shipper's contract enables Tennessee to negotiate a contract extension with an existing firm shipper who might otherwise depart the system, all shippers may benefit when Tennessee files its next rate case. That is because there would be additional units of service over which to spread the pipeline's fixed costs, which might not otherwise be present.²⁰ Accordingly, the Commission denies rehearing on this issue.

2. Posting of Capacity and the Details of the Renegotiated Contracts

24. Finally, the New England LDCs raise two arguments concerning the posting of capacity. First, the New England LDCs contend that the Commission wrongly assumed that any additional capacity that an existing Tennessee shipper might obtain as part of this re-negotiation would have already been posted by Tennessee. The New England LDCs argue that the Commission's assumption is wrong because section 10.4.3 states plainly that "to the extent that Transporter and Shipper have mutually agreed to such an arrangement, the requirements of Article III, section 10.4.2 or *Article XXVIII, section 5 of these General Terms and Conditions shall not apply.*" (Emphasis added).

25. The New England LDCs explain that Article XXVIII, section 5.1 of Tennessee's GT&C provides that "available capacity on [Tennessee's] system will be posted on the PASSKEY System." They argue that, given the directive of section 10.4.3 which renders the entirety of Article XXVIII, section 5 of Tennessee's tariff inapplicable, there appears to be no requirement that Tennessee post the available capacity that it now seeks to add

¹⁹ *Northern Natural Gas Company*, 118 FERC ¶ 61,053 at P 51 (2007); *ANR Pipeline Company*, 116 FERC ¶ 61,201 at P 9 (2006).

²⁰ *See Process Gas Consumers Group v. FERC*, 292 F.3d 831, 839-40 (D.C. Cir. 2002).

to an existing shipper's re-negotiated agreement.²¹ Thus, the New England LDCs submit that the Commission's reliance on *Northern Natural Gas Company*²² is incorrect and the Commission's acceptance of Tennessee's proposal on these grounds is arbitrary and capricious and not reasoned decision-making.

26. Second, the New England LDCs argue that the Commission erred by not requiring Tennessee to post information regarding the details of the renegotiated contracts. They state that in *Northern Natural Gas Company*,²³ the Commission approved a tariff provision that allowed a contract extension option similar (although less broad) to the one Tennessee proposed in section 10.4.3. In response to concerns that shippers would not be able to ascertain whether the pipeline was implementing contract extensions in an unduly discriminatory manner, the New England LDCs state that the Commission required the pipeline to post information regarding the "special details" of the contract on its Internet web site. Here, the New England LDCs contend that, in contrast, the Commission has allowed Tennessee to engage in contract negotiations without any obligation to post the details. They believe that Tennessee now has carte blanche to enter into any type of arrangement it wants with a shipper in complete secrecy, which they argue is unjust and unreasonable.

27. The New England LDCs argue that, under Tennessee's proposal, the Commission and Tennessee's other shippers would not know what additional capacity has been added to existing contracts absent prospectively combing through Tennessee's updated index of shippers and comparing it to previous shipper contracts. The New England LDCs contend that the Commission's failure to provide a rational basis for its departure from its own policy and precedent is unjust, unreasonable, arbitrary and capricious and does not reflect reasoned decision-making.²⁴

²¹ According to the New England LDCs, this might not be the case if Tennessee had only exempted the agreement from the bidding and posting requirements of Article III, section 10.4.2 or Article XXVIII, section 5 of its GT&C. Instead, Tennessee exempted the arrangement, *i.e.*, the entirety of section 10.4.3. They argue that this arrangement could last for a considerable length of time before an agreement is reached. Rehearing at 11, note 9.

²² 110 FERC ¶ 61,361 (2005).

²³ 113 FERC ¶ 61,207 (2005).

²⁴ Rehearing at 12 (*citing Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997), *cert. denied*, 540 U.S. 937 (2003), *ANR Pipeline Co. v. FERC*, 71 F.3d 987, 901 (D.C. Cir. 1995)).

28. We deny the New England LDCs request for rehearing on this issue. We do not interpret Tennessee's proposal as in any way affecting its obligation to post all available capacity. Section 284.13(d) of the Commission's regulations requires all interstate pipelines to post available capacity. Consistent with section 284.13(d), the first sentence of Article XXVIII, section 5.1 of Tennessee's GT&C states that Tennessee's available capacity will be posted on its PASSKEY system. This posting requirement is not, and cannot be, altered by proposed section 10.4.3. All section 10.4.3 does is authorize Tennessee to negotiate a contract extension which may include the addition of currently unsubscribed capacity. Because section 284.13(d) of the regulations and section 5.1 of Tennessee's GT&C require that such unsubscribed capacity be posted as available at all times, such capacity must have been posted as available before any negotiations authorized by section 10.4.3 take place.

29. Section 10.4.3 can and does make clear that any generally available capacity included in an arrangement to extend an existing long term contract does not have to be committed to the bidding process under Article XXVIII, section 5²⁵ nor to the bidding process under Article III, section 10.4.2.²⁶ We also find that, if and to the extent Tennessee and a long term shipper mutually agree to add capacity as part of the extension renegotiation of an existing arrangement, section 10.4.3 provides that flexibility; however, the capacity must have already been posted pursuant to section 284.13(d) the Commission's regulations.

30. Similarly, section 10.4.3 does not exempt Tennessee from making transactional postings that are required by section 284.13(b) of the Commission's rules and regulations, including subsection (1)(viii), which pertains to posting of "special details." This section and subsection require an interstate pipeline to post, for pipeline firm service, with respect to each contract, or revision of a contract for service, certain information no later than the first nomination under a transaction. Specifically, a pipeline is required to post special details pertaining to a pipeline transportation contract, including whether the contract is a negotiated rate contract, conditions applicable to a discounted contract, and all aspects in which the contract deviates from the pipeline's tariff. As we specifically stated in the May 9 Order, Tennessee is required to post any special details pursuant to section 284.13(b)(viii) of our regulations. Accordingly, we find that the New England LDCs' specifications of errors on this issue have no merit. We, therefore, deny rehearing.

²⁵ The NPV Open Season process for generally available capacity.

²⁶ The ROFR Open Season process.

3. Whether the Proposed Tariff Permits Packaged Deals

31. The New England LDCs maintain that, despite the Commission's stated policy, namely, to enable those who value capacity the most to obtain it and the belief that a pipeline will generally seek the highest possible rate from those to whom it sells capacity,²⁷ Tennessee has found a way to further its economic interest by obtaining revenues for available capacity that effectively exceeds the maximum tariff rate through "packaging" valuable capacity (that would sell at maximum tariff rates on a stand-alone basis) with much less valuable capacity, *e.g.*, Zone 6-4 backhauls (that would sell at less than maximum rates on a stand-alone basis).²⁸ The New England LDCs argue that the Commission's failure to examine whether Tennessee will use its new tariff authority to enter into "packaged" capacity deals is not reasoned decision-making.

32. The New England LDCs state that this situation is not hypothetical, as evidenced by the notice it attached to its protest.²⁹ The New England LDCs explain that this open season notice contained maximum tariff rate capacity from Tennessee's production areas in Zones 0 and 1 to delivery points in Zone 6.³⁰ They assert that the capacity into Zone 6 is fully subscribed and very valuable on the Tennessee system. However, they contend that, since the capacity from the production area to Zone 6 is included in a larger "package" that also covers other less valuable capacity, a shipper that offers the maximum tariff rate for the Zone 0/1 to Zone 6 capacity may not be awarded the capacity because another entity is willing to also purchase less valuable capacity.³¹

²⁷ May 9 Order at P 19. The New England LDCs state that the Commission cited to two cases in support of this general proposition. *Northern Natural Gas Co.*, 111 FERC ¶ 61,379 at PP 38-39 (2005) and *Gulf South Pipeline Co.*, 119 FERC ¶ 61,032 at P 11 (2007). Rehearing at 13 and note 10.

²⁸ According to the New England LDCs, since Tennessee can sell the forward-haul service from Zone 1-6 at the maximum rate as long as the shipper also combines it with a Zone 6-4 backhaul, Tennessee obtains more revenue than if the shipper had only contracted for the forward-haul maximum rate. Rehearing at 13 and note 11 (*citing* New England LDCs Protest at 6-8).

²⁹ The notice concerned Tennessee's recently posted Open Season # 592. *See* New England LDCs' Protest at Attachment 1.

³⁰ According to the New England LDCs, the long haul capacity delivery points are at the city gates of certain of the New England LDCs. Rehearing at 13, note 12.

³¹ The New England LDCs claim that Open Season # 592 includes a backhaul from Zone 6-4 at maximum tariff rates. The last page of the posting states that: "All final bids received during the open season will be evaluated on an aggregate NPV basis."

33. The New England LDCs are concerned that Tennessee could use proposed section 10.4.3 to require a shipper that wants to extend its contract, or acquire a totally new service, to take additional capacity that Tennessee has been unable to market. In other words, they argue that the “package” capacity deals could become the default method by which contracts will be extended under section 10.4.3. The New England LDCs contend that shippers will take these packaged contracts because of Tennessee’s market power, particularly in constrained markets such as the New England market. If the shipper refuses to take the unwanted capacity, they argue that Tennessee can simply decline to increase the capacity under contract and instead post the “package” under Article XXVIII, section 5 of its GT&C.³² They assert that the May 9 Order completely failed to address their concerns with this aspect of Tennessee’s proposal. The New England LDCs assert that the Commission’s reliance on its general policies regarding capacity allocation, without evaluating the specific facts presented, falls short of this standard. They assert further that the two cases cited by the Commission in the May 9 Order did not address the propriety of capacity packaging such as that allegedly engaged in by Tennessee.

34. The New England LDCs argue that the Commission must consider whether Tennessee could use proposed section 10.4.3 to require a shipper that wants to extend its contract to take additional capacity that Tennessee has been unable to market and, therefore, preclude Tennessee from using section 10.4.3 in such a manner. The New England LDCs further argue that the Commission’s failure to prohibit Tennessee from using section 10.4.3 to award “packaged” capacity deals is contrary to its precedent and policies. They maintain that the May 9 Order did not address, or even mention, the New

Rehearing at 14, note 13.

³² The New England LDCs argue that this is especially problematic for LDCs, which are essentially unable to bid on these arrangements because they would have no use for the entire package of capacity and a regulator could deem the purchase to be imprudent. The New England LDCs provided the following example in their protest: If one of the New England LDCs wants to acquire additional capacity from Zone 1-6, Tennessee could utilize proposed section 10.4.3 to avoid the posting and bidding requirements of its tariff by suggesting that the LDC extend its existing service agreement for Zone 1-6 service, add the additional Zone 1-6 service that the LDC wants to acquire, and also take backhaul service from Zone 6-4. If the LDC chose not to take the additional service, then it would only be able to keep its existing capacity under its ROFR right in Article III, section 10.4.2 and would be precluded from acquiring additional capacity. If the LDC refused to purchase the unneeded capacity for Zone 6-4, Tennessee could make the same deal with another shipper under Article XXVIII of its GT&C. The New England LDCs state that Tennessee conceded in its answer that this would be the case. *See* Rehearing at 14-15.

England LDCs' argument that Tennessee's award of capacity in "packaged deals" is a type of tying arrangement. Since tying arrangements are contrary to the Commission's policies, the New England LDCs believe that the Commission's acceptance of Tennessee's proposed tariff revision permits Tennessee to do indirectly what it clearly cannot do directly.

35. The New England LDCs argue that the Commission's policy clearly prohibits tying arrangements by pipelines. They state that in *Williams Natural Gas Company*,³³ (*Williams*) the Commission required Williams to remove all language in its tariff that would allow Williams to consider offers to purchase other related capacity when evaluating the net present value of offers during the ROFR process. The New England LDCs state that, in an analogous situation, the Commission has held that a pipeline should not be able to post and require bidding on noncontiguous segments of capacity when awarding available capacity.³⁴ According to the New England LDCs, this means that "the Commission's policy against tying is meant to prevent pipelines from requiring shippers to take capacity that the shippers do not want in order to get capacity that the shippers do want."³⁵

36. The New England LDCs assert that the Commission also has held that a pipeline cannot require a shipper to bid on capacity outside of its contract and capacity path for purposes of computing NPV under the ROFR process.³⁶ Under this policy, they claim that Tennessee would not be able to assign a higher value to a shipper who bids the maximum rate for capacity under its contract when that shipper also bids on other unrelated segments of capacity. In other words, according to the New England LDCs, a pipeline is unable to assign a higher value to a tying arrangement, even if the shipper submits such a bid entirely on its own volition. They state that Tennessee argued in its answer that the New England LDCs' reliance on the cases above that prohibit tying are

³³ Rehearing at 16 (*citing Williams Natural Gas Co.*, 62 FERC ¶ 61,261 at 62,760 (1993)).

³⁴ Rehearing at 16 (*citing Natural Gas Company of America*, 82 FERC ¶ 61,036 at 61,140 (1998)). The New England LDCs state that this case addressed bidding on unrelated segments of capacity in the open season context, i.e., the same type of tariff provision Tennessee uses for its package open seasons.

³⁵ Rehearing at 17 (*citing Transwestern Pipeline Co.*, 92 FERC ¶ 61,035 at 61,080 (2000)).

³⁶ Rehearing at 17 (*citing ProGas USA, Inc. v. Iroquois Gas Transmission System L.P.*, 116 FERC ¶ 61,033 (2006)).

inapposite, given that Tennessee's "package" open seasons are the result of pre-arranged deals.³⁷

37. Since the Commission found Tennessee's proposed tariff revisions were just and reasonable apparently based solely on the reasons stated by Tennessee in its answer, they assert that presumably the Commission was swayed by Tennessee's argument. Contrary to the implication in its answer, however, the New England LDCs argue that Tennessee does not limit "package" open seasons to pre-arranged deals. The New England LDCs included in Attachment 1 to its rehearing request notices for five package open seasons held by Tennessee since 2004. The New England LDCs state that none of these open seasons are pre-arranged deals and therefore Tennessee's attempt to distinguish the cases cited by the New England LDCs prohibiting tying arrangements is baseless.

38. Given the Commission's general policy against tying arrangements, the New England LDCs argue that the reasoning for Tennessee's broad tariff authority in section 10.4.3 is brought into context. They contend that the Commission's approval of Tennessee's new tariff authority in section 10.4.3 gives Tennessee the regulatory approval to enter into tying agreements. They claim that the tariff language does this by virtue of the last sentence, which states that *the requirements of Article III, section 10.4.2 (ROFR rights) or Article XXVIII, section 5 (award of available capacity) shall not apply*. As a result, the New England LDCs argue that the Commission's policies that prohibit tying with regard to ROFR rights and open season capacity allocation procedures would be inapplicable to transactions negotiated pursuant to section 10.4.3. They argue that proposed section 10.4.3 can be used by Tennessee to dispose of excess capacity via tying arrangements free from any review and insulated from the Commission's case law prohibiting tying arrangements, which they maintain is clearly unjust and unreasonable. The New England LDCs request that the Commission grant rehearing and expressly hold that Tennessee cannot use section 10.4.3 to enter into any agreements that "package" new capacity with the shipper's pre-existing capacity under contract.

39. As the Commission found in the May 9 Order, Tennessee's proposal is consistent with Commission policy and precedent where the Commission has previously approved other pipeline's tariff provisions that reflect a flexible approach to re-contracting. Tennessee's tariff does not allow it to require shippers to take or add capacity they do not want. Shippers (such as New England LDCs) with a long term firm service agreement with a ROFR have the right, under the Commission's regulations and under section 10.4 of Tennessee's GT&C, to use the regular ROFR procedures to obtain a contract extension. As the New England LDCs state, under those procedures Tennessee cannot require the existing shipper to bid on capacity outside of its contract and capacity path for purposes of computing NPV under the ROFR process. Therefore, shippers with a ROFR

³⁷ Rehearing at 17 (*citing Tennessee Answer at 16-17*).

will continue to have complete control over whether to extend their existing agreement(s), without the addition of any new capacity.

40. Section 10.4.3 provides an alternative flexibility that the transporter and shipper may mutually agree to renegotiate the terms of their long term firm transportation agreements. Tennessee cannot mandate negotiations or require a shipper to acquire additional capacity under section 10.4.3 (or take less). By the same token, a shipper cannot mandate negotiations or require Tennessee to make additional capacity part of the negotiated exchange for the underlying extension. Rather, section 10.4.3 enables the parties to determine when it is in their best interests to renegotiate a service arrangement and further, because the decision to renegotiate must be mutual, the rights of both parties are protected.³⁸ Clearly, a shipper would not agree to act under section 10.4.3 unless it was in its commercial interest to do so, which is also true of Tennessee.

41. We are convinced that Tennessee's proposal will enhance shippers' contracting options and will be beneficial in terms of those shippers who may have been reluctant to renew their service on Tennessee if such renewal was strictly limited to the terms they originally signed up for. Further, it appears that the proposal will be beneficial to both Tennessee and the overall system in that it helps mitigate the marketing risk for turned-back capacity.

42. The Commission is not convinced that the open season notice the New England LDCs' reference is a situation that involves a packaged deal or that section 10.4.3 will permit Tennessee to enter into any tying arrangements. We therefore deny the New England LDCs' request for rehearing on this issue. The New England LDCs have failed to identify any actual tariff language that (1) requires shippers to take unwanted capacity or service in order to restructure their existing service agreements, (2) shows where Tennessee's open seasons impose limitations on what portion of the available capacity shippers may bid on as a condition of participating in the open season, or (3) supports New England LDCs' contention that Tennessee has in any way acted in contravention of its Commission-approved tariff. Accordingly, rehearing is denied

III. Compliance Filing

43. In its May 23, 2007 compliance filing, Tennessee submits Substitute Ninth Revised Sheet No. 324 and Substitute Fifth Revised Sheet No. 324A for inclusion in its FERC Gas Tariff, Fifth Revised Volume No. 1 to comply with the condition in the May 9 Order. Specifically, Tennessee states that the revised tariff sheets clarify that any agreement to extend a contract pursuant to section 10.4.3 must be reached prior to the initiation of the ROFR procedure pursuant to section 10.4.2 of its GT&C. Tennessee added the following sentence to section 10.4.3:

³⁸ Rehearing at 3 (*citing ANR Pipeline Company*, 116 FERC ¶ 61,201 at P 2 (2006)).

If an Agreement has a regulatory right-of-first refusal, the agreement to extend must be reached prior to the initiation of the right-of-first refusal procedure pursuant to Section 10.4.2 of these General Terms and Conditions.

44. ConEd filed a limited protest stating that it is concerned that pipelines should not be permitted to post expiring capacity under the ROFR and subsequently elect to use the non-ROFR extension process after reviewing the competing bids. ConEd states that such an approach would, among other things, be a waste of the resources of the bidders and permit pipelines to use the bids submitted in the ROFR process as a stalking horse for their negotiations with the capacity holder. ConEd explains that, posting expiring capacity is not the “initiation of Tennessee’s ROFR procedure.” Rather, it contends that Tennessee’s section 10.4.2 describes a pre-posting procedure in which Tennessee provides notice of the expiring contract, the shipper has the option of terminating the contract, agreeing to a five-year extension, or requesting a lesser extension, and Tennessee has the option of accepting the requested lesser extension or posting the capacity for bids. ConEd argues that the sentence quoted above in the May 23rd compliance filing would require Tennessee and the capacity holder to cease negotiations many months before Tennessee posts the capacity, the time at which Hess sought to have contract extension discussions between Tennessee and the capacity holder cease.

45. ConEd recognizes that Hess, in its April 24, 2007 motion to intervene and comments, cited to an ANR order which approved tariff language similar to that proposed by Tennessee.³⁹ However, ConEd asserts that it must be recognized that the practical effects of the ANR and Tennessee proposals differ substantially. ConEd explains that ANR’s GT&C section 2.12(b) provides that the agreement to extend a contract must be reached prior to initiation of the ROFR pursuant to ANR’s GT&C section 22.3. According to ConEd, that section provides for the initiation of ANR’s ROFR process no earlier than eight months, nor later than seven months, prior to the expiration of the shipper’s contract. In contrast, ConEd states that, under Tennessee’s section 10.4.2, the shipper is given notice of an expiring contract 13 months before its termination and the shipper must elect whether to extend the contract or any portion thereof a full twelve months before the contract’s termination. To the extent the shipper elects to extend the contract for less than the automatic extension period, ConEd states that Tennessee may

³⁹ The Hess Motion asserted, *inter alia*, that the shipper and Tennessee should be required to exercise the contract extension process prior to initiation of the ROFR procedure. Hess Motion at 9-10. More specifically, the Hess Motion asserted that “Tennessee and the shipper should not be permitted to post the expiring contract capacity under the ROFR, and subsequently elect to use the non-ROFR extension process after reviewing the competing bids.” Hess Motion at 9, emphasis in the original. In support of its position, the Hess Motion cited *ANR*, 116 FERC ¶ 61,201 (2006).

require the shipper to exercise its ROFR and post the capacity for bidding no later than 180 days prior to the expiration of the agreement.

46. ConEd believes that the contract flexibility objectives reflected in Tennessee's April 9 filing and the concerns addressed by the Hess Motion may be harmonized by adopting the following language, in lieu of the language of the May 23 compliance filing:

“If an Agreement has a regulatory right-of-first refusal, the agreement to extend must be reached prior to Transporter's posting the capacity for bidding pursuant to Section 10.4.2(a) of these General Terms and Conditions.”

With this approach, ConEd asserts that the flexibility of capacity holders and Tennessee to negotiate contract extensions will be maximized, but will, as requested by Hess, terminate prior to the initiation of the ROFR bidding process, 180 days prior to the expiration of the service agreement. Therefore, ConEd requests that Tennessee be required to amend its compliance filing in the manner proposed herein. ConEd asserts it is authorized to state that Tennessee has no objection to this request.

47. The Commission finds that the language proposed above helps to achieve the contract flexibility objectives reflected in Tennessee's April 9 filing and addresses the concerns raised by the Hess Motion. Since Tennessee has no objection to the proposed language we accept the May 23rd filing subject to Tennessee filing revised tariff language, within 15 days of the date of this order, to reflect the new language set forth above.

The Commission orders:

(A) New England LDCs' request for rehearing is denied.

(B) The compliance filing is accepted subject to Tennessee filing revised tariff language, within 15 days of the date of this order, to reflect the new language as stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary