

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Tennessee Natural Gas Company

Docket No. RP97-13-013

ORDER ACCEPTING NEGOTIATED RATE FILINGS SUBJECT TO CONDITIONS

(Issued May 27, 2004)

1. On April 27, 2004, East Tennessee Natural Gas Company (East Tennessee) filed a revised tariff sheet,¹ three Rate Schedule FT-A service agreements with Carolina Power & Light Company (CPL), and three related letter agreements (two negotiated rate agreements and one discount agreement). As discussed below, the Commission will accept East Tennessee's proposed tariff sheet, service agreements and letter agreements subject to conditions to be effective May 1, 2004.

Background

2. On September 24, 2003, East Tennessee filed firm service agreements and associated letter agreements with CPL in Docket No. RP97-13-008. East Tennessee states that these agreements were entered into in order to secure the anchor load necessary to support East Tennessee's Patriot Project facilities which has been granted certificate authorization by the Commission.² On October 31, 2003, the Commission accepted those agreements subject to condition.³ The Commission explained that East Tennessee had included in its filings copies of the service agreements along with redlined versions of the service agreements highlighting the differences from the form of service agreement in effect at the time East Tennessee executed the agreements with the Patriot shippers. The Commission noted, however, that the filing also included letter agreements

¹ Fifth Revised Sheet No. 177 to its FERC Gas Tariff, Second Revised Volume No. 1.

² East Tennessee Natural Gas Co., 101 FERC ¶ 61,188 (2002).

³ East Tennessee Natural Gas Co., 105 FERC ¶ 61,162 (2003).

which supplemented the service agreements. The Commission stated that East Tennessee's letter agreements contained provisions that appeared to modify the form of service agreement and provisions permitting the letter agreements to supercede any contrary provisions in the form of service agreement or the pipeline's tariff.

3. The Commission found that East Tennessee's filing of letter agreements was contrary to the direction of the Commission's 2003 Policy Statement modifying the Commission's negotiated rate policy⁴ that the form of service agreement be used as the starting point in drafting negotiated rate contracts, that East Tennessee had failed to adequately delineate the differences between the terms in its letter agreements and that of the form of service agreement in redline/strikeout, and that East Tennessee had failed to provide a detailed narrative outlining the differences between the terms of its letter agreements and those of the form of service agreement. Therefore, the Commission found that East Tennessee failed to comply with the Policy Statement. Because the agreements were entered into several months before the issuance of the Policy Statement, the Commission determined not to reject East Tennessee's filing as deficient but rather to require East Tennessee to file supplemental information that fully complied with the Policy Statement.

4. On December 1, 2003, East Tennessee withdrew the CPL agreements in its compliance filing to the October 31, 2003 Order, explaining that the agreements were being renegotiated. East Tennessee states that the instant filing contains those renegotiated agreements and that it has submitted a tariff sheet reflecting three new service agreements with CPL. East Tennessee has filed three service agreements under Rate Schedule FT-A and three associated letter agreements (two negotiated rate agreements⁵ and one discount agreement⁶) which it has entered into with CPL.

5. The three service agreements between East Tennessee and CPL follow the Form of Service Agreement in East Tennessee's tariff with the blanks filled in with the appropriate information. Each service agreement contains a few minor deviations from the Form of Service Agreement and East Tennessee has redlined copies of the service agreements reflecting the variations. The three letter agreements each state that they have been entered into to provide rates for the service to be provided under the relevant service agreement. The letter agreements also contain non-rate provisions. Each letter

⁴ Natural Gas Pipeline Negotiated Rate Policies and Practices, 104 FERC ¶ 61,134 (2003) (Policy Statement).

⁵ The service agreements are designated as service agreement 410104R1 and service agreement 410135.

⁶ This discount service agreement is designated as 410103R1.

agreement includes a provision that: “[i]n the event of a conflict between this Agreement and Transporter’s FERC Gas Tariff and/or the Service Agreement, this Agreement shall control.” In order to show the differences between the Form of Service Agreement and the letter agreement, East Tennessee has included in its filing copies of each letter agreement in which the entire letter agreement is redlined.

6. East Tennessee states that it entered into these agreements with CPL to secure the anchor load necessary to support the development and construction of the Patriot Project and that the subject agreements represent a negotiated allocation of the risks of development of the Patriot Project and the commitment CPL has made to the project.

7. Notice of East Tennessee’s filing was issued with interventions and protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. §154.210 (2003)). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214 (2003)), all timely filed motions to intervene and any motions To intervene out of time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No interventions or protests were filed.

Discussion

8. As an initial matter, the instant filing presents issues related to the appropriate manner for pipelines to file negotiated and discount rate agreements that include material deviations from the Form of Service Agreement. In particular, this case raises the issue of the extent to which the Commission will permit pipelines to use a document separate from the service agreement to set forth the parties’ agreement as to the negotiated or discounted rate to be paid by the customer and other terms agreed to by the parties.

9. The Commission’s regulations require that pipelines include in their tariff a Form of Service Agreement, and file any contract that deviates materially from the Form of Service Agreement.⁷ The filing of non-conforming service agreements enables the Commission and other interested parties to review the contract to determine whether the material deviations comply with the requirements of the Natural Gas Act, including that the pipelines have not engaged in undue discrimination.

⁷ 18 C.F.R. § 154.1(d) and 154.110 (2003). The Commission has held that a material deviation includes any provision in a service agreement that is not in the approved language of the Form of Service Agreement and (1) goes beyond filling-in-the-blank spaces with the appropriate information allowed by the tariff or (2) affects the substantive rights of the parties. Policy Statement at P 27, citing, Columbia Gas Transmission Corp., 97 FERC ¶61,221 at 62,002 (2001).

10. In its 2003 Policy Statement modifying its negotiated rates policy, the Commission noted that where pipelines had filed negotiated rate service agreements with material deviations, the deviations had often not been clearly identified, requiring the Commission to carefully compare the negotiated rate agreement with the Form of Service Agreement in order to determine how the two may differ.⁸ The Policy Statement continued:

“Indeed, on some occasions parties have drafted the entire service agreement independently of the form of service agreement in the tariff. As a result, provisions may be worded differently from similar provisions in the form of service agreement, but it is not immediately apparent whether the parties intended the provision to be substantively different. These circumstances hinder the Commission’s ability to assess whether the transaction is unduly discriminatory as well as the assessment of the transaction by shippers attempting to determine if they are similarly situated to the shipper in the negotiated transaction.”⁹

11. Therefore, the Commission determined that the Form of Service Agreement should be the starting point for drafting any negotiated rate.¹⁰ The Commission also required that a pipeline filing a negotiated rate contract proposing material changes from its Form of Service Agreement must clearly delineate differences between its negotiated contractual terms and that of its Form of Service Agreement in redline/strikeout.¹¹

12. In the instant case, East Tennessee has used the Form of Service Agreement for the purpose of entering into agreements with CPL, and consistent with the Policy Statement has filed a redline/strikeout version showing the deviations from the Form of Service Agreement. However, East Tennessee has also entered into separate letter agreements which set forth the negotiated or discounted rate for each service agreement. As discussed further below, these letter agreements go beyond delineating the rate to be paid and include provisions concerning certain non-rate matters that are also covered by the service agreements, such as CPL’s right to assign the agreements and what law

⁸ Policy Statement at P 31.

⁹ Id.

¹⁰ Policy Statement at P 33.

¹¹ In addition, the pipeline must provide “a detailed narrative outlining the terms of its negotiated contract, the manner in which such terms differ from its form of service agreement, the effect of such terms on the rights of the parties, and why such deviation does not present a risk of undue discrimination.” Policy Statement at P 33.

should govern resolution of disputes. The letter agreements also contain provisions stating that to the extent there is any conflict between the letter agreement, on one hand, and the Form of Service Agreement and the pipeline's tariff, on the other hand, that the letter agreement will govern. East Tennessee has redlined each letter agreement in its entirety as a material deviation from the Form of Service Agreement.

13. The Commission finds that by structuring its agreements with CPL in this manner East Tennessee has violated the policies established in the 2003 Policy Statement concerning the filing of contracts with material deviations from the Form of Service Agreement, hindering the Commission's ability to efficiently review these contracts for undue discrimination, consistency with Commission policies, and violations of the NGA.

14. The Commission recognizes that Article VI of East Tennessee's Form of Service Agreement provides that the rates will be the maximum rate for the service "except as provided to the contrary in any written or electronic agreement(s) between the Transporter and Shipper" The Commission has no objection to the service agreement being structured so that a negotiated or discounted rate may be set forth in a separate document (rate document), along with other provisions directly related to the agreed-upon rate. However, the Commission will require that any such rate document be consistent with the Form of Service Agreement. Since the Form of Service Agreement only provides for modification of the maximum rate by a separate document, that document must be exclusively focused upon the rate to be charged.¹² This means the rate document may only set forth the rate, together with any provisions that are solely related to implementing the agreed-upon rate. For example, a rate document setting forth a negotiated rate might contain a provision that the customer will not seek to change the negotiated rate pursuant to NGA section 5 or a provision concerning the renegotiation of the rate if the pipeline loses the authority to charge a negotiated rate. Such a rate document may not contain other provisions on non-rate matters.

15. Including non-rate provisions in the rate document that cover the same subject matter as other provisions of the Form of Service Agreement violates the requirement of the Policy Statement that the Form of Service Agreement be used as the starting point for the negotiated agreement. That is because it leads to a situation in which both the service agreement between the parties and the rate document contain a provision on the same

¹²In essence, the written or electronic agreement providing for a rate other than the maximum rate may be considered a blank in the Form of Service Agreement to be filled in with the information contemplated by the Form of Service Agreement. See Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,380 at P 17 (2003) (finding that appropriate amendments must be "constructed to focus only on the negotiated rates themselves and any other provisions that are directly related to the negotiated rates and do not affect service"). See e.g., Tennessee Gas Pipeline Co., filing in Docket No. RP96-312-134.

subject, but the two provisions are worded somewhat differently. The pipeline then, as here, attempts to meet the filing requirements of the Policy Statement by redlining the entire rate document. This does not highlight which individual provisions of the rate document address the same subjects as certain provisions of the service agreement and modify those service agreement provisions. It is thus not immediately apparent whether the parties intended the relevant provisions of the service agreement and the rate document to be substantively different, and, if so, what the substantive difference is. This places the Commission and other parties in the same position they occupied before the Policy Statement set forth the filing requirements in that they are hindered in their ability to assess whether the transaction is unduly discriminatory and in the case of other shippers whether they are similarly situated to the shipper in the negotiated transaction. Our discomfort with this type of situation is further heightened where, as here, the rate document contains a provision that if there is any conflict between the rate document and either the Form of Service agreement or the tariff, the rate document will control. This suggests that the parties themselves are not certain about the extent of the material deviations from the form of service agreement they may have agreed to. If the parties to the agreement are unsure about the nature of their agreed-upon deviations, how can either the Commission or other interested parties assess whether those material deviations should be approved?

16. The Commission reemphasizes that the Form of Service Agreement should be the starting point to the crafting of a negotiated rate agreement. As such, the rate document must not contain any provisions that address the same issues as provisions contained in the Form of Service Agreement, and to the extent provisions in the negotiated agreement are intended to be different from the corresponding provisions contained in the Form of Service Agreement, such provisions must be placed in the appropriate section of the Form of Service Agreement with the changes highlighted with redline and strikeout.¹³ In other words, the provisions of the negotiated rate agreement should be identical to the provisions contained in the Form of Service Agreement unless the pipeline intends to modify the rights and obligations of the parties as contained in the Form of Service Agreement. If such modification is the intent of the parties, the negotiated service agreement must reflect, in redline and strikeout, these differences from the Form of Service Agreement. Further, such action will obviate any need for pipelines to request language which would permit a letter agreement to control if a conflict develops concerning the rights and obligations of the parties under the letter agreement as opposed to the service agreement or the tariff. If the negotiated service agreement is properly

¹³ For example, if the Form of Service Agreement discusses assignment of capacity in paragraph no. 7 and the negotiated agreement uses different wording in addressing assignment of capacity, paragraph no. 7 of the negotiated service agreement must be modified using redline and strikeout to capture the wording used in the negotiated rate agreement.

filed, any deviation between that agreement and the Form of Service Agreement in the tariff will be redlined, and explained in a narrative. Therefore, the properly filed negotiated service agreement signed by the parties will control any dispute.¹⁴

17. Therefore, the Commission will accept East Tennessee's filing to be effective May 1, 2004, subject to the following conditions. East Tennessee is directed to renegotiate the subject transactions as discussed above, using the Form of Service Agreement in its tariff as a starting point for the negotiated rate services. Starting with the terms presented in the Form of Service Agreement and in its tariff, East Tennessee will determine term by term whether the negotiated transaction follows the terms of the Form of Service Agreement and highlight any deviations. In the Commission's view, there is no reason to reflect terms in a negotiated service agreement that are different than the terms of the Form of Service Agreement in the tariff, if the parties to the negotiated agreement do not wish to alter their rights and obligations as set forth in the Form of Service Agreement. In such case, the exact wording of the Form of Service Agreement in the tariff must be maintained. To the extent that the parties wish to alter their rights and obligations from those contained in the Form of Service Agreement, and the parties believe that Commission policy permits such changes as non-conforming service agreements provisions, the pipeline must highlight such modifications in redline and strikeout. Placing the modification in a separate letter agreement that is intended to control the negotiated service agreement is not a permissible manner in which to comply with the Commission's filing requirements for negotiated transactions.

18. If the Form of Service Agreement includes a blank space for the insertion of a rate (or other permissible negotiable term) or language which indicates that the rate or term is located in an appendix or in an exhibit or subject to a separate agreement, the pipeline may place such information in an exhibit, or appendix, or rate document, but the information must relate solely to the referenced rate or term.

19. For example, for firm service under contract no. 410104R1 the paragraphs designated 1-3 of East Tennessee's letter agreement address rate matters. East Tennessee's Form of Service Agreement provides that the rate will be the currently effective rate for the service except as provided to the contrary by written or electronic agreement between the Transporter and the Shipper. Therefore, as discussed above, East Tennessee may place information such as that contained in these paragraphs in a rate document or exhibit to its negotiated service agreement.

20. Paragraph 4 of East Tennessee's letter agreement states that in the event of a conflict between the letter agreement and the negotiated service agreement, the letter agreement will control. As set forth above, if the negotiated service agreement is

¹⁴ See Texas Eastern Transmission, LP, 107 FERC ¶ 61,099 (2004).

properly filed, it will control the non-rate rights and obligations of the parties to the negotiated service agreement. Therefore, this provision is not acceptable.

21. Paragraphs 5 and 6 of the letter agreement set forth the term of the negotiated rate agreement. This information must be placed in Article X of the negotiated service agreement to conform to the Form of Service Agreement and with redline and strikeout as appropriate. Paragraph 7 of the letter agreement discusses assignments of rights under the negotiated agreement. If East Tennessee does not wish to change the rights and obligations of the parties with regard to assignments, it must use the language that is in Article XII of its Form of Service Agreement. If Paragraph 7 of the letter agreement is intended to change such rights and obligations, this language must be placed in the negotiated service agreement to conform to Article XII of the Form of Service Agreement with deviations highlighted in redline and strikeout.

22. Paragraph 8 of the letter agreement constitutes a type of most favored nation clause. The Commission has found most favored nation clauses to be permissible if the clause is limited to the rate to be charged. In the instant clause, East Tennessee has required that the shipper also agree to the terms and conditions of service agreed to by a similarly situated shipper.¹⁵ The Commission will not permit this clause as it is premised on the incorrect assumption that the pipeline may negotiate terms and conditions of service with some shippers that are different from those offered to other shippers. If the parties wish to retain a most favored nation type clause it must pertain solely to rates.¹⁶

23. Paragraph 9 of the letter agreement discusses remedies for the failure of the Transporter to perform under a precedent agreement. Article 11.3 of East Tennessee's Form of Service Agreement provides language regarding the rights of the parties if the parties to the agreement are unable to obtain all necessary and satisfactory regulatory approvals for service within a time certain when the service results from new construction. In its Transmittal Letter, East Tennessee states that it has received regulatory approvals for the subject project and that the facilities are in place to provide

¹⁵ In Paragraph 8 (c) the letter agreement states that "Shipper agrees to the same applicable terms and conditions that such Similarly Situated Party or Customer agreed to for its lower rate and its firm transportation service, then for the term of the lower rate agreed to with the Similarly Situated Shipper or Customer Transporter will discount its applicable rate to Shipper to match such lower rate."

¹⁶ Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,380 at P 26 (2003).

service under this agreement and, therefore, Article 11.3 of its Form of Service Agreement is not applicable to the service.¹⁷ Pre-service conditions that do not affect transportation services or rate should only be in the precedent agreement and not in the negotiated service agreement.¹⁸ In any event, since the conditions have been satisfied, East Tennessee must remove this language from its negotiated service agreement.

24. Paragraph 10 of the letter agreement provides that CPL may terminate its contract with East Tennessee if a connecting service construction project is not completed and ready for service as of the effective date of the Primary term of the service agreement, or if the connecting pipeline is unwilling or unable to provide service to CPL after the primary term commences. The Commission has determined that pipelines should not be permitted to negotiate such predetermination clauses unless such clauses are offered, subject to reasonable conditions, as a part of the pipeline's generally applicable tariff.¹⁹ Accordingly, East Tennessee must remove such language from its agreement or place such language in its tariff so that all of its shippers may avail themselves of a pre-termination clause.

25. Paragraph 11 of the letter agreement addresses regulatory matters and the rights of parties to renegotiate the service if the Commission modifies the agreement. This language must be placed in the negotiated service agreement and redlined. Further, Paragraph 12 of the letter agreement contains language that the laws of Tennessee will govern any conflict related to the subject service. Similar language is contained in East Tennessee's Form of Service Agreement at Article 14.4. Therefore, if East Tennessee does not intend to change the rights and the obligations of the parties, it must use language identical to that contained in its Form of Service Agreement. If East Tennessee does intend to change such rights and obligations, it must include language in its negotiated service agreement in redline and strikeout.

26. The letter agreement for contract 410135 contains language similar to the letter agreement discussed above and modifications similar to the above discussion must be made. Paragraphs 1 through 7 of this letter agreement must be treated the same as the first seven paragraphs of the letter agreement for contract no. 410104R1. Paragraphs 8 through 11 of this contract must be treated as the language in Paragraphs 11 through 14 of letter agreement for contract no. 410104R1.

¹⁷ East Tennessee Transmittal Letter at 4. Moreover, Article 5 of East Tennessee's Form of Service Agreement states that "[t]he facilities necessary to receive, transport, and deliver gas as described herein are in place and no new facilities are anticipated to be required."

¹⁸ Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,380 P 23-24 (2003).

¹⁹ ANR Pipeline Co., 97 FERC ¶ 61,224 at 62,025-026 (2001).

27. East Tennessee has also filed discounted rate contract no. 4100103R1. The Commission will accept East Tennessee's discounted rate filing to be effective May 1, 2004, subject to East Tennessee refiling the discounted rate agreement as discussed below. Generally a discounted rate agreement may only reflect a rate between the maximum and minimum rate reflected in the pipeline's tariff. If the pipeline wishes to include in the discounted rate shipper's service agreement provisions that materially deviate from the Form of Service Agreement in the tariff, the pipeline must file the service agreement. Since the Commission must undertake the same analysis to determine whether the service agreement filed is unduly discriminatory as for a negotiated rate agreement and other shippers must be able to determine whether they are similarly situated to the shipper receiving the discount, East Tennessee is directed to file a redline version of its Form of Service Agreement reflecting any material deviations contained in its discount agreement. In undertaking this action, East Tennessee should follow the directions and findings of the Commission as set forth in its discussion for negotiated rates.

The Commission orders:

(A) East Tennessee's tariff sheet, negotiated rate filings and discounted rate filings are accepted to be effective May 1, 2004, subject to the conditions set forth in the body of this order.

(B) East Tennessee is directed to file to comply with the directive of the instant order within 30 days of the issuance of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.