

107 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP

Docket No. RP99-480-008

ORDER ACCEPTING TARIFF SHEETS AND SERVICE
AGREEMENT FOR A NEGOTIATED RATE SUBJECT TO
MODIFICATIONS AND CONDITION

(Issued April 30, 2004)

1. On March 31, 2004, Texas Eastern Transmission, LP (Texas Eastern) filed revised tariff sheets,¹ proposing to provide firm transportation service at a negotiated rate for Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (CP&L) effective May 1, 2004. The revised tariff sheets listed in footnote No. 1 and the Service Agreement are accepted effective the later of May 1, 2004, or the date the M-1 Expansion Project facilities are placed into service, subject to modifications and condition as discussed below. Our action here permits Texas Eastern to provide service to CP&L, while preserving our statutory responsibility to assure service is rendered in a not unduly discriminatory manner.

Proposal

2. Texas Eastern proposes, in accordance with its negotiated rate authority,² to enter into a negotiated rate transaction with CP&L under its Rate Schedule FT-1 (Contract No. 910429), to provide firm transportation service with a primary term commencing on May 1, 2004 and continuing through October 31, 2018, utilizing capacity created by Texas Eastern's M-1 Expansion Project. The M-1 Expansion Project was authorized in

¹ Original Sheet No. 108 and Sheet Nos. 109 – 125 to FERC Gas Tariff, Seventh Revised Volume No. 1.

² By Commission letter order issued September 22, 1999, the Commission authorized Texas Eastern to charge negotiated rates for its transportation services.

CP02-381-000, and, among other things, provided for the construction of 32 miles of mainline looping and 28,000 horsepower of compression.³ The Service Agreement provides for up to 50,782 per Dth of firm transportation service from April 1 through October 31 with respective reservation and usage charges of \$1.00 per Dth and \$0.0740 per Dth, and up to 10,150 per day of firm transportation service from November 1 through the following March 31 with a respective reservation and usage charges of \$5.86 per Dth and \$0.0610 per Dth for each contract year.

3. Texas Eastern supports its proposal by filing a proposed tariff sheet listing CP&L as a party to a negotiated rate arrangement, a January 4, 2004 Service Agreement, and a January 9, 2004 Negotiated Rate Agreement with CP&L. Texas Eastern indicates that in accordance with the 2003 Policy Statement,⁴ it filed a marked version of the Service Agreement with CP&L highlighting the differences between the pro forma FT-1 service agreement in effect at the time Texas Eastern executed the Service Agreement with CP&L.

4. Texas Eastern contends that the Negotiated Rate Agreement does not contain terms and conditions that constitute impermissible material deviations from the pro forma service agreement. Texas Eastern asserts that, while paragraph 8 of the Negotiated Rate Agreement constitutes a most favored nations clause, that clause applies only to the negotiated rate and does not affect the terms and conditions of service. Texas Eastern states that the Commission has permitted this type of most favored nations clause.⁵ Texas Eastern indicates that while paragraph 4 of the Negotiated Rate Agreement provides that the Negotiated Rate Agreement controls if there is a conflict between the Service Agreement and Texas Eastern's Tariff, the Negotiated Rate Agreement only pertains to the negotiated rate applicable under the Service Agreement. Texas Eastern accordingly asserts that this provision does not affect the terms and conditions of service. Texas Eastern contends that paragraph 4 is not unduly discriminatory and the Commission should deem the paragraph a permissible deviation from the pro forma service agreement. Further, paragraph 10 of the Negotiated Rate Agreement provides that in the event the Commission modifies any provision, the parties will renegotiate an agreement that maintains the relative positions of the parties.

³ 101 FERC ¶ 61,120 (2002), order issuing certificate, 102 FERC ¶ 61,245 (2003).

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

⁵ The Commission permits most-favored nations clauses as permissible deviations, so long as they only pertain to the rate for service. See Gulfstream Natural Gas System, L.L.C., 100 FERC ¶ 61,036 (2002), order on reh'g, 101 FERC ¶ 61,368 (2003); Colorado Interstate Gas Co., 101 FERC ¶ 61,268 (2002).

Interventions

5. Public notice of Texas Eastern's filing was issued on April 7, 2004. Interventions and protests were due as provided in § 154.210 of the Commission's Regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214), all timely filed motions to intervene and the motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

6. The Commission accepts Texas Eastern's proposed tariff sheets and the Service Agreement, subject to condition and Texas Eastern making certain modifications to its tariff sheets.

Deviation from 2003 Policy Statement

7. The 2003 Policy Statement addressed the Commission's Negotiated Rate Policy and provided for several modifications to that policy. Among other things, the Commission stated that its experience with negotiated rate filings had shown that the filings on occasion lacked the information necessary for the Commission's staff and the pipeline's shippers to analyze the negotiated rate agreement. The Commission noted that where pipelines had filed service agreements with material deviations from the pipeline's form of service agreement, 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. In order to provide greater transparency and to assist the Commission and interested parties in analyzing negotiated rate transactions, the 2003 Policy Statement found that the form of service agreement must be used as a starting point in drafting any negotiated rate contract. The Commission required that a pipeline filing a contract proposing material changes from its form of service agreement must clearly delineate differences between its negotiated contractual terms and its form of service agreement in redline and strikeout. Further, the 2003 Policy Statement required that the pipeline shall 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.⁶

⁶ 104 FERC ¶ 61,134 at P 33 (2003).

9. Texas Eastern has not complied with the Commission's revised policy concerning the filing of negotiated rate agreements. In this proposal, Texas Eastern filed both a Service Agreement and a Negotiated Rate Agreement. The Negotiated Rate Agreement contains a provision that controls in the event of a conflict between the Negotiated Rate Agreement and either Texas Eastern's tariff and/or the Service Agreement.⁷ While Texas Eastern, in accordance with the 2003 Policy Statement, filed the appropriate redline and strikeout version of the Service Agreement showing the differences between the negotiated contractual terms in the Service Agreement and Texas Eastern's form of service agreement, it is clear from analyzing the Negotiated Rate Agreement that it goes beyond simply setting forth the rate agreed to between the parties. For example, Paragraph 7 of the Negotiated Rate Agreement contains provisions concerning the customer's assignment rights that differ from the assignment rights set forth in Article VII of the Service Agreement. However, Texas Eastern has not indicated the differences between these two provisions by redline and strikeout or otherwise brought them to our attention. Also, as discussed further below, the Negotiated Rate Agreement contains a most favored nations clause, which appears to contemplate the possibility the customer could negotiate terms and conditions of service that differ from those in the tariff.

10. As the Commission found in East Tennessee Natural Gas Co.,⁸ the filing of a Negotiated Rate Agreement that is a separate document from the Service Agreement "is contrary to the 2003 Policy Statement direction that the form of service agreement be used as the starting point in drafting negotiated rate contracts."⁹ The Commission intended by this direction that the entire agreement between the parties be set forth in a single document, with any differences between the parties' agreement and the form of service agreement indicated by redline and strikeout. The purpose of this requirement was to avoid the very situation that has occurred here, where the separate Service Agreement and Negotiated Rate Agreement contain differing provisions on the same subject, such as those concerning assignment rights, and "the deviations have . . . not been clearly identified, requiring the Commission to carefully compare the negotiated rate agreement with the form of service agreement to determine how the two may differ."¹⁰

⁷ See Negotiated Rate Agreement at P 4 and transmittal letter of the application at p. 3.

⁸ 105 FERC ¶ 61,162 at P 16 (2003).

⁹ There is no provision in Texas Eastern's Form of Service Agreement for the negotiated rate to be set forth separately from the rest of the Service Agreement, for example in an appendix.

¹⁰ 2003 Policy Statement, 104 FERC ¶ 61,134 at P 31 (2003).

11. While we have not required renegotiation of separate service and negotiated rate agreements which were executed before the 2003 Policy Statement, here Texas Eastern executed the separate Service Agreement and the Negotiated Rate Agreement in January 2004, after both the policy statement and the East Tennessee order. Accordingly, the Commission directs that Texas Eastern file a revised Service Agreement which uses the form of service agreement as the starting point and includes in a single document the entire agreement between the parties. All differences between the revised Service Agreement and the form of service agreement must be indicated by redline and strikeout. In addition, Texas Eastern must provide a detailed narrative outlining the manner in which the terms of the Service Agreement differ from the 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.

Receipt Points

12. In reviewing the filing, there is a conflict between Texas Eastern's definition of the primary receipt points in revised Sheet No. 108 and in Exhibit A of the Service Agreement. The revised Sheet No. 108 provides that as applicable, all points on Texas Eastern's Master Receipt Point list are available as receipt points while Exhibit A of the Service Agreement indicates that the firm point of receipt is "NONE." The Service Agreement further provides for a transportation path from two separate zones on Texas Eastern's system, indicating that the transportation path receipt is restricted to two zones. Texas Eastern is required to revise Sheet No. 108 and the Service Agreement to resolve the inconsistencies between the two documents. Further, providing a receipt point of "NONE" in the Service Agreement is unacceptable since at least one primary receipt point where the shipper has the highest priority for service is required to provide firm service consistent with § 284.7(a)(3) of the Commission's regulations. In addition, failure to designate the primary receipt points for firm transportation service makes it unclear whether any nominated secondary firm transaction is inside or outside the shipper's primary path for purposes of scheduling such transactions. Texas Eastern is accordingly required to designate the specific receipt points for the proposed firm transportation service.

Most Favored Nations Clause

13. Texas Eastern provides for a most favored nations clause (MFN) at paragraph 8 of the Negotiated Rate Agreement. While the Commission's orders addressing various negotiated rate filings¹¹ has permitted MFN provisions, such MFN provisions are only permitted when they apply to rate conditions. In this instance, Texas Eastern has

¹¹ See orders cited in n. 5 of this order.

proposed a MFN clause at paragraph 8(c) which permits a shipper to agree to the same applicable terms and conditions that a Similarly Situated Party or Customer agreed to for its lower rate and its firm transportation service. It appears from this provision, that Texas Eastern is permitting shippers to change the terms and conditions within a MFN clause instead of just the rate. We find this type of MFN clause to be unacceptable. Its premise is that Texas Eastern may negotiate terms and conditions of service with some shippers that are different from those offered other shippers. However, in Order No. 637, the Commission determined to not allow pipelines to negotiate terms and conditions of service that it does not offer to all shippers. If Texas Eastern wishes to offer specific terms and conditions not found in the current Form of Service Agreement and its tariff to a shipper, it must propose a tariff provision that is generally applicable and offer such rights to all shippers on a nondiscriminatory basis. Texas Eastern is required to remove paragraph 8(c) from its Negotiated Rate Agreement.¹²

Electric Power Costs

14. The Commission in authorizing the M-1 Expansion Project required Texas Eastern to ensure that expansion electric power costs above \$1,874,000 are the responsibility of M-1 Expansion shippers and Texas Eastern alone and that no cost attributable to the proposed expansion can be charged to the existing shippers.¹³ The Negotiated Rate Agreement provides at paragraph 2 that the shipper is exempt from any fuel charges or other surcharges in connection with the proposed service, except ACA. Since the issue of Texas Eastern's electric power costs is currently pending before the Commission in Docket No. RP03-542-000 and to ensure that the electric power costs for the M-1 Expansion Project are properly assigned, acceptance of Texas Eastern's filing is subject to the outcome of the pending electric power cost proceeding in Docket No. RP03-542-000.¹⁴

¹² See Gulfstream Natural Gas System, L.L.C., 100 FERC 61,036 (2002), re'g denied, 101 FERC ¶ 61,368 (2002); 103 FERC ¶ 61,312 (2003); 105 FERC ¶ 61,380 (2003).

¹³ 101 FERC ¶ 61,120 at P 36 (2002).

¹⁴ See Texas Eastern Transmission, LP, 106 FERC ¶ 61,082 (2004).

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The Commission orders:

The Commission accepts the tariff sheets listed in footnote No. 1, effective the later of May 1, 2004, or the date the M-1 Expansion Project facilities are placed into service, subject to Texas Eastern filing to revise its tariff sheets and Service Agreement, as discussed above, within 15 days of issuance of this order. This acceptance is subject to the outcome of Docket No. RP03-542-000. Further, Texas Eastern is required to notify the Commission of the exact effective date of the tariff sheets.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.