UNITED STATES OF AMERICA
FEDERAL ENERGY REGUATORY COMMISSION

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

Fidelity Exploration and Production Company
Complainant

v. Docket No. RP04-130-000

Southern Star Central Gas Pipeline, Inc.
Respondent

ORDER DISMISSING COMPLAINT

(Issued March 8, 2004)

1. Fidelity Exploration and Production Company (Fidelity) filed a complaint against Southern Star Central Gas Pipeline, Inc. (Southern Star), contending that Southern Star violated its tariff provisions that outline the best bid procedure for an existing shipper's right of first refusal. Southern Star requests that the Commission deny Fidelity's complaint. For the reasons discussed below, the Commission dismisses Fidelity's complaint.

Fidelity's Complaint

2. Fidelity executed two maximum rate firm transportation contracts for capacity on the Southern Star system, each with a primary receipt point at the Bonny Reservoir in Southern Star's production area and a primary delivery point at the production area/market area interface (PMI). One contract is for 5,000 dth/d of capacity and has a five year term. The other contract is for 3,000 dth/d, and expired on February 1, 2004. The scope of Fidelity's ROFR rights in order to retain its capacity under the 3,000 dth/d contract is the subject of this complaint.

3. Section 6 of the GTC of Southern Star's tariff contains its procedures for ROFR rights at the expiration or renegotiation of agreements. Section 6.2 provides in relevant part:

> Southern Star will post the available capacity under an expiring or terminating service agreement on its electronic bulletin board together with all applicable terms (including quantity and maximum rate) six months prior to the expiration or termination of any such service agreement, however, if the termination period is less than six months, Southern Star shall post the availability of such capacity after either party provides the other with a notice of termination. Such posting shall state the bid closing date and will remain on the bulletin board for at least one month. Bids for such capacity may be for less than the total amount of the capacity available.
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> The best bid shall be that bid which Southern Star determines, after consideration of the elements of the bid, including but not limited to, term, quantity, and rate(s), provides the greatest economic value, after discounting for net present value….A bid to pay the maximum rate for a given term will be deemed superior to a bid to pay a specified dollar rate, which is equal to the currently effective maximum rate, for the same term, if other elements of the bids are the same….If the best bid is a contingent bid, Southern Star will notify the bidder making the best bid within 5 business days following the bid closing date. That bidder will have 5 business days following such notification to satisfy or waive the contingency or Southern Star may disregard such bid.... The existing capacity holder will have a right of first refusal to match the best bid received for such capacity within 30 days after receiving the notification of the best bid.

4. Fidelity states that on July 25, 2003, Southern Star posted a notice of the availability of the capacity under its expiring contract on its electronic bulletin board. The closing date for third party bids was August 25, 2003, at 12:00 noon CST. Fidelity contends that the applicable terms for the capacity posted for bid clearly state the receipt point, Bonny Reservoir, the delivery point, the PMI, the rate schedule (FTS-P), and the winter and summer quantities (3000 dth). It states that at least one bid was received by Southern Star for this capacity. However, it maintains that the service request form submitted by that bidder included a different receipt point from the one in the Fidelity-Southern Star service agreement. Instead of the Bonny Reservoir receipt point, the Service Request Form named Echo Springs as the receipt point to be used. The Echo Springs receipt point is upstream of the Bonny Ridge receipt point but is in the same production area rate zone. Fidelity contends that the bidder sent a letter to Southern Star stating that the bid was contingent on moving the primary receipt point under this contract to Echo Springs.

5. Fidelity states that pursuant to section 6.2 of Southern Star's tariff, Southern Star notified Fidelity that the best bid was 3000 dth/d at the maximum rate for a term of twenty years. Fidelity posits that since the tariff requires that Southern Star notify the existing shipper after contingencies have been resolved, Southern Star must have agreed to move the receipt point to Echo Springs before it notified Fidelity of the best bid.

6. Fidelity explains that if the best bid is a contingent bid and Southern Star notifies the bidder and the bidder has five business days following such notification to satisfy or waive the contingency, or Southern Star may disregard such bid. Fidelity contends that in this case, the bidder was not bidding on Bonny Reservoir, but for capacity for the receipt point of Echo Springs. It observes that rather than requiring this bidder to commit to Bonny Reservoir and then wait until February 1, 2004, to determine the availability of capacity at Echo Springs, Southern Star accepted the Service Request Form submitted by the bidder that designates Echo Springs as the primary receipt point. Fidelity argues that the Service Request Form illustrates that the bidder was not bidding on capacity at Bonny Reservoir but rather Echo Springs.

7. Fidelity maintains that section 6.2 requires that Southern Star resolve the contingency before the best bid that must be matched is presented to the existing shipper. It opines that if that in fact happened, Southern Star must have told the contingent bidder that it could have the capacity at Echo Springs beginning in February 2004. Fidelity states that it is unaware of any provision in Southern Star's tariff that allows it to reserve capacity for future use by a new shipper.

8. On August 25, 2003, the ROFR bid closing date, Fidelity states that Southern Star sent it a ROFR Notice which did not list receipt and delivery points, indicating that the best bid was the maximum rate under Rate Schedule FTS for 3000 dth/d for a term of twenty years. Consequently, Fidelity claims that it thought that the capacity was for the same receipt and delivery points offered in the Notice of Available Capacity, rather than the Echo Springs receipt point. However, Fidelity states that it requested documentation of the best bid because it appeared strange that a party would want the Bonny Reservoir receipt point for a term of twenty years. It was at this point that it first became aware that the competing bid contemplated a different receipt point.

9. Fidelity argues that as a result of this contingent bid, Southern Star required it to match the maximum rate for twenty years in order to maintain its capacity on Southern Star's system from the Bonny Reservoir to the PMI. Fidelity, believing that it had no choice, exercised its ROFR and signed a contract for the maximum rate at twenty years for 3000 dth/d, subject to its right to have the Commission determine whether Southern Star conducted the bidding process in a manner consistent with its tariff.

10. Fidelity contends that Southern Star's requiring it to match a best bid that was contingent on a different primary receipt point than posted, led to an unjust and unreasonable result in the ROFR and bidding process. It contends that the ability to switch the receipt point to a different location undermines shippers' ROFR at the expiration of their agreements because they are effectively required to match any bid submitted to the pipeline. Fidelity maintains that the Commission should not permit Southern Star to accept contingency bids that change the elements of the bid and then require the existing shipper to match the changed bid. Fidelity posits that if the Commission allows Southern Star to accept contingencies in the bidding process that change the elements of the existing service agreement, then Southern Star can manipulate the bidding process to its advantage.

11. Fidelity requests that the Commission modify the term of the new contract with Southern Star to reflect the previous less than 20-year term of the expiring contract, or, in the alternative, require Southern Star to present Fidelity with a best bid for its capacity with Bonny Reservoir as the primary receipt point without any contingencies.

12. Notice of Fidelity's complaint was issued on January 2, 2004, with intervention or comments due on January 20, 2004. Missouri Gas Energy, City Utilities of Springfield Missouri, the Missouri Public Service Commission, Atmos Energy Corporation, and Kansas Gas Service, a Division of ONEOK, Inc. filed timely motions to intervene. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[1] the motions to intervene are granted. Southern Star filed an answer to the complaint on January 19, 2004. This was followed by a response by Fidelity, a further answer by Southern Star, and a second response by Fidelity. While Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[2] generally prohibits further pleadings after the respondent's answer to a complaint, in this case the further pleadings have served to clarify the relevant facts, and accordingly the Commission allows those pleadings.

Southern Star's Answer

13. Southern Star contends that the competing bidder made a timely and valid bid, pursuant to its tariff, for the same 3000 dth/d of firm production area capacity held by Fidelity and properly referenced the capacity in its Transportation Capacity Bid Letter of August 25, 2003. It points out that the bid was contingent upon moving the primary receipt point from the Bonny Reservoir to an upstream receipt point on the same line

[1] 18 C.F.R. § 385.214 (2003).

[2] 18 C.F.R. § 385.213(a)(2) (2003).

segment, known as Echo Springs, all within the production area to which Rate Schedule FTS-P contracts apply. Southern Star maintains that it had 3,000 dth/d of capacity available at the Echo Springs point for February 1, 2004 (when the contract would start), which enabled it to clear the contingency pursuant to section 6.2 of its GTC. Further, it points out, section 4.2 of the GTC, allows all firm capacity holders to move their primary points so long as capacity is available at the requested point. Southern Star states that this was the only competing bid received at maximum rates and a term of twenty years, subject only to the right of the current capacity holder to match the bid.

14. After Southern Star sent its August 25, 2003 notice of competing bid to Fidelity, it admits that Fidelity became aware that there was limited space available at the upstream Echo springs point, and made an informal request to Southern Star to move the receipt point on Fidelity's other firm contract with Southern Star from the Bonny Reservoir to Echo Springs. Southern Star points out that as this call was made after August 25, 2003, and Southern Star had already committed the 3,000 dth of capacity at Echo Springs to the competing bidder, it was unable to accommodate Fidelity's request. Southern Star argues that it had no additional capacity at Echo Springs to offer after accepting the competing bid.

15. Southern Star maintains that Fidelity's complaint mischaracterizes Southern Star's actions as reserving capacity for future use. It maintains that reserving capacity in the manner that Fidelity implies, would involve taking capacity off the board for future use without having such capacity under contract. Here, it observes, the competing bidder, with no affiliation to Southern Star, entered into a valid, binding contract for the requested capacity. Once this occurred, Southern Star argues, it had no further right to sell or make available this capacity. It posits that the mere fact that the competing bidder's capacity term did not begin until February 1, 2004, did not make the capacity contingent or reserved.

Fidelity's Response

16. Fidelity filed a response to Southern Star's answer. Although Fidelity acknowledges that the Commission's Rules of Practice and Procedure generally do not recognize responses to answers, it believes that it has good cause to file in the instant proceedings. Although Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[3] generally prohibits a response to an answer, we will allow Fidelity's response in this case because it will assist in addressing the issues in this complaint proceeding.

[3] 18 C.F.R. § 385.213(a)(2) (2003).

17. It reiterates that pursuant to Southern Star's tariff, the bidder must either satisfy or waive the contingency, not Southern Star. It points out that Southern Star satisfied the contingency by changing the posted package (i.e. Bonny Reservoir to the PMI) without ever notifying the current capacity holder.

18. Fidelity observes that Southern Star attempts to justify changing the contract package by arguing that section 4.2 of the GTC allows all firm capacity holders to move their primary points if available capacity exists. However, Fidelity argues that this is a misleading statement because the third party bidder was not a firm capacity holder because the bid was still subject to Fidelity's ROFR.

19. Fidelity maintains that upon first gaining knowledge that capacity was available at Echo Springs, it requested to move capacity under its firm contract for 5,000 dth/d from Bonny Reservoir to Echo Springs in September 2003, prior to executing the ROFR, but Southern Star denied access because it claimed it lacked the available capacity due to the bid at issue here. Further, Fidelity continues, Southern Star did not post the available capacity to Echo Springs on its Electronic Bulletin Board (EBB). Fidelity contends that if it had known capacity was available at Echo Springs, it would have likely requested that Southern Star change its primary receipt point under one or both of its contracts.

20. Fidelity maintains that Southern Star's statement that Fidelity has never yet in writing requested to move its point on either of its contracts, even after matching the competing bid for capacity is untrue. Fidelity states that it exercised its ROFR under the following two conditions: (1) Fidelity would have the same right as the bidding party to move the primary receipt point to Echo Springs, or other receipt points on the same line section, per the contingency outlined in the matching bid; and (2) Fidelity would not waive any rights that it may have if it was later determined that the bidding and evaluation process was not in conformance with Southern Star's FERC tariff.

Additional Filings

21. In its reply to Fidelity's response, Southern Star contends that its tariff does not require that the bidder must satisfy or waive the contingency. Instead, it states that its tariff merely grants Southern Star the ability to disregard a bid with unsatisfied or uncleared contingencies. In addition, Southern Star maintains that Fidelity has yet to exercise its tariff right to move its receipt point to Echo Springs.

22. Fidelity responds that it has in fact executed a contract with Southern Star with a primary receipt point of Echo Springs. It points out that on October 27, 2003, Fidelity executed a written amendment to its Transportation Agreement with Southern Star that was subject to the ROFR process to reflect a term of twenty years for 3,000 dth/d at Echo Springs.

Discussion

23. Order No. 636 tempered pipelines' pre-granted abandonment authority by establishing a ROFR under Section 7 (b) of the NGA to protect customers. The ROFR consisted in part, of regulatory requirements and, in part, of Commission policies. The ROFR regulatory provisions as revised in Order No. 637[4] allow a firm shipper with a contract of one year or more at the maximum rate to continue its transportation arrangement by matching the longest term and highest rate for that capacity, up to the maximum rate, offered by any other person.

24. The first issue raised by Fidelity's complaint is whether the third party bid which the existing shipper must match should designate the same capacity path as reflected in the expiring contract. In other words, can the existing shipper be required to match a third party bid that is premised on using a different primary receipt and/or delivery point than provided in the existing shipper's contract, but that encompasses the existing shipper's mainline capacity? Commission policy does not limit third party bids to the same primary receipt and delivery points as in the existing shipper's contract. One purpose of the ROFR process to balance protection of captive customers with the "furtherance of market values (putting capacity in the hands of those who value it the most)."[5] The ROFR accordingly allows the existing customer to retain its capacity by matching the bid of the third party who places the highest value on the capacity.

25. Limiting the universe of third parties who can bid on the existing customer's mainline capacity to those who will use the same primary receipt and delivery points as the existing shipper would often severely restrict the eligible third party bidders. For example, there may be few shippers located at the same delivery point as the existing shipper, while there could be many other shippers who require the mainline capacity currently held by the existing shipper in order to reach different delivery points. Since the existing shipper's mainline capacity may well be valuable to shippers using different primary receipt or delivery points, those shippers should be able to participate in any bidding process which includes the objective of putting scarce capacity into the hands of those who value it the most.

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[4] Order 637 at 31,336-42.

[5] INGAA v. FERC, 285 F.3d 18, 52 (D.C. Cir. 2002).

26. In fact, in Order No. 636,[6] the Commission even contemplated that shippers who want to use an additional rate zone could participate in the ROFR bidding process. The Commission stated that, while such a bidder could participate in the bidding process and bid up to the maximum rate for the zones it desires to use, the existing shipper need only bid up to the maximum rate for its zone in order to retain its capacity.

27. Fidelity cites Northwest Pipeline Corporation[7] for the proposition that the third party bids should be limited to using the same primary receipt and delivery points as in the existing shipper's contract. However, Northwest addresses a different situation. There, the pipeline was concerned that existing shippers on the system other than the holder of the capacity under the expiring contract might use their rights under the tariff to change their primary points without additional payment to take the primary points under the existing contract before the ROFR bidding process was complete. As a result, those points would no longer be available to either third party bidders or the holder of the expiring contract. The Commission approved Northwest's proposal to temporarily freeze existing shippers' rights to move their primary points to the points used in the expiring contract so that potential bidders during the ROFR process for the expiring contract would have certainty with regard to capacity they were attempting to acquire. The Commission also found the proposal to be consistent with the Commission's policy that priority for capacity should be given to the party placing the greatest value on that capacity. It does not follow from Northwest's approval of a restriction on the right of shippers currently on the system to change their primary points that a new shipper, not currently on the system, should be limited in the ROFR process to bidding on the existing receipt and delivery points in the expiring contract. In fact, allowing third party bids to use other primary receipt and delivery points is consistent with the underlying policy, upon which the Northwest decision is based, that the shipper who values the capacity the most should be the one that receives it.

28. Based upon the above discussion, the Commission finds that Southern Star could, consistent with Commission policy, accept a third party bid that was premised on the third party bidder being able to use a different primary receipt point, in this case the Echo Springs receipt point. After Southern Star received that bid and cleared the primary point contingency by agreeing to reserve the Echo Springs primary point for service to the third party bidder commencing on February 1, 2004, it notified Fidelity of the best bid to be matched. However, Southern Star only told Fidelity that the best bid was for a twenty-year term at the maximum rate. It did not disclose that the bid had been a contingent bid

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[6] FERC Statutes and Regulations ¶ 30,939

[7] 66 FERC ¶ 61,304 (1994).

which requested a receipt point, Echo Springs, upstream of the original Bonny Reservoir. The Commission finds that Southern Star's notice should have notified Fidelity that the bid had a different receipt point than the Bonny Reservoir. However, the Commission finds that in this case, the failure of Southern Star's notice to fully disclose the terms of the third party bid did not cause actual harm to Fidelity. This is because, before Fidelity matched the bid, it requested further information from Southern Star concerning the bid and was then informed what the actual receipt point was.

29. Fidelity contends that pursuant to Southern Star's tariff, the bidder is required to either satisfy or waive the contingency, not Southern Star. We find that this is not a tenable argument. Although Southern Star states that it satisfied the contingency, it is more accurate to say that the contingency was resolved by both parties as they were able to agree on the alternate receipt point.

30. Section 4.2 of the GTC provides that firm shippers may change receipt and delivery points if there is available capacity at the requested points. Southern Star claims that its actions with regard to changing the receipt point, was consistent with its tariff. On the other hand, Fidelity believes that this is a misleading statement because the bidder was not a firm capacity holder, because the bid was still subject to Fidelity's ROFR. Instead, Fidelity maintains that Southern Star was unlawfully reserving capacity for the competing bidder. On this basis, Fidelity contends that Southern Star improperly denied Fidelity's request to change the primary receipt point in its other non-expiring contract to Echo Springs. The Commission does not find this to be the case. Fidelity did not make its request until after Southern Star had accepted the third party bid and cleared the contingency. As a result, at the time Fidelity made its request, there was already a valid contract with the third party bidder for service to commence at a future date, which the third party bidder would have been bound by but for the fact that Fidelity matched its bid. For the integrity of the bidding process, bidders need to be able to bid on capacity that will remain available during the entire bidding process, as the Commission held in <u>Northwest</u>. Reserving capacity for which the pipeline has accepted a third party bid in the ROFR process is not an unlawful withholding of capacity to give undue advantage to a competing bidder. In addition, we find no evidence that Southern Star was attempting to manipulate the bidding process to favor a particular bidder. The competing shipper is not affiliated with Southern Star and we discern no untoward motive for Southern Star's action in this case.

31. Finally, we do not find any action by Southern Star that has improperly prevented Fidelity from changing the primary point in its expiring contract to Echo Springs. Once Fidelity matched the third party bid, there was no longer any reason for Southern Star to reserve the Echo Springs point for the third party bidder. In its February 24 pleading, Fidelity states that, after it matched the third party bid, it requested to change the primary receipt point in its contract from the Bonny Reservoir to Echo Springs. Since there was

now capacity available at that point, Southern Star granted the request, and Fidelity's contract was amended on October 27, 2003 in order to implement this change. Therefore, consistent with the provisions of Southern Star's tariff, Fidelity has in fact been able to move its primary receipt point to Echo Springs.

32. In its complaint, Fidelity only requests that the Commission either (1) modify the term of the new contract into which Fidelity entered into with Southern Star to reflect the previous term of the expiring contract between Fidelity and Southern Star, or (2) in the alternative, require Southern Star to present Fidelity with a best bid from a third party for capacity with Bonny Reservoir as the primary receipt point without any contingencies. If the Commission were to adopt this as a resolution of this complaint, Southern Star would be forced to accept a deal that will not allow it to maximize its value. In these circumstances, the Commission does not believe this is consistent with Commission policy or a fair result.

33. Fidelity requests that the Commission direct Southern Star to modify its tariff procedures to clarify that existing shippers should not be required to match contingency bids that alter the elements of the bid, including, but not limited to, the receipt and delivery points. For the reasons discussed above, the Commission denies this request.

34. The Commission finds that when viewed in their entirety, Southern Star's bid and evaluation process did not lead to unfair and inequitable results. Accordingly, Fidelity's complaint is dismissed.

<u>The Commission order:</u>

Fidelity's complaint in this proceeding is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary.