

134 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Southern LNG, Inc.

Docket Nos. RP08-25-002
RP08-25-001

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued March 28, 2011)

1. In this order, we address Marathon LNG Marketing LLC's (Marathon) request for rehearing of the Commission's order approving the negotiated rate agreement of Southern LNG, Inc. (Southern LNG) subject to conditions and further review.¹ For the reasons discussed below, the Commission denies Marathon's request for rehearing of the December 31 Order.

2. In addition, Southern LNG submitted a filing in compliance with the Commission's December 31 Order issued in this proceeding. For the reasons discussed below, the Commission accepts Southern LNG's filing in compliance with the December 31 Order and approves Southern LNG's negotiated rate agreement.

I. Background

3. Southern LNG operates a liquefied natural gas (LNG) import terminal on Elba Island in Chatham County, Georgia. Southern LNG commenced operations at the Elba Island terminal in 1978. In a series of orders issued from 1999 – 2003, the Commission authorized expansions to the Elba Island facility.² Following those expansions, Southern

¹ *Southern LNG, Inc.*, 125 FERC ¶ 61,395 (2008) (December 31 Order).

² *See Southern LNG, Inc.*, 89 FERC ¶ 61,314 (1999), *reh'g denied*, 90 FERC ¶ 61,257 (2000); *Southern LNG, Inc.*, 94 FERC ¶ 61,188 (2001); *Southern LNG, Inc.*, 96 FERC ¶ 61,083 (2001) (This group of cases constitutes the "Elba I" expansion); *see also, Southern LNG, Inc.*, 101 FERC ¶ 61,187 (2002), *order on reh'g*, 103 FERC ¶ 61,029 (2003). (This group of cases constitutes the "Elba II" expansion).

LNG offered two LNG services on an open access basis, LNG-1 and LNG-2.³ LNG-1 service is a firm service in which Southern LNG receives and stores LNG, and then vaporizes the LNG and delivers it at the existing point of interconnect with Southern Natural Gas Co. (Southern). Southern LNG provides the same service under Rate Schedule LNG-2 on an interruptible basis. Southern LNG has two shippers, Shell North America LNG (Shell LNG) and BG LNG Services, LLC (BG LNG), who have contracts for all of the available LNG-1 firm capacity at the Elba Island terminal.

4. On September 20, 2007, the Commission issued an order approving, among other things, Southern LNG's proposal in Docket No. CP06-470 to expand its Elba Island terminal in two phases: Phase A and Phase B expansions with proposed in-service dates of June 1, 2010 and December 3, 2012, respectively (Elba III).⁴ In Phase A, Southern LNG proposed to: a) construct a new 200,000 cubic meter tank for increased storage capacity; b) install submerged combustion vaporizers with a firm send-out capacity of 405 MMcf per day; and c) modify the existing unloading docks to accommodate larger LNG ships and to facilitate the simultaneous unloading of two LNG ships. In Phase B, Southern LNG proposed to: a) construct an additional 200,000 cubic meter tank; and b) install submerged combustion vaporizers with a firm send-out capacity of 495 MMcf per day. Southern LNG entered into precedent agreements with Shell LNG and BG LNG for the entire firm capacity of Phase A and Phase B, respectively. Southern LNG stated that it will provide service for Elba III under its proposed new Rate Schedule LNG-3, which includes incremental rates for shippers using the service.

5. Shell LNG released all of its LNG-1 capacity to BG LNG until the Elba III expansion is placed in service.

6. On October 18, 2007, Southern LNG proposed changes to its tariff that allow the pipeline the flexibility to negotiate rates with its customers in accordance with the requirements of the *Negotiated Rate Policy Statement*.⁵ Specifically, Southern LNG stated the tariff changes, among other things, would: 1) add a new section 25.4 to the General Terms and Conditions (GT&C) of its tariff to describe the terms and

³ See *Southern LNG, Inc.*, 89 FERC at 61,959-61,961 (Southern LNG proposed to re-commission the Elba Island terminal to provide open-access service to shippers importing LNG and Commission approved its application.).

⁴ *Southern LNG Inc.*, 120 FERC ¶ 61,258, at Ordering Paragraph (A) and (K) (2007) (September 2007 Certificate Order), *reh'g denied* 122 FERC ¶ 61,137 (2008).

⁵ *Natural Gas Pipeline Negotiated Rates Policies and Practices*, 104 FERC ¶ 61,134 (2008) (*Negotiated Rate Policy Statement*).

qualifications under which negotiated rate transactions will be performed; and 2) revise its form of service agreement to provide negotiated rate options for both its LNG-1 and LNG-2 services. On November 14, 2007, the Commission accepted Southern LNG's filing.⁶

7. On November 28, 2008, Southern LNG filed a negotiated rate agreement between Southern LNG and BG LNG for its service under Rate Schedule LNG-1. Southern LNG stated that the negotiated rate agreement would permit BG LNG to use the expanded docking facilities being constructed as part of Elba III, Phase A under its existing LNG-1 service agreement. Hence, it would permit BG LNG to bring in larger size ships to the Elba Island terminal before the completion of the construction of the additional storage and vaporization facilities approved as a part of Elba III, Phase A. Under the negotiated rate, BG LNG would pay Southern LNG's maximum rates under Rate Schedule LNG-1, plus an additional reservation charge reflecting the cost of service of the expanded docking facilities. When the negotiated rate agreement was filed, Southern LNG estimated that cost of service would be \$3,185,600. However, the negotiated rate agreement provided that, within six months after the expanded docking facilities were placed in service, Southern LNG would adjust the additional reservation charge to reflect the total actual capital cost and working capital of the expanded docking facilities.

8. Southern LNG stated that the negotiated rate agreement would be effective from the date the modifications are placed in service until the earlier of: a) the date service commences from the send-out facilities associated with Elba III, Phase A; b) the date service commences on the Elba Express Pipeline; or c) December 31, 2010.⁷ During that term, BG LNG would be the only capacity holder at the Elba Island terminal because Shell LNG had released all of its LNG-1 capacity to BG LNG until Elba III is placed in service. Moreover, there would be no increase in contract demand for BG LNG's early use of the expanded docking facilities at the Elba Island terminal.

⁶ *Southern LNG, Inc.*, RP08-25-000, at 1 (November 14, 2007) (unpublished letter order).

⁷ When Southern LNG filed its negotiated rate agreement, the facilities association with Elba III, Phase A had not been fully constructed. However, since that time, the Commission has approved in Docket Nos. RP10-271 and RP10-350, subject to conditions, tariff sheets placing Rate Schedule LNG-3 for the use of the expansion facilities effective March 1, 2010. *See Southern LNG, Inc.*, 130 FERC ¶ 61,146 (2010). Subsequently, Southern LNG filed revised tariff sheets pursuant to the Commission's order and these sheets were accepted on August 4, 2010 by the Commission. *See Southern LNG, Inc.*, Docket Nos. RP10-271-000, -001, and RP10-350-000, -001 (August 4, 2010) (unpublished letter order).

9. Southern LNG asserted that the terms and conditions of service for the service agreement conformed in all material respects with Southern LNG's form of service agreement; therefore, it did not include in its filing the pro forma part of the service agreement or a marked version of the body of the service agreement.

10. Marathon protested Southern LNG's filing (December 8 protest). Marathon stated that it is party to a contract with BG LNG which provides that Marathon may deliver LNG to BG LNG at the inlet of Southern LNG's Elba Island terminal and generally requires Marathon to reimburse BG LNG for a percentage of the terminalling costs paid by BG LNG to Southern LNG pursuant to its existing Rate Schedule LNG-1 Service Agreement. Marathon argued that the negotiated rate agreement filed by Southern LNG violates the Commission's *Negotiated Rate Policy Statement* and impermissibly negotiated rates for Rate Schedule LNG-3 service in a service agreement governing Rate Schedule LNG-1 service, violating section 25.4 of GT&C of Southern LNG's tariff. Marathon further asserted that the instant negotiated rate agreement violates the Commission's *Incremental Pricing Policy Statement*,⁸ as it results in BG LNG Services, an existing customer, paying for expansion facilities which are not needed to provide its Rate Schedule LNG-1 service. Finally, Marathon stated that mechanisms exist which would allow Southern LNG to initiate service using expansion facilities prior to the in-service date of Elba III, Phase A. Marathon asserts the Commission frequently allows interim rates for initial construction prior to the completion of an expansion or prior to the in-service date of an entire system.⁹ However, Marathon argued that Southern LNG must make appropriate filings to do so under Rate Schedule LNG-3, not Rate Schedule LNG-1.

11. The Commission issued the December 31 Order accepting the negotiated rate agreement, as filed, effective the later of January 1, 2009, or the date that the Phase A Slip modifications are placed in service, subject to conditions and further review. The Commission required Southern LNG to, among other things, respond to the issues raised by Marathon in its December 8 protest.¹⁰ The Commission further required Southern LNG to include in its filing a discussion on whether approval of the agreement violates the Commission's policy against negotiating terms and conditions of service and why the

⁸ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (*Incremental Pricing Policy Statement*).

⁹ *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008); *see also*, *Rockies Express Pipeline LLC* ¶ 116 FERC ¶ 61,272 (2006).

¹⁰ December 31 Order, 125 FERC ¶ 61,395 at P 11.

use of the expanded docking facilities by BG LNG is not being subsidized by the LNG-3 customers.

12. On January 6, 2009, Southern LNG filed a request for authorization to commence service at the expanded dock facility. Southern LNG stated that it was making the request pursuant to Environmental Condition 12 of the September 2007 Certificate Order, which states that “Southern LNG must receive written authorization from the Director of OEP before commencing service from each phase of the Terminal Expansion portion of the Project.”¹¹ The Office of Energy Projects (OEP) issued a letter order on January 30, 2009 (Docket No. CP06-470-000), stating that the term “service” in Condition 12 refers to transportation of new volumes of natural gas in the interstate system to be provided in Phases A and B of the Elba III expansion project. Therefore, that condition did not apply to beginning use of the expanded dock facilities.

II. Responses to Marathon’s December 8 Protest

A. Southern LNG Answer

13. Southern LNG filed an answer to Marathon’s December 8 protest which argued that the purpose of the negotiated rate was for Southern LNG to place in service certain dock facilities authorized by the Commission in Docket No. CP06-470 prior to the time that the vaporization and storage facilities associated with Elba III are placed in service. Southern LNG stated that the early in-service date for dock facilities was requested by BG LNG in order to allow BG LNG to bring in larger “Q-Max” size ships at the Elba Island terminal. Southern LNG asserted that it only had two customers at the terminal, BG LNG and Shell LNG. Southern LNG contended that Shell LNG had released all of its terminal capacity to BG LNG under a term release extending until Elba III is placed in service. Consequently, Southern LNG argued that, until such time, BG LNG is the only capacity holder at the terminal and would be the sole beneficiary of the larger dock for the period in which the negotiated rate is in effect.

14. Southern LNG argued that, contrary to Marathon’s claims, its proposed negotiated rate is consistent with the Commission’s pricing rules. Southern LNG asserted that a capacity holder may agree to pay a negotiated rate higher than the recourse rate and that the rules Marathon invoked regarding the structure and basis for the negotiated rate are rules associated with the designing of recourse rates. Southern LNG further claimed that Marathon’s analysis as to whether the negotiated rate agreement somehow applies under the *Incremental Pricing Policy Statement* is irrelevant. With respect to negotiated rates, Southern LNG averred that the Commission does not usually look beyond the four

¹¹ September 2007 Certificate Order, 120 FERC at 62,119.

corners of the rate agreement and has done so only to see if the rate is calculable under its own terms such that a third party can determine what the rate is or in response to claims that a specific rate is unduly discriminatory. Southern LNG claimed that Marathon has not raised either claim.

15. Southern LNG stated that, while Marathon asserted it is inappropriate to charge BG LNG for the use of the expanded dock facilities under BG LNG's existing service agreement under LNG-1, there was no other course of action that could be legally or practically implemented. Southern LNG contended that when the dock facilities are proposed to be placed in service, if BG LNG were to bring any ship and use the Elba Island Terminal, the service could only be provided under the LNG-1 service agreement because LNG-1 was the only firm service in effect at that time.

16. Southern LNG avowed that Southern LNG could not legally charge BG LNG for service under Rate Schedule LNG-3 because there is no approved tariff for this service on file with the Commission. Southern LNG also claimed that it did not have the functional capability to provide service under Rate Schedule LNG-3. Southern LNG argued that, although the Commission has authorized parties to commence service from various facilities associated with an expansion on a piecemeal basis, it has not done so when the basic facilities associated with providing that service (in this case the vaporizers or tank) are not operative. Southern LNG stated that the service under Rate Schedule LNG-3 cannot commence because without the new vaporization or tank facilities, there is no ability to service any increased level of contract quantities. At this time, Southern LNG contended that it only has the capability and legal ability to service the contract quantities associated with Rate Schedule LNG-1.

17. Southern LNG argued that Marathon also objected to the negotiated rate on the basis that it would result in cost subsidization of the Elba III by the LNG-1 ratepayers. Southern LNG noted that Marathon is not a ratepayer and does not hold terminal capacity and it is, therefore, not necessary for the Commission to respond to Marathon's claims in the same way as it would a ratepayer. Southern LNG claimed that Marathon had not shown that it will be harmed in any way by the implementation of the proposed negotiated rate. Moreover, Southern LNG averred that BG LNG, who will benefit directly from the use of the terminal, is the sole rate payer at this time and the other existing and future capacity holder, Shell LNG, has not objected to the transaction.

18. Consequently, Southern LNG requested that Commission reject Marathon's arguments against its negotiated rate agreement.

B. BG LNG Answer

19. BG LNG stated that Marathon's argument that the negotiated rate is not authorized by Southern LNG's tariff or the Commission's *Negotiated Rate Policy Statement* because the negotiated rate does not relate to the service to be provided is unsound. BG LNG

argued that the proposed slip modifications covered in the rate agreement are modifications to the existing loading docks. BG LNG asserted that the rate agreement will expire when the LNG-3 service from the terminal expansion starts but until that time, whenever BG LNG brings in a ship under its LNG-1 service agreement, it will be using the modified slip. Therefore, BG LNG contended that the negotiated rate under the LNG-1 service agreement relates to LNG-1 service and is authorized by the tariff and the Commission's pricing rules.

20. BG LNG claimed that Marathon's argument that the negotiated rate somehow violates the Commission's *Incremental Pricing Policy Statement* and section 3 of the Natural Gas Act (NGA) because it reflects a subsidy by an existing shipper is also not accurate. BG LNG stated this pricing policy and NGA section 3 pertain to recourse rates for existing and incremental shippers. BG LNG argued, however, that the negotiation of rates by natural gas companies and their customers is a separate matter of regulation addressed by the Commission in a separate policy statement. Because the applicable recourse rates are consistent with the *Incremental Pricing Policy Statement* and section 3 of the NGA, BG LNG maintains that any resulting negotiated rate is likewise lawful.

21. Finally, BG LNG averred that Marathon's protest omitted material facts to mislead the Commission into believing that this proceeding raises a substantive controversy. BG LNG stated that Marathon's protest leads one to believe that it will be affected by the increase in terminal charges to be paid by BG LNG; in fact, BG LNG asserted it had already informed Marathon that it was not intending to seek slip modification costs from Marathon. Therefore, BG LNG contended that Marathon had raised no issue that requires resolution by the Commission.

III. Compliance Filing and Rehearing Request

A. Compliance Filing

22. Southern LNG filed a letter (letter) in compliance with the Commission December 31 Order directing Southern LNG to respond to Marathon's protest that the negotiated agreement violates: 1) Commission policy regarding negotiated rates; 2) Southern LNG's tariff; and 3) section 3 of the NGA. Southern LNG states that it incorporates by reference the details of its previously filed answer and also BG LNG's answer filed in this proceeding.

23. In addition to the statements incorporated from previous filings, Southern LNG states that there are no negotiated terms and conditions of service associated with the negotiated agreement because service will be provided under the terms of Rate Schedule LNG-1. With respect to section 25.4 of the GT&C authorizing it to negotiate rates, Southern LNG claims that the negotiated rate agreement is completely in compliance with its provisions. Specifically, Southern LNG asserts that section 25.4(b) "Applicability" states:

Any provision of Southern LNG's effective FERC Gas Tariff to the contrary notwithstanding, Southern LNG and Customer may mutually agree in writing to rates, rate components, charges, surcharges, or credits for services that differ from those required, established or imposed by any applicable provision of Southern LNG's effective FERC Gas Tariff.

Southern LNG avers that, on its face, the agreement meets the broad terms of the tariff.

24. For the reasons stated above and those incorporated by reference, Southern LNG requests that the Commission accept the negotiated rate agreement without conditions.

1. Notice and Procedural Matters

25. Notice of Southern LNG's compliance filing was published in the *Federal Register*, 74 Fed. Reg. 7421 (2009), with protests and interventions due on or before February 17, 2009. Marathon filed a timely protest to the compliance filing. Southern LNG filed an answer to Marathon's protest.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2010), prohibits answers to protests unless otherwise ordered by the decisional authority. The Commission will accept Southern LNG's answer because it has provided information that assisted us in our decision-making process.

2. Protest and Answer

27. On January 27, 2009, Marathon filed a protest which raised essentially the same arguments regarding the negotiated rate agreement as those contained both in its initial protest and request for rehearing, which is discussed below. Marathon also states that Southern LNG's compliance filing provides only the most cursory of responses and cites no authority for its actions.

28. On February 10, 2009, Southern LNG responded to Marathon's protest stating that it should be dismissed by the Commission. Southern LNG argues the simple answer which has been explained previously in Southern LNG's pleadings is that: 1) the negotiated agreement is consistent with Southern LNG's tariff and the *Negotiate Rate Policy Statement*; and 2) there was no other course of action that could be legally or practically implemented.

B. Request for Rehearing

29. Marathon filed a request for rehearing of the Commission's December 31 Order identifying five issues for consideration:

1. Whether the Commission exceeded its statutory authority through its acceptance of a negotiated rate agreement which provides for payment for the use of non-jurisdictional expansion facilities under a jurisdictional rate schedule in violation of section 3 of the NGA.
 2. Whether the Commission erred in accepting a negotiated rate agreement that results in existing customers subsidizing expansion service, in violation of section 3 of the NGA.
 3. Whether the Commission erred in accepting a negotiated rate agreement that is inconsistent with the Commission's negotiated rate policy.
 4. Whether the Commission erred in accepting a negotiated rate agreement that provides for "incremental plus" pricing, in violation of the Commission's own incremental pricing policies.
 5. Whether the Commission erred in accepting a negotiated rate agreement from Southern LNG that is inconsistent with Southern LNG's FERC Gas Tariff.
30. Because the rehearing request and the compliance filing raise essentially the same issues and arguments, we address both below and deny the request for rehearing and accept Southern LNG's compliance filing.

IV. Discussion

31. The Commission finds that Southern LNG's negotiated rate agreement with BG LNG is a just and reasonable method of permitting BG LNG to use the expanded dock facilities for service under its existing contract for service governed by Rate Schedule LNG-1. Southern LNG completed construction of the expanded dock facilities before it completed construction of the other Elba III facilities; however, until it completed construction of the Elba III vaporization and storage facilities, Southern LNG could not provide any service under Rate Schedule LNG-3. Thus, the instant negotiated rate agreement permits BG LNG to make more efficient use of its existing LNG-1 service agreement by bringing in larger "Q-Max" size ships at the Elba Island terminal during the interim between completion of the expanded docking facilities and in-service date of the remaining Elba III facilities necessary to providing LNG-3 service.

32. The additional reservation charge in the negotiated rate agreement above the maximum LNG-1 rate compensates Southern LNG for BG LNG's use of the expanded docking facilities, the costs of which are not included in the existing maximum LNG-1 rate. Because the negotiated rate agreement permits BG LNG to use those facilities, it is reasonable that it pay Southern LNG for that use. No party contests that the additional

reservation charge in the negotiated rate agreement reasonably reflects the cost of service of the expanded docking facilities.

33. For the reasons discussed below, the Commission rejects Marathon's various objections to our approval of the Southern LNG negotiated rate agreement with BG LNG.

A. Whether the Commission's Acceptance of Southern LNG's Negotiated Rate Agreement Violated the *Negotiated Rate Policy Statement*

1. Marathon Argument

34. Marathon argues that the negotiated rate agreement violates the ban on individually negotiated terms and conditions of service in the *Negotiated Rate Policy Statement*. Marathon avers that Southern LNG's negotiated rate agreement specifically provides that BG LNG will be paying an additional charge for the use of expansion facilities, not for the use of existing facilities. Marathon asserts that such a provision does not appear in the pro forma Rate Schedule LNG-1 service agreement on file with the Commission. Therefore, Marathon maintains that the agreement to pay for and utilize additional facilities (approved for expansion service customers) is an individually-negotiated term and condition of service.

35. Marathon also claims that the *Negotiated Rate Policy Statement* makes it clear that the ability to negotiate rates relates to a particular service for which a recourse rate is also available.¹² Marathon states that the recourse rate is calculated on a cost-of-service basis for the particular service to be provided and the customer is to have the option of electing between a negotiated rate for that service and the recourse rate. Marathon argues that the maximum tariff rate for the existing service at Elba Island is the recourse rate for Rate Schedule LNG-1 service. Marathon avers that the existing tariff rate is not the recourse rate for Rate Schedule LNG-3 service or some interim service for which no recourse rate exists. Therefore, Marathon asserts there can be no negotiated rate for this interim, expanded service.

2. Commission Decision

36. The Commission determined in Order No. 637 not to "provide pipelines with preapproval to negotiate terms and conditions of service" with individual customers

¹² *Id.* ¶ 61,241.

because of the risk of undue discrimination among customers.¹³ However, Order No. 637 also recognized that the Commission's regulations¹⁴ permit a pipeline to file a contract with non-conforming terms and conditions for Commission approval, and that such a filing allows the Commission and other parties to determine whether the non-conforming contract is unduly discriminatory or adversely affects service to others. While the Commission prohibits non-conforming provisions which present a substantial risk of undue discrimination among shippers, it may approve material deviations which do not present such a risk.¹⁵

37. The Commission finds that the provision in the negotiated rate agreement for BG LNG to use the expanded dock facilities for its LNG-1 service is a non-conforming term and condition of LNG-1 service. As Southern LNG has explained, the negotiated rate agreement was part of an agreement to put the Elba III expanded dock facilities into service before the remaining Elba III facilities are placed in service, so that BG LNG could use the expanded dock facilities for its LNG-1 service. This benefitted BG LNG by permitting it to use more efficient, larger ships to deliver LNG to the Elba Terminal for storage and vaporization under the LNG-1 rate schedule. Because use of those expanded dock facilities to bring in larger ships had not previously been part of the LNG-1 service, the agreement to permit BG LNG to use those facilities for larger ships under its LNG-1 service agreement constituted a new term and condition of that service.

38. However, in the unique circumstances of this case, the Commission finds that the provision for BG LNG to use the expanded dock facilities for its LNG-1 service is just and reasonable and not unduly discriminatory. The instant negotiated rate agreement will be in effect only for the period from the in-service date of the expanded dock facilities until the remaining Elba III facilities are placed in service. During that period, BG LNG will be Southern LNG's only firm shipper. That is because Southern LNG's only other

¹³ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,344, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005). *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,003 (2001) (*Columbia Gas*).

¹⁴ 18 C.F.R. § 154.1(d) (2010).

¹⁵ *Columbia Gas*, 97 FERC at 62,003.

LNG-1 customer, Shell LNG, has released its firm LNG-1 capacity to BG LNG until the Elba III in-service date. In addition, Southern LNG lacks the necessary capacity to provide any firm service under Rate Schedule LNG-3 until the Elba III terminal and vaporization facilities are completed. Therefore, the negotiated rate provision giving BG LNG access to the expanded docking facility for larger ships does not provide it a higher quality of service than other similarly situated shippers or adversely affect other similarly situated shippers for the simple reason that there are no such shippers. For the same reason, there is no likelihood of discrimination against similarly situated shippers. Permitting BG LNG to use the expanded docking facility before Elba III is placed in service thus allows BG LNG to make more efficient use of its existing LNG-1 service, without affecting Southern LNG's service to any other shipper.

39. Consistent with Order No. 637, if a material deviation in a non-conforming contract constitutes a negotiated term and condition of service, the Commission ordinarily requires that the pipeline modify its tariff to offer the negotiated service to all its customers or explain why it can only provide the service to this one customer.¹⁶ Here, the Commission sees no need to require Southern LNG to modify its tariff. Neither Rate Schedule LNG-1 nor the pro forma LNG-1 service agreement contain any provision expressly restricting LNG-1 shippers to the use of any particular docking facilities. Therefore, BG LNG's use of the expanded dock facilities does not violate any express provision of Southern LNG's tariff. Moreover, as already discussed, there are no other firm shippers to whom use of the expanded dock facilities can be offered during the interim period the instant negotiated rate agreement is in effect. Thereafter, when all the Elba III facilities are placed in service, the expanded dock facilities will be available for use by all of Southern LNG's shippers, regardless of what service they take.

40. The Commission also finds no merit in Marathon's arguments that the Commission must reject the Southern LNG/BG LNG negotiated rate agreement, because there is no corresponding recourse rate for this service. Marathon is correct that the Commission requires pipelines to allow shippers the option of choosing to take service under a traditional cost-of-service recourse rate instead of requiring them to negotiate rates for any particular service. However, there is a Commission accepted rate on file for Southern LNG's Rate Schedule LNG-1 service,¹⁷ and BG LNG did have the option to continue paying that rate for its LNG-1 service, albeit without using the expanded

¹⁶ *Id.*

¹⁷ *See Southern LNG, Inc.*, 112 FERC ¶ 61,314 (2005) (Commission approval of a settlement agreement wherein Southern LNG maintains its currently effective base rates.).

docking facilities to bring in larger size vessels than were previously able to use the expanded facilities.

41. The Commission recognizes that the existing LNG-1 rate does not include the costs of the expanded dock facilities, and thus that rate schedule does not include a previously approved cost-based surcharge for the use of the expanded dock facilities. However, because the negotiated rate agreement permits BG LNG to use those facilities to bring in larger ships, it is reasonable that it compensate Southern LNG for that use. The negotiated rate is a formula rate designed to reflect the total actual capital cost and working capital of the expanded docking facilities, and no party contests that the negotiated rate agreement reasonably reflects the cost of service of the expanded docking facilities. Also, given BG LNG's option to continue taking its existing LNG-1 service under the existing rate, there does not appear to be a significant danger that Southern LNG was able to exercise market power in the negotiation of that rate.

42. The Commission has previously approved use of negotiated rates as a vehicle for a pipeline and shippers to resolve similar transitional rate issues. For example, the Commission has approved negotiated rate agreements under which shippers paying an incremental rate for an individually certificated service or geographically restricted Part 284 open access service were able to convert to a higher quality Part 284 open access service in return for agreeing to pay a negotiated surcharge above the generally applicable rate for that service for a period of time.¹⁸ The transaction at issue here similarly permits BG LNG to receive a somewhat higher quality Part 284 open access LNG storage and vaporization service in return for its agreement to pay a negotiated surcharge to compensate the pipeline for costs incurred in connection with the service.

B. Whether the Negotiated Rate Agreement is Consistent with Southern LNG's Tariff

1. Marathon Argument

43. Marathon asserts that Commission regulations require natural gas companies to comply with the terms and conditions in their Commission-approved tariffs.¹⁹ Marathon

¹⁸ *Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051, at 61,155-56 (1999).
Tennessee Gas Pipeline Co., 100 FERC ¶ 61,151 (2002).

¹⁹ See 18 C.F.R. § 154.3(a) (2010) (stating that a "natural gas company must not directly or indirectly, demand, charge, or collect any rate of charge for, or in connection with, the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classification, practices, rules, or regulations, different from

(continued...)

asserts that Southern LNG has not complied with the negotiated rate provisions of its tariff because the negotiated rate agreement with BG LNG for service under Rate Schedule LNG-1 includes costs of expansion facilities constructed to provide service under Rate Schedule LNG-3. Specifically, Marathon states that section 25.4 (a)(i) provides, in pertinent part, that “Southern LNG and Customer may negotiate a rate for any service under any rate schedule (Negotiated Rate)” and that the negotiated rate or rate formula “shall be set forth on Exhibit F (LNG-1) or Exhibit B (LNG-2) to the applicable Service Agreement executed by Southern LNG and Customer.” In addition, Marathon asserts that section 25.4(a)(ii) states that the negotiated rate “may be greater than or less than the maximum charges stated in Southern LNG’s rate schedule *for that service.*” Marathon also states that section 25.4(a)(iii) of the GT&C provides that for purposes of allocating capacity, customers paying a negotiated rate “which exceeds Southern LNG’s maximum rate *for that service* is deemed to have paid the maximum Recourse Rate.” Finally, Marathon states that section 25.4(a)(iv) of the GT&C provides that when exercising rights of first refusal, a customer’s highest rate must match “the maximum rate applicable to *such service* as set forth in Southern LNG’s rate schedule for *such service.*”

44. Marathon states that there is no question that the negotiated rate must be a rate negotiated to recover the cost of the facilities and services to which the rate schedule applies not the facilities and services to which a different rate schedule applies. Marathon argues that, in this instance, the negotiated rate agreement is specifically structured and stated to be a rate designed to recover the costs of expansion facilities built to provide the expansion service under Rate Schedule LNG-3.

2. Commission Decision

45. We reject Marathon’s argument that Southern LNG’s negotiated rate agreement with BG LNG violates the negotiated rate provisions its tariff. Marathon basically claims that the negotiated rate agreement violates Southern LNG’s tariff because it does not specifically relate to the services received under Rate Schedule LNG-1. We find that the negotiated rate agreement does relate to service provided under Rate Schedule LNG-1. The negotiated rate agreement provides that service will be provided under the terms of Southern LNG’s pre-existing Rate Schedule LNG-1 and BG LNG’s LNG-1 service agreement. The negotiated rate agreement does not increase BG LNG’s firm contract quantities under that service agreement. In addition, during the term of the negotiated rate agreement, the Elba III storage and vaporization facilities will not be in service, because the negotiated rate agreement terminates upon the in-service date of those facilities. Therefore, all storage and vaporization services received by BG LNG under

those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically permitted by order of the Commission.”).

the negotiated rate agreement must be provided pursuant to its pre-existing LNG-1 contract entitlements and using the pre-existing Elba storage and vaporization facilities. BG LNG's use of the expanded dock facilities to use larger ships to deliver LNG to Southern LNG for storage and vaporization under its existing LNG-1 service agreement does not transform the service into an LNG-3 service, which Southern LNG cannot provide until the facilities associated with Rate Schedule LNG-3 are available for use.

C. Whether the Commission's Acceptance of Southern LNG's Negotiated Rate Agreement Violated the Commission's Incremental Pricing Policy Statement and the September 2007 Certificate Order

1. Marathon Argument

46. Marathon states Commission policy prohibits "incremental plus" pricing when expansion facilities will be integrated and operated with existing facilities as part of a unified system.²⁰ Marathon asserts the Commission's September 2007 Certificate Order in Docket No. CP06-470, *et. al.* authorized the creation of Rate Schedule LNG-3 and initial incremental rates to pay for those facilities and the service to be provided through those facilities. Marathon contends that these expansion facilities include modifications to the existing unloading docks—the "Slip Modifications" referenced in the negotiated rate agreement.

47. Marathon also argues that, in the September 2007 Certificate Order, the Commission stated that the establishment of an incremental rate was appropriate and would protect Marathon LNG from subsidizing the expansion because all of the incremental costs are to be recovered through the incremental rates charged under Rate Schedule LNG-3.²¹ Marathon claims that here the Commission has accepted an agreement under which BG LNG, the existing customer, will be paying for the use of facilities in excess of what was necessary to render its service during the course of the initial rate period.

2. Commission Decision

48. The Commission does not find merit in Marathon's arguments that approval of the negotiated rate agreement results in "incremental plus" pricing in violation of the

²⁰ *Gulf South Pipeline, LP, et. al.*, 120 FERC ¶ 61,291, at P 25-31 (2007), *order on reh'g*, 122 FERC ¶ 61,162, at P 10 (2008); *see also* 123 FERC ¶ 61,322, *order on reh'g*, 125 FERC ¶ 61,199, at P 11-12 (2008).

²¹ *See* September 20 Certificate Order, 120 FERC ¶ 61,258 at P 65.

Incremental Pricing Policy Statement. Nor is approval of the negotiated rate agreement inconsistent with the September 2007 Certificate Order.

49. The negotiated rate agreement addresses a situation not addressed by the September 2007 Certificate Order: use of the expanded dock facilities in conjunction with Rate Schedule LNG-1 service before the in-service date of the Elba III storage and vaporization facilities and commencement of LNG-3 service. As previously discussed, BG LNG's use of the expanded dock facilities in order to deliver LNG to Southern LNG for storage and vaporization under Rate Schedule LNG-1 directly benefits BG LNG by permitting it to use larger vessels for such deliveries. It is therefore reasonable that BG LNG should pay for that service.

50. The Commission's negotiated rate policy permits a pipeline and shipper to negotiate mutually acceptable rates for a service different than the Commission-approved cost-based recourse rate for that service. Therefore, such a negotiated rate need not comply with the incremental rate policies applicable to the determination of the just and reasonable recourse rate for an expansion, including the policy that existing customers should not subsidize an expansion. In any event, BG LNG is not paying for LNG-3 service authorized by the September 2007 Certificate Order in this negotiated rate agreement because, during the term of the agreement, Southern LNG has not completed the facilities necessary to offer such services. The negotiated rate agreement only covers the use of the modified dock facilities for LNG-1 service until Elba III is completed. The Commission does not regard a payment for early use of the expanded dock facilities in connection with LNG-1 service as an improper subsidization by existing shippers of the Elba III expansion. Southern LNG and BG LNG have mutually agreed to a negotiated rate for such early use of the expanded dock facilities, and the Commission sees no reason to interfere with that agreement between two sophisticated participants in the natural gas market.

D. Whether the Commission exceeded its statutory authority through its acceptance of Southern LNG's negotiated rate agreement.

1. Marathon Argument

51. Marathon states that, since the enactment of the Energy Policy Act of 2005 (EPA 2005), the Commission's authority over new LNG terminals and expansions of existing terminals has been severely restricted by statute. Marathon asserts that section 311 of EPA 2005 added a new NGA section 3(e)(3) which provides that before January 1, 2015, the Commission may not condition an order approving an application to site, construct, expand or operate and LNG terminal on any regulation of the rates, charges, terms, or conditions of service of the LNG terminal. Marathon contends that because section 3 of the NGA does not provide the Commission with express authorization to regulate the rates for LNG services, the Commission's sole authority to regulate rates for facilities of new or expanded LNG terminals remains its power to

condition an order approving such facilities on regulation of the rates.²² Marathon also avers that, since the Commission cannot condition an order to expand an LNG terminal on regulation of its rates until January 1, 2015, the Commission presently cannot exert jurisdiction over the rates for LNG expansion services and, furthermore, cannot do so without a condition on approval of the LNG expansion facilities in the first place as a basis for its jurisdiction.

52. As a result of NGA section 3(e)(3), Marathon argues the rates as well as the terms and conditions of the Southern LNG negotiated rate agreement must be strictly a matter of private contract. Marathon asserts that the Southern LNG negotiated rate agreement, which clearly contains rates to recover costs for the LNG expansion facilities, is beyond the Commission's jurisdiction to accept or approve. Therefore, Marathon claims the Commission could not act on the price that Southern LNG has decided to charge for the use of the Elba III facilities.

2. Commission Decision

53. Section 311 of EAct 2005 amended section 3 of the NGA governing the Commission's authority over the siting, construction, expansion or operation of an LNG terminal.²³ As amended by EAct 2005, NGA section 3(e)(1) reaffirms the Commission's exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."²⁴ This provision also states that, except "as specifically provided in this Act, nothing in this Act is intended to affect otherwise applicable law related to any Federal agency's authorities related to LNG terminals."²⁵ Further, section 311(c) of EAct 2005 added a new NGA section 3(e)(3)(B) which provided in pertinent part that, before January 1, 2015, the Commission shall not condition an order approving an application to site, construct, expand or operate an LNG terminal: 1) on a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant securing the order; 2) any regulation of the rates, charges, terms or conditions of service of the LNG terminal, or

²² *Distrigas Corp. v. FPC*, 495 F.2d 1057, 103-64, *cert. denied*, 419 U.S. 834 (1974); *see also Dynergy LNG Production Terminal*, 97 FERC ¶ 61,231 (2001).

²³ Energy Policy Act of 2005, Pub. L. No. 109-58, § 311, 119 Stat. 594, 685 (2005).

²⁴ 15 U.S.C. § 717b(e)(1) (2006).

²⁵ *Id.*

3) a requirement to file with the Commission schedules or contracts related to such rates terms and conditions.²⁶

54. Marathon construes the NGA section 3(e)(3)(B) prohibition on conditioning approval of a new or expanded LNG terminal very broadly, contending that it removes the Commission's statutory authority to approve rates, terms, and conditions of service proposed by an applicant for approval of such a terminal. Marathon made a similar argument in the Elba III certificate proceeding in Docket No. CP06-470, contending that the Commission's approval of Southern LNG's proposed Rate Schedule LNG-3 violated the NGA section 3(e)(3)(B) prohibition on conditioning approval of an LNG terminal expansion. The Commission rejected that contention on the ground that Southern LNG had itself proposed to provide service at the terminal expansion on an open access basis pursuant to Rate Schedule LNG-3. The Commission held that approval of such a proposal by a pipeline did not constitute a "condition" on approval of the terminal expansion within the meaning of NGA section 3(e)(3)(B). The Commission explained:

Southern LNG has selected and proposed what the Commission has approved, i.e., to expand its LNG terminal and provide expanded tariffed service under continuing and limited Commission review. Where an applicant seeks to establish and implement a business plan based on and incorporating the body of regulatory law provided by existing Commission policies, only a tortured reading of the word "condition" can make the statute's prohibition applicable. We note again that the prohibition itself is to be construed narrowly. Section 3(e)(1)'s second sentence states that "[e]xcept as specifically provided in this Act, nothing in this Act is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals (emphasis supplied)."²⁷

55. There is even less reason to interpret NGA section 3(e)(3)(B) as applicable in this case. Southern LNG has proposed, and seeks approval of, its negotiated rate agreement with BG LNG. As previously explained, the purpose of that negotiated rate agreement is to permit BG LNG to use the expanded dock facilities in connection with its preexisting Rate Schedule LNG-1 service before the Elba III expansion storage and vaporization service is placed in service. This LNG-1 service was originally approved by the Commission in 1999, which was approximately six years before the passage of EPAct

²⁶ *Id.*

²⁷ *Southern LNG, Inc.*, 122 FERC ¶ 61,137, at P 13 (2008).

2005 adopting NGA section 3(e)(3)(B).²⁸ We do not read NGA section 3(e)(3)(B) as prohibiting the Commission from issuing an order accepting a negotiated rate contract for LNG service that Southern LNG has itself proposed.²⁹ Moreover, the Commission's December 31 Order did not "act on the price" that Southern LNG decided to charge BG LNG as Marathon has suggested. Instead, we accepted Southern LNG's filing subject to conditions and further review: a review initiated to receive responses to questions also raised by Marathon in its protest.³⁰ As we have received sufficient answers to our inquiry, we are, as discussed within this order, accepting Southern LNG's negotiated agreement without further conditions.

56. In short, we are merely reviewing a rate agreement proposed by the pipeline to ensure its compliance with our policy and regulations.

E. Whether the Commission's Acceptance of Southern LNG's Negotiated Rate Agreement Resulted in Subsidization in Violation of Section 3 of the NGA.

1. Marathon Argument

57. Marathon states that section 3(e)(4) of the NGA states, "an order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers."³¹ Marathon alleges that Southern LNG circumvents this requirement through the negotiated rate agreement filed in this docket. Marathon contends that Southern LNG's agreement with BG LNG uses the Commission's negotiated rate program to shift costs from the expansion service to the existing open access service, thereby creating a subsidization prohibited by the

²⁸ *Southern LNG, Inc.*, 89 FERC at 61,959.

²⁹ *See Trunkline LNG Co.*, 117 FERC ¶ 61,339, at P 20 (2006) ("Here, however, Trunkline LNG has specifically requested that the Commission grant it authority to provide its proposed enhanced services to unaffiliated third parties at cost-based rates under its open-access tariff. We do not read section 3(e)(3)(B) as precluding the Commission from issuing and enforcing such authorization when proposed by the applicant.").

³⁰ December 31 Order, 125 FERC ¶ 61,395 at P 11. (The Commission accepts the filing subject to the condition that Southern LNG responds fully to Marathon's protest.).

³¹ 15 U.S.C. § 717(e)(4).

statute. Marathon argues that, for this reason alone, the negotiated rate filing should have been rejected.

58. Marathon also states the Commission recognized this in the September 2007 Certificate Order for Elba III that LNG-1 customers must not subsidize the expansion service. Marathon avers that the Commission stated, “[e]xisting customers are not paying for anything more than what was necessary to render their service during the course of the initial rate period.”³² Yet, by accepting the negotiated rate agreement, Marathon claims the Commission has authorized the existing customer, BG LNG, to pay for docking facilities over and above what was necessary to render its service during the course of the initial rate period.

2. Commission Decision

59. Marathon cites section 3(e)(4) of the NGA and the September 2007 Certificate Order approving, among other things, Southern LNG’s request for authorization for Elba III as evidence that approval of Southern LNG’s negotiated rate agreement improperly allows subsidization by shifting costs from an expansion service to an existing open access service. This argument is incorrect.

60. As the Commission has already found earlier in this order, BG LNG’s agreement to pay a negotiated rate for early use of the expanded dock facilities in connection with its existing LNG-1 service does not constitute subsidization of the Elba III expansion. BG LNG’s use of the expanded dock facilities in order to deliver LNG to Southern LNG for storage and vaporization under Rate Schedule LNG-1 directly benefits BG LNG by permitting it to use larger vessels for such deliveries. It is therefore reasonable that BG LNG should pay for that service. Therefore, there is no subsidization of the Elba III expansion in violation of NGA section 3(e)(4).

The Commission orders:

(A) The request for rehearing is hereby denied, as discussed in the body of this order.

(B) Southern LNG’s compliance filing is hereby accepted as in compliance with the December 31 Order.

³² September 2007 Certificate Order, 122 FERC ¶ 61,137 at P 65; *see also Incremental Pricing Policy*, 88 FERC ¶ 61,227.

(C) Southern LNG's negotiated rate agreement with BG LNG is hereby approved.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.