171 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Tennessee Gas Pipeline Company, L.L.C. Docket No. RP20-631-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued April 30, 2020)

1. On February 28, 2020, Tennessee Gas Pipeline Company, L.L.C. (Tennessee) filed a petition for declaratory order requesting authorization to charge market-based rates for a proposed firm storage service (FS Flex) under Rate Schedule FS-F.[1] Tennessee states that the firm storage service would use storage capacity and deliverability from a firm storage contract between Tennessee and Pine Prairie Energy Center, LLC (Pine Prairie).[2] Tennessee states that its petition, direct testimony, and market power study demonstrate that it will not be able to exercise market power, acting together or in concert with other storage providers, when providing the proposed FS Flex service. As discussed below, we grant market-based rate authority for the proposed FS Flex service.

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[1] In a companion filing in Docket No. RP20-621-000, Tennessee seeks approval of the proposed firm storage service, *i.e.*, the FS Flex service, under proposed Rate Schedule FS-F. According to Tennessee, FS Flex service is designed to meet the needs of liquefied natural gas (LNG) customers and other market participants in the Gulf Coast region. We are accepting the language proposed in that *pro forma* tariff filing in an order issued concurrently.

[2] Tennessee asserts that Pine Prairie is owned by Plains All American Pipeline, L.P., which is not affiliated with Tennessee, and operates the Pine Prairie Energy Center facility located in the Gulf Coast Production Area (defined as east Texas, Louisiana, Mississippi and Alabama) near Tennessee's 800 Line system, and provides natural gas storage, hub and wheeling services at market-based rates.

Background

2. Tennessee states that its mainline transmission system extends in a northeasterly direction from Texas and the Gulf of Mexico to New England and that it has approximately 91.1 billion cubic feet (Bcf) of underground working natural gas storage capacity available to support its cost-based firm and interruptible storage services and system balancing needs. Tennessee further states that it has approximately 33.6 Bcf of storage capacity in the Gulf Coast Production Area (defined as east Texas, Louisiana, Mississippi and Alabama) pursuant to storage contracts with two of its affiliates, Bear Creek Storage Company, L.L.C. and Kinder Morgan Texas Pipeline, L.L.C. Tennessee asserts that its owner, Kinder Morgan, through its subsidiaries, has an ownership interest in eight existing natural gas storage facilities located in the Gulf Coast Production Area. Tennessee states that Kinder Morgan holds a 100% ownership interest in five of these facilities, and a majority ownership in the others. Tennessee further states that Kinder Morgan, through its subsidiaries, also owns other natural gas-related transmission assets in the Gulf Coast Production Area including interstate and intrastate pipelines.

3. Tennessee proposes to use storage capacity and deliverability from a firm storage contract between Tennessee and Pine Prairie to support its FS Flex service at market-based rates. According to Tennessee, that agreement provides Tennessee with 8,000,000 dekatherms (Dth) of firm storage rights, 200,000 Dth per day (Dth/d) of firm injection rights and 400,000 Dth/d of firm withdrawal rights at the Pine Prairie Energy Center facility.[3]

4. Tennessee states that the proposed FS Flex service will provide customers with the flexibility to select the level of storage capacity, withdrawal, and injection rights that best meet their needs. According to the filing, the proposed service will offer customers three firm injection options. The Class A service option is designed for traditional storage customers that require firm injection rights year-round. The Class B service option is designed for LNG customers that may require large firm injection rights for a limited number of days each year to address short-term interruptions in the operation of LNG liquefaction facilities. The Class C service option is designed for those customers, such as marketers, who are willing to accept interruption of their firm injection rights for a limited number of days each year. Tennessee states that the Class B and C service options are complementary because those contracts can be paired to allow a Class B shipper's firm injection rights to rely on the firm injection rights of a related set of Class C shippers. Tennessee states that the FS Flex service is a flexible storage service

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[3] Tennessee states that the Pine Prairie Energy Center facility physically interconnects with Tennessee on its 800 Line system. The facility has approximately 56,000,000 Dth of working gas capacity and 3,200,000 Dth/d of daily deliverability.

designed to meet the current needs of LNG customers and other market participants in the Gulf Coast Production Area.

5. Tennessee asserts that its petition and the attached exhibits containing the market power study and direct testimony demonstrate that Tennessee will not be able to exercise market power, acting together or in concert with other storage providers, when providing the proposed FS Flex service, and thus request that the Commission grant it authority to provide the proposed service at market-based rates. Tennessee asserts that its request for market-based rate authority addresses the three-step analysis set forth in the Commission's policy and precedent (1) evaluation of the relevant product and geographic markets; (2) measurement of a firm's market share and market concentration; and (3) consideration of other relevant factors.[4]

6. Tennessee states that the relevant geographic market for the proposed FS Flex service is the Gulf Coast Production Area. Tennessee states that this is the same narrow geographic market accepted by the Commission in granting authorization to provide storage services at market-based rates in numerous other proceedings.[5] Tennessee states the relevant product market includes both interstate and intrastate underground natural gas storage services and local production in the Gulf Coast Production Area. Tennessee states the evidence filed with its petition demonstrates that the market is unconcentrated, as evidenced by a Herfindahl-Hirschman Index (HHI) calculation of 296 for working gas capacity and 496 for daily deliverability, both well below the 1,800 HHI used by the Commission as the threshold to indicate a possible market power concern.

7. Tennessee further asserts that its supporting evidence demonstrates that Tennessee (including its Kinder Morgan affiliates) has a small market share of approximately 7.9% for working gas capacity and 8.9% for daily deliverability in the relevant market. Tennessee states that this is well below levels at which the Commission has expressed

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[4] Tennessee Petition at 3 (citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,230, *clarified by* 74 FERC ¶ 61,194, *reh'g denied*, 75 FERC ¶ 61,066 (1996), *petition. for review denied sub. nom.*, *Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998)).

[5] Tennessee Petition at 3 (citing *Pine Prairie Energy Center, LLC*, 135 FERC ¶ 61,168 (2011). *See also Pine Prairie Energy Center, LLC*, 109 FERC ¶ 61,215 (2004), *certificate amended*, 116 FERC ¶ 61,316 (2006), *Pine Prairie Energy Center, LLC*, 128 FERC ¶ 61,136 (2009), *certificate amended*, 131 FERC ¶ 62,226 (2010).

possible market power concerns. Tennessee states that the petition also demonstrates that other relevant factors, such as the ease of entry into the market,[6] growing natural gas production and the fact that the underlying storage capacity and deliverability from its firm storage agreement with Pine Prairie is already subject to market-based rate authority, further mitigates any remaining market power concerns.

8. In conformance with the requirements set forth in section 284.504 of the Commission's regulations,[7] Tennessee states that it will separately account for all costs and revenues associated with the proposed FS Flex service and will notify the Commission within ten days of acquiring knowledge of significant changes in its market power status.

9. Tennessee requests that the Commission issue an order granting it waiver of any Commission regulations necessary and appropriate to implement the authorizations requested. Tennessee specifically requests waiver of sections 284.7(e) and 284.10 of the Commission's regulations which require that natural gas companies providing Part 284 storage services charge reservation fees that recover all fixed costs based on the straight fixed-variable (SFV) rate design methodology.

10. Tennessee requests the Commission act on an expedited basis and issue an order granting the requested authorization and waivers no later than April 30, 2020. Tennessee asserts that expedited treatment is appropriate because (1) the underlying storage capacity and deliverability provided by its firm storage contract with Pine Prairie, which will support the proposed FS Flex service, is currently operational, and as a result, the service can be implemented as soon as June 1, 2020, following Commission approval of Tennessee's companion Natural Gas Act section 4 tariff filing; and (2) expedited approval will also enable Tennessee to finalize certain required changes to its internal systems and to market the proposed service prior to its implementation on June 1, 2020. Tennessee states that expedited approval of the petition will enable it to meet the current needs of the market participants and LNG customers for flexible storage services.

[6] Tennessee states the Commission has repeatedly concluded that barriers to entry into the Gulf Coast Production Area are low. Tennessee Petition at 16 (citing *Gulf South Pipeline Co.*, 168 FERC ¶ 61,034 at P 30 (2019); *see also Jefferson Island Storage & Hub, L.L.C.*, 163 FERC ¶ 61,049, at PP 13, 17 (2018)).

[7] 18 C.F.R. § 284.504 (2019).

Public Notice and Interventions

11. Public notice of the filing was issued on March 4, 2020, providing for a comment deadline of March 13, 2020. Pursuant to Rule 214,[8] all timely filed motions to intervene and any unopposed motion to intervene filed out of time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

12. Tennessee requests authority to add a new firm storage service, FS Flex service, and to charge market-based rates for its proposed service. The Commission's main concern in granting a pipeline the use of market-based rates for a service is the presence that the pipeline has in the relevant marketplace. Simply put, if the pipeline has market power over a service in the relevant marketplace, then we will not permit it to charge market-based rates for that service.

13. Pursuant to the Alternative Rate Policy Statement,[9] the Commission has developed a framework for evaluation of requests for market-based rates. This framework has two principle purposes: (1) to determine whether the applicant can withhold or restrict services and, as a result, increase price by a significant amount for a significant period of time; and (2) to determine whether the applicant can discriminate unduly in price or terms and conditions of service. To find that an applicant cannot withhold or restrict services, significantly increase prices over an extended period, or unduly discriminate, we must find that either there is a lack of market power[10] because customers have good

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[8] *Id.* § 385.214.

[9] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines,* 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification,* 75 FERC ¶ 61,024, reh'g denied 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petitions denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement), *criteria modified, Rate Regulation of Certain Natural Gas Storage Facilities* ,Order No. 678, 115 FERC ¶ 61,343; *order on clarification and reh'g,* Order No. 678-A, 117 FERC ¶ 61,190 (2006).

[10] We define "market power" as "the ability of a pipeline to profitably maintain prices above competitive levels for a significant period of time." Alternative Rate Policy Statement, 74 FERC at 61,230.

alternatives,[11] or that the applicant or the Commission can mitigate the market power with specified conditions.

14. Consistent with the methodology provided by the Alternative Rate Policy Statement, our analysis of whether Tennessee has the ability to exercise market power includes three major steps. First, we will review whether Tennessee has specifically and fully defined the relevant markets to determine which specific products or services are identified, and the suppliers of the products and services that provide good alternatives to the applicant's ability to exercise market power.[12] Additionally, as part of the first step, we will identify the relevant geographical market. Second, we will assess Tennessee's market share and market concentration. We use market share and HHI as screens in assessing whether a pipeline has the ability to exercise market power in defined product and geographical markets. However, HHI is just one factor we may evaluate.[13] The Alternative Rate Policy Statement recognizes that having a large market share in a concentrated market does not constitute market power if ease of entry and other competitive factors can prevent the applicant from exercising significant market power.[14] Lastly, we will evaluate other relevant factors.

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[11] A "good alternative" is an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for an applicant's service. *Id.* at 61,231.

[12] The relevant product market consists of the applicant's service and other services that are good alternatives to the applicant's services. *Id.*

[13] For example, the Commission has accepted an HHI of 1,800 as the threshold indicating the potential ability for an applicant to exercise market power. In cases where the HHI was higher than 1,800, the Commission has performed further review to determine whether other competitive factors nevertheless will prevent the applicant from being able to exercise market power. *See, e.g., UGI Storage Co.*, 133 FERC ¶ 61,073 (2010); *Arlington Storage Co., LLC,* 125 FERC ¶ 61,306 (2008); *Rendezvous Gas Services, L.L.C.,* 112 FERC ¶ 61,141, (2005).

[14] In the Alternative Rate Policy Statement, the Commission states that its consideration of a market-based rate proposal will include an examination of market concentration. Further, it explained that:

> [T]o measure market concentration, one generally considers the summary measure of market concentration known as the Herfindahl-Hirschman Index (HHI). If the HHI is small then one can generally conclude that sellers cannot exercise market power in this market. A small HHI indicates that customers have sufficiently diverse sources of supply in this market that

Relevant Markets

15. In its market power study, Tennessee identifies the relevant product market as both interstate and intrastate underground natural gas storage services and local production which will offer potential shippers reasonable alternatives. Tennessee states that the available alternatives are sufficient to limit the exercise of market power.

16. Tennessee identifies the relevant geographic market for its proposed services as the Gulf Coast Production Area which Tennessee states is defined as east Texas, Louisiana, Mississippi, and Alabama.[15] Tennessee states that this Gulf Coast Production Area is the same narrow geographic market accepted by the Commission in granting authorization to provide services at market-based rates in other proceedings.[16]

> no one firm or group of firms acting together could profitably raise market price. If the HHI is higher then additional analysis may be needed to determine if the seller can exercise market power.
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> **Error! Objects cannot be created from editing field codes.**The Commission will analyze the HHI calculation for the relevant markets. The HHI will be evaluated for each relevant path and/or origin market and each destination market utilizing the relevant data for each mainline receipt point (origin market) and each delivery point (destination market). If an applicant wishes to argue for either a broader or narrower market definition, it should also include calculations for its market definitions. Only sales or capacity figures associated with good alternatives should be used in calculating the HHI. In addition, applicants should aggregate the capacity of affiliated companies into one estimate for those affiliates as a single seller.

Alternative Rate Policy Statement,**Error! Objects cannot be created from editing field codes.** 74 FERC at 61,234 (footnote omitted); *see Golden Triangle,* 152 FERC ¶ 61,158, at P 11 & n.10 (2015).

[15] Tennessee Petition at 7.

[16] Tennessee Petition at 3 (citing *Pine Prairie*, 135 FERC ¶ 61,168, *Pine Prairie*, 109 FERC ¶ 61,215, *certificate amended*, 116 FERC ¶ 61,316, *Pine Prairie*, 128 FERC ¶ 61,136, *certificate amended*, 131 FERC ¶ 62,226).

17. We agree that the relevant geographic market for Tennessee's proposed service is the Gulf Coast Production Area. We also agree that the relevant product market includes both interstate and intrastate underground natural gas storage services as well as local production.

Market Share and Market Concentration

18. Tennessee contends that it has a small market share in the Gulf Coast Production Area and that it will not be able to exercise market power for firm storage service either acting alone or with other storage providers. Tennessee asserts that it has determined that the total working gas capacity and deliverability of the Kinder Morgan affiliated facilities (which include its storage contract with Pine Prairie) is approximately 269,090 MMcf and 5,495 MMcf per day respectively, which represents a 7.9% market share for working gas capacity and an 8.9% market share for deliverability in the geographic market.

19. Tennessee has satisfactorily shown that, within the relevant market, its prospective market share is low and that the market's concentration is below the threshold we would require before we would need to undertake further scrutiny. As set forth above, in order to ascertain whether additional scrutiny is needed, we examine concentration in the relevant market using HHI. The Alternative Rate Policy Statement states that a HHI of less than 1,800 indicates that sellers cannot exert market power because customers have sufficiently diverse alternatives in the relevant market.[17] If the HHI is above 1,800 we will give the applicant more scrutiny in order to make a determination about a seller's ability to exercise market power because the market is more concentrated. Here, the HHI for the proposal presented by Tennessee for working gas capacity is 296 and the HHI for deliverability is 496.

20. Tennessee's low market share and market concentration levels demonstrate that Tennessee lacks market power. The HHI reflected by Tennessee's study reflects that it is less likely to be able to exert market power because customers have sufficiently diverse alternatives in the relevant market. Tennessee's HHI levels of market concentration are below the 1,800-threshold level, which demonstrates that it will not be able to exercise market power in the relevant market area. Furthermore, Tennessee's market shares of 7.9% for working gas capacity and 8.9% for deliverability support a finding that it lacks market power.

Other Relevant Factors Mitigating Potential Market Power

21. In addition to market share and concentration, Tennessee asserts that other factors support the conclusion that it will not be able to exercise market power in the Gulf Coast Production Area. For example, ease of entry into a market inhibits the potential for any

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[17] Alternative Rate Policy Statement, 74 FERC ¶ 61,076 at 61,235.

given participant to exercise market power.[18] Tennessee asserts that the existence of the 62 certificated underground natural gas storage projects since 2000, the 65 existing storage facilities, and the hundreds of local producers in the Gulf Coast Production Area supports an ease of entry finding on the part of the Commission.[19] Tennessee also states that the storage capacity and deliverability service provided by its firm storage agreement with Pine Prairie is priced at market-based rates. Therefore, Tennessee argues, the Commission has already determined that market-based rates for storage services provided directly by Pine Prairie using the Pine Prairie Energy Center facility are appropriate.

22. We agree with Tennessee that barriers to entry are likely to be low in the relevant market and that alternative products are available to shippers in the relevant geographic area. Accordingly, upon examination of the material and studies presented by Tennessee, we find that Tennessee lacks significant market power in the relevant geographical area for the proposed market-based firm storage service. Further, for the reasons discussed above, we accept Tennessee's request to charge market-based rates for the FS Flex service under Rate Schedule FS-F as currently structured.

Change in Circumstances

23. Nevertheless, Tennessee must notify the Commission if future changes in circumstances significantly affect its present market power status, as required by the Commission's regulations.[20] Any event which would affect Tennessee's ability to withhold or restrict services or increase its ability to discriminate unduly in price or terms of service must be reported to the Commission within 10 days of acquiring knowledge of any such changes. Failure to timely file a change in circumstance report or failure to comply with the reporting requirements would constitute a violation of the Commission's regulations. We also reserve the right to require an updated market power analysis at any time.[21]

Waiver of Cost-Based Regulations

24. Tennessee states that it requests waiver of sections 284.7(e) and 284.10 of the Commission's regulations which require natural gas companies providing Part 284

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[18] *Id.* at 61,234.

[19] Tennessee Petition at 20.

[20] 18 C.F.R. § 284.504(b) (2019).

[21] *Golden Triangle Storage, Inc.*, 152 FERC ¶ 61,158, at P 24 (2015).

storage services to charge reservation fees that recover all fixed costs based on the SFV rate design methodology.

25. In light of our approval of market-based rates for the proposed storage service, the cost-related information required by these regulations is not relevant. Therefore, for good cause shown, we grant waiver of these regulations for the new market-based rate storage service accepted herein for Tennessee's FS Flex service.[22]

The Commission orders:

(A) The petition for declaratory order requesting authority to provide the proposed FS Flex service at market-based rates is granted.

(B) Waiver of certain cost-based regulations is granted as discussed in the body of this order.

(C) If Tennessee elects to provide service at market-based rates, it must notify the Commission, as required by section 284.504(b) of the Commission's regulations, if future changes in circumstances affect its market power status. Tennessee must notify the Commission within 10 days of acquiring knowledge of any such changes. The notification must include a detailed description of the new facilities and their relationship to Tennessee.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[22] *Golden Triangle Storage, Inc.*, 121 FERC ¶ 61,313, at PP 35-36 (2007); *Golden Triangle Storage, Inc.*, 138 FERC ¶ 61,036, at P 23 (2012).