

171 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP Energy Company

Docket No. RP20-481-000

v.

Natural Gas Pipeline Company of America LLC

ORDER ON COMPLAINT

(Issued May 26, 2020)

1. On January 31, 2020, BP Energy Company (BP) submitted a complaint (Complaint) against Natural Gas Pipeline Company of America LLC (NGPL) alleging that NGPL is improperly requiring BP to take an unwanted additional service in order to exercise a Right of First Refusal (ROFR). As discussed below, we deny the Complaint.

I. BP's Complaint

2. BP states that NGPL violated section 22.3(d)(1) of the General Terms and Conditions of NGPL's Tariff (GT&C),¹ section 4(d) of the Natural Gas Act (NGA),² and section 154.207 of the Commission's regulations³ by requiring BP to take NGPL's optional SW (System Wide) service to retain capacity subject to a ROFR.⁴ Specifically, BP represents that it executed a contract for service under NGPL Rate Schedule FTS at

¹ Natural Gas Pipeline Company of America LLC, FERC Gas Tariff, General Terms & Conditions, Part 6.22, PreGranted Abandonment & Rollover Rights, 0.0.0 (NGPL GT&C Part 6.22).

² 15 U.S.C. § 717c(d) (2018).

³ 18 C.F.R. § 154.207 (2019).

⁴ Complaint at 3.

maximum rates for the term April 1, 2018 through March 31, 2020.⁵ The contract included the SW service option, which provided BP with secondary point rights throughout NGPL's system. BP explains that the contract also qualified for the ROFR established by Commission regulations.⁶ BP states that it notified NGPL of its intent to exercise its ROFR and elected to retain its full primary point capacity at maximum rates without the SW service option.⁷ BP represents that on October 11, 2019, NGPL posted notice of BP's capacity for bid,⁸ which states:

For acceptable bid(s) that include the [SW option] [NGPL] shall convey a term sheet to the current capacity holder that includes an NPV for matching purposes with and without the SW option. The current capacity holder may elect to match the bid(s) either with or without the SW [o]ption. NGPL may, but is not required to, accept any bid which reflects a discount from the applicable maximum rate.⁹

3. BP states that on November 18, 2019, NGPL tendered to BP notice of a competing bid pursuant to the ROFR procedures. NGPL claimed that BP was required to match the Net Present Value (NPV) of the competing bid including the SW option. This notice, according to BP, did not contain an NPV for matching purposes with and without the SW option and did not allow the capacity holder to elect to match the bid(s) either with or without the SW option. BP states that this in turn had the effect of increasing the applicable maximum monthly base rate per Dth from \$4.24 to \$7.2550 (off-peak) and \$8.1700 (peak). BP claims that over the term of the contract, this imposes an additional \$7.5 million in charges on BP.¹⁰ On December 2, 2019, BP elected to exercise its ROFR, but reserved its legal rights to challenge NGPL's actions.¹¹

4. BP asserts that NGPL's conduct violates section 22.3(d) of NGPL's GT&C, as NGPL has forcibly bundled its SW service option as a condition to exercise of a

⁵ *Id.* at Ex. 1 (Contract No. 149384-FTSNGPL).

⁶ *Id.* at 6.

⁷ *Id.* at 8.

⁸ *Id.*

⁹ *Id.* at Ex. 2.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 10.

regulatory ROFR.¹² Section 22.3 of the GT&C provides that “[i]n comparing bids hereunder or in assessing rollovers under section 22.2, [NGPL] shall not take into account as increasing the value of any bid any separate amount paid, or which a shipper agrees to pay, for the LN and/or SW service option under Rate Schedule FTS, FFTS, or FTS-G.”¹³ BP also argues that NGPL has violated section 4(d) of the NGA and section 154.207 of the Commission’s regulations, as NGPL has implemented a tariff change by doing what its tariff specifically forbids: requiring a shipper to take the SW service option as a condition to exercising a regulatory ROFR. BP states that NGPL has implemented this tariff change without making a filing with the Commission or providing public notice.¹⁴

5. BP further states that in 1998, as part of a generic evaluation of NGPL’s capacity auction mechanism, the Commission rejected NGPL’s proposal to mandate that shippers participating in capacity auctions also take NGPL’s optional SW service.¹⁵ BP notes that NGPL did not seek rehearing of this aspect of the Commission’s order and that NGPL implemented the Commission directive by modifying two provisions of its general auction tariff in GT&C Sections 5.1(c)(3) and 5.1(c)(4).¹⁶ BP states that NGPL appears to have dropped the compliant language in a subsequent settlement filed in 2000;¹⁷ however, BP notes that NGPL’s currently-effective Tariff provides that “[t]he capacity allocation procedures of this Section 5.1(c) shall not apply where a shipper is utilizing unilateral rollover rights or the [ROFR] procedures provided in Section 22 of these [GT&C]. Instead, the procedures in said Section 22 will govern the award of capacity.”¹⁸

¹² *Id.* at 10-11.

¹³ NGPL GT&C Part 6.22.

¹⁴ Complaint at 11.

¹⁵ *Id.* at 2-3 (citing *Nat. Gas Pipeline Co. of Am. LLC*, 85 FERC ¶ 61,202, at 61,839 (1998) (citing *N. Nat. Gas Co.*, 84 FERC ¶ 61,154, at 61,839 (1998), *order on reh’g and clarification*, 87 FERC ¶ 61,033 (1999))).

¹⁶ *Id.* at 3, 7 (citing *Nat. Gas Pipeline Co. of Am.*, Compliance Filing, Docket No. RP97-431-006 (filed Nov. 25, 1998); *Nat. Gas Pipeline Co. of Am.*, Compliance Filing, Docket No. RP97-431-005 (filed Dec. 1, 1998)).

¹⁷ *Id.* at 3 (citing *Nat. Gas Pipeline Co. of Am.*, Stipulation and Agreement, Docket No. RP97-431-009 (filed June 16, 2000)).

¹⁸ *Id.* (citing *Nat. Gas Pipeline Co. of Am.*, Stipulation and Agreement, Docket No. RP97-431-009, at app. A (filed June, 16, 2000); Natural Gas Pipeline Company of

6. BP requests that the Commission order NGPL to (a) refund with interest all amounts collected by NGPL in connection with the mandatory bundling of its SW service option under BP's replacement contract; (b) revise BP's replacement contract to award BP's capacity at the proper maximum rate excluding the SW service option; and (c) cease and desist from the practice of mandatory bundling the optional SW service.¹⁹

II. Notice and Responsive Pleadings

7. On February 6, 2020, the Commission issued a notice of the Complaint with responses due as provided in Rules 211 and 214 of the Commission's Rules of Practice and Procedure.²⁰ On February 20, 2020, NGPL answered the Complaint (NGPL Answer). Also, on February 20, 2020, Tenaska Marketing Ventures filed a comment in support of the Complaint,²¹ wherein it urges the Commission to issue an order granting the Complaint in its entirety. On March 3, 2020, BP filed an answer in response to the NGPL Answer. On March 9, 2020, NGPL filed an answer to BP's answer.

8. Pursuant to Rule 214,²² all timely motions to intervene and any unopposed motions 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. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise ordered by the decisional authority.²³ We are not persuaded to accept BP's March 3, 2020 answer or NGPL's March 9, 2020 answer and, therefore, reject them.

America LLC, FERC Gas Tariff, General Terms & Conditions, Part 6.5, Section 5, Priority of Service, 2.0.0 (NGPL GT&C Section 5)).

¹⁹ *Id.* at 4.

²⁰ 18 C.F.R. §§ 385.211, 385.214 (2019).

²¹ Although Tenaska labeled its filing an "answer," Tenaska is not the respondent in this proceeding (a person against whom the complaint is directed). *See* 18 C.F.R. § 385.102(f)(2) (2019).

²² 18 C.F.R. § 385.214.

²³ 18 C.F.R. § 385.213 (a)(2) (2019).

NGPL Answer

9. NGPL alleges that BP is attempting to use the ROFR to change its existing firm transportation service, contrary to Commission regulations, policy, NGPL's Tariff, and BP's contract. NGPL requests that the Commission dismiss the Complaint.²⁴

10. NGPL states that the regulatory ROFR allows a shipper with an expiring contract to "continue its transportation arrangement" by matching another shipper's bid for "its firm service."²⁵ NGPL argues that a shipper cannot use the ROFR to change the character of its service.²⁶ NGPL states that BP exercised its right to match the highest bid in the ROFR bidding process and retain its existing contract for firm transportation service with the SW option, but that it now seeks to downgrade its service. According to NGPL, BP is attempting to use the ROFR process to obtain a different service at a rate below the highest bid received.²⁷

11. NGPL asserts that BP misinterprets GT&C Section 22.3(d)(1) to mean a shipper can use the ROFR process to convert a SW contract to a non-SW contract. NGPL states that BP ignores Section 22.3(d)(4), which provides that to retain its capacity under the ROFR, BP must match the best price and term submitted during ROFR bidding. NGPL also states that Section 22.3(d)(1) prevents an incumbent shipper with non-SW service from being forced to add SW service to its existing FTS contract in order to retain its service as part of the ROFR process.

12. NGPL maintains that it followed the requirements of its Tariff and Commission policy in requiring BP to match the best bid submitted during the ROFR bidding for BP's transportation arrangement (firm transportation service with the SW option).²⁸ NGPL states that while BP notified NGPL on September 27, 2019 of its intent to exercise the ROFR on its contract, BP did not inform NGPL in the election notice that it wanted to discard its SW service. NGPL states that it conveyed the best bid to BP on November 18, 2019 and that BP was allowed to match the NPV of the competing bid. NGPL states that while the *pro forma* notice for the ROFR discusses the possible provision of an NPV both with and without the SW service, the latter was not applicable here because the service

²⁴ NGPL Answer at 1.

²⁵ *Id.* (quoting 18 C.F.R. § 284.221(d)(2)(ii)).

²⁶ *Id.* at 1-2.

²⁷ *Id.*

²⁸ *Id.* at 2-3.

subject to the ROFR was firm transportation service with the SW option and the best bid for matching purposes was for the same service. NGPL states that BP eventually exercised the ROFR by matching the best bid, but indicated to NGPL it was taking regulatory action to drop the SW option from its contract.²⁹

13. NGPL also argues that the 1998 Settlement (which according to NGPL pertains to NGPL's auction procedures for initial capacity awards) is irrelevant to the instant proceeding, as it is unrelated to the ROFR and was superseded two years later.³⁰

III. Discussion

14. We deny the Complaint. The regulatory ROFR was designed to protect an existing firm customer's need to continue its historical transportation service, while recognizing the role of market forces in determining contract price and term.³¹ The ROFR permits a long-term firm transportation shipper with the right to renew its expiring contract to continue its existing service by matching the highest bid, not above the

²⁹ *Id.* at 4.

³⁰ *Id.* at 11-12.

³¹ 18 C.F.R. § 284.221(d)(2) (2019); *Pipeline Serv. Obligations & Revisions to Regulations Governing Self-Implementing Transp.; & Regulations of Nat. Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 (cross-referenced at 59 FERC ¶ 61,030), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (cross-referenced at 60 FERC ¶ 61,102), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

existing maximum rate.³² However, the regulatory ROFR does not afford the firm shipper a right to change the essential character of its service,³³ as BP seeks to do here.

15. We find that the SW option is essential to BP's existing firm service. In its contract for FTS service for the term April 1, 2018 through March 31, 2020, BP selected the SW option.³⁴ This service has a higher maximum reservation rate than FTS service

³² *NUI Corp. (City Gas Company of Florida Division) v. Fla. Gas Transmission Sys.*, 92 FERC ¶ 61,044, at 61,118 (2000) (“The purpose of the ROFR is to protect customers against the abandonment of their existing service by enabling them to continue that service by matching the highest bid, not above the existing maximum rate”); *Williams Nat. Gas Co.*, 69 FERC ¶ 61,166, at 61,637 (1994) (“The right of first refusal process allows long-term firm transportation shippers with expiring contracts the option of continuing their service if they agree to match competitive bids up to the maximum rate.”); *Certification of New Interstate Nat. Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,394 (2000) (“The Commission’s ROFR regulations provide that a shipper whose contract is expiring is entitled to renew that contract by matching the highest bid made for the capacity up to the maximum rate.”); *Williams Nat. Gas Co.*, 83 FERC ¶ 61,052, at 61,299 (1998) (The ROFR enables “any long-term firm transportation customer... to continue receiving *that firm service* by agreeing to pay up to the maximum rate and matching the length of the contract term of another customer who wants and values the service”) (quoting Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,448) (emphasis in original)).

³³ *Regulation of Short-Term Nat. Gas Transp. Servs. & Regulation of Interstate Nat. Gas Transp. Servs.*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,339 (cross-referenced at 90 FERC ¶ 61,109) (The ROFR “was never intended to permit shippers to increase or change their service”), *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 (cross-referenced at 91 FERC ¶ 61,169), *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); *Williams Nat. Gas Co.*, 65 FERC ¶ 61,221, at 62,013 (1993) (“[T]he character of the service being provided under the expiring contract cannot be changed through use of the right of first refusal process”), *reh’g denied*, 66 FERC ¶ 61,315, at 61,946 (1994); *Columbia Gas Transmission Corp.*, 110 FERC ¶ 61,063, P 18 (2005); *NUI Corp. (City Gas Company of Florida Division) v. Fla. Gas Transmission Sys.*, 92 FERC at 61,119 (“The ROFR has always been a limited right designed to permit the shipper to retain its historic service.”).

³⁴ Complaint, Ex. 1.

without the SW option³⁵ in exchange for the right to access all receipt and delivery points on NGPL's system as secondary points.³⁶ The higher maximum reservation rate reflects the right to secondary point access outside the zones for which shippers pay reservation charges that is not afforded to other shippers without the SW service.³⁷ Therefore, BP may not discontinue the SW option, an essential aspect of its historical service, as part of the ROFR process.³⁸

16. We reject BP's argument that NGPL violated Section 22.3 of the GT&C. Consistent with the Commission's regulatory ROFR, Section 22.3 provides a shipper with an expiring firm service contract with a term of one year or greater the right to continue its service if the shipper matches the price and term offered for such service by another bidder.³⁹ Subsection 22.3(d)(1) provides that NGPL "shall convey to the original Shipper a term sheet for the best bid (based on price and term)."⁴⁰ As BP points out, that subsection goes on to state that "[i]n comparing bids hereunder or in assessing rollovers under Section 22.2, [NGPL] shall not take into account as increasing the value of any bid any separate amount paid, or which a shipper agrees to pay, for the LN and/or SW service option under Rate Schedule FTS, FFTS, or FTS-G."⁴¹ This language does not provide BP with a right to discontinue a fundamental aspect of its existing historical service that

³⁵ There is a single rate for FTS-SW service. *See* Natural Gas Pipeline Company of America LLC, FERC Gas Tariff, Part 5.2, Rate Schedule FTS, 0.0.0 (NGPL Rate Schedule FTS).

³⁶ *See* NGPL GT&C Section 5.

³⁷ *See Algonquin Gas Transmission Co.*, 103 FERC ¶ 61,235, at P 14 (2003) ("For ROFR purposes, as it does generally, the Commission regards service as defined by the rate schedule under which a shipper has its contract.")

³⁸ *See* Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,339 ("The purpose of the right of first refusal is to protect the captive customer's historical service, and therefore it should apply only when the existing shipper is seeking to contract for its historical capacity. The right of first refusal is a limited right and it was never intended to permit shippers to increase or change their service. It is intended to be a means of defense against pipeline market power, not a mechanism to award an existing shipper a preference over a new shipper for different service.")

³⁹ NGPL GT&C Part 6.22.

⁴⁰ *Id.*

⁴¹ *Id.*

includes the SW option while retaining FTS service through the ROFR process. Rather, this language ensures that a historical shipper without the SW option in its existing service may not be compelled to add the SW option in order to match a competing bid in the ROFR process.⁴² Therefore, we find that NGPL has not violated its tariff by requiring BP to continue its existing FTS-SW service through the ROFR process. Because we find NGPL acted consistent with its tariff, we also reject BP's arguments that NGPL violated section 4(d) of the NGA and section 154.207 of the Commission's regulations by implementing a tariff change without a filing.

17. We also reject BP's argument that NGPL's notice demonstrates that BP can discontinue the SW option as part of the ROFR process. NGPL's generic notice does not override the ROFR set out in the Commission's regulations and NGPL's tariff.⁴³ The notice does not create a right for BP to modify an essential aspect of its existing firm service through the ROFR process. Accordingly, the statements made by NGPL in its boilerplate notice cannot control the ROFR procedure.⁴⁴

18. We also reject BP's arguments based on NGPL's tariff provisions relating to capacity auctions in GT&C Section 5.1(c) and the Commission's orders addressing

⁴² Section 22.3(d)(1) protects the historical shipper by providing that NGPL shall not consider any "separate amount" or "surcharge" that the historical shipper does not pay in determining the best bid. Section 22.3(d)(4) requires the historical shipper to match the price (up to the maximum recourse rate) and term (up to five years) of the best bid for the portion of its service it desires to retain. *Id.*

⁴³ NGPL states that it uses the same *pro forma* notice for all ROFRs. NGPL Answer at 4.

⁴⁴ The notice states: "For acceptable bid(s) that include the [SW option] [NGPL] shall convey a term sheet to the current capacity holder that includes an NPV for matching purposes with and without the SW option. The current capacity holder may elect to match the bid(s) either with or without the SW Option." Complaint, Ex. 2. As BP concedes, the notice also states: "In comparing bids in the ROFR, the NPV of all acceptable bids received in this ROFR shall be determined in accordance with all applicable provisions of [NGPL's] tariff, as well as the NPV evaluation methodology applicable to Initial Open Season bid evaluations posted on [NGPL's] DART system as of the Posting Start Date. . . . For any bids submitted with the SW Option, the value of the SW Option shall be included in the determination of the NPV of the bid." Complaint at 9.

NGPL's capacity auction procedures.⁴⁵ The general capacity auction procedures are distinct from and not relevant to the issue presented in BP's complaint regarding the ROFR process. As the Commission has explained, "procedures for rollover and ROFR rights are different from general capacity award procedures throughout the industry, and it is general Commission policy to allow such differences."⁴⁶

The Commission orders:

The Complaint is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁵ See Complaint at 3 (citing *Nat. Gas Pipeline Co. of Am.*, 85 FERC ¶ 61,202; *N. Nat. Gas Co.*, 84 FERC ¶ 61,154, *order on reh'g and clarification*, 87 FERC ¶ 61,033).

⁴⁶ *Nat. Gas Pipeline Co.*, 93 FERC ¶ 61,075, at 61,205 (2000).