

171 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Betelgeuse Energy, LLC

Docket No. RP20-521-000

v.

El Paso Natural Gas Company, L.L.C.

ORDER ON COMPLAINT

(Issued June 18, 2020)

1. On February 13, 2020, Betelgeuse Energy, LLC (Betelgeuse) filed a Complaint objecting to El Paso Natural Gas Company, L.L.C.'s (El Paso) rejection of Betelgeuse's non-conforming bids in two open seasons for capacity under expiring contracts subject to a right of first refusal (ROFR).¹ As discussed further below, we deny the Complaint.

Background

2. Betelgeuse states that it is a wholly owned subsidiary of Spica Energy Holdings, LLC, with its principal place of business in Gainesville, Florida. According to Betelgeuse, it is a newly established entity that was formed "to focus on the development

¹ In Order No. 636, the Commission amended its regulations to permit pre-granted abandonment of transportation contracts but permitted customers taking service for one year or more at the maximum rate to continue to receive the historical service upon which they had relied by conditioning such pre-granted abandonment on a ROFR for the existing shipper. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 (1992) (cross-referenced at 59 FERC ¶ 61,030); 18 C.F.R. § 284.221(d) (2019). A pipeline may also offer a ROFR to its customers separately on a non-discriminatory basis. Under the Commission's approach, an existing shipper with a long-term firm contract could retain its service from the pipeline by matching the rate and length of service of a competing bid, with the rate capped by the pipeline's maximum tariff rate.

of natural gas supply and market sectors around the Permian Basin, including on El Paso.”²

3. El Paso is a natural gas company that operates an interstate pipeline system transporting natural gas from the southwestern United States to various points in Texas, New Mexico, Colorado, Oklahoma, Arizona, California and northern Mexico. El Paso’s system consists of the South and North system mainlines, which can deliver natural gas from the San Juan, Permian and Anadarko Basins to various delivery points throughout its system.

4. As described in the Complaint, on January 2, 2020, El Paso initiated two open seasons for capacity made available by the expiration of two firm transportation agreements that are subject to the ROFR provisions in El Paso’s tariff, with bidding to commence on January 2, 2020 and close on January 30, 2020 at 5:00 p.m.³ According to El Paso’s open season materials, it solicited bids for capacity for service over El Paso’s South Mainline consisting of 10,000 to 25,000 dekatherms per day (Dth/d) under the first open season and 45,000 to 78,000 Dth/d under the second.⁴ The open season notices identified primary receipt points located near the Southwest Texas and New Mexico border with delivery to Ehrenberg, California.

5. In the open season notices, El Paso specified that it reserved the right to reject bids that “contain additional or modified terms or are inconsistent with the provisions of Transporter’s FERC Gas Tariff.” El Paso also reserved the right in the open season notices to “seek clarification of bids that have what appears to be an obvious error.”⁵ Betelgeuse explains that the notice established that capacity would be awarded to the bid that yields the highest total present value, pursuant to a formula where quantity, rate, and term are considered.⁶

6. Betelgeuse explains that it anticipated that multiple bidders would submit maximum rate bids for all the capacity in both open seasons and, thus, the winning bidder

² Complaint at 2.

³ *Id.*

⁴ The available capacity varies by month. Betelgeuse included the open season notices and other auction materials in the exhibits to the Complaint.

⁵ *Id.* at 3.

⁶ *Id.* El Paso’s monthly reservation rate for deliveries to the California zone is \$11.0077 per Dth.

would be the one that submitted the bid with the longest end date.⁷ Because none of the notices established an end date, Betelgeuse states that it contacted via phone a representative of El Paso to inquire about whether there was a maximum end date that could be bid in each open season. Betelgeuse states that it was concerned that the bids contemplated by Betelgeuse would be rejected by El Paso for exceeding an undisclosed maximum contract duration. According to Betelgeuse, when Betelgeuse proposed including a provision indicating that it would accept shorter end dates if El Paso ultimately decided to establish maximum end date limits during the bidding evaluation process, an El Paso representative responded that he saw no issue with the proposal.⁸

7. On January 30, 2020, Betelgeuse submitted its bids, inserting “03/31/2084 or maximum accepted term end date” in the blank for the “Requested Term End Date.”⁹ Betelgeuse states that it decided to submit the bid with a duration of 64 years, from April 1, 2020 through March 31, 2084, after following El Paso’s recommendation and identifying contracts on other pipelines with durations in excess of 60, 70, 80, and in some cases even 90 years.¹⁰

8. Betelgeuse states that the next day, El Paso posted notices listing the bids it had received in both open seasons, all of them at maximum tariff rates, and most of them for all the capacity offered.¹¹ Betelgeuse states that its 64-year bids yield the highest present value for both open seasons, but nevertheless, on February 6, 2020, El Paso posted notices indicating it had accepted bids for 39-years and 1 month for both open seasons.¹²

9. Following an inquiry by Betelgeuse, Betelgeuse states that El Paso’s legal counsel informed it that Betelgeuse’s bids had been rejected based on the non-conforming language added to the bid along with the requested term end date – referring to the phrase “or maximum accepted term date.”¹³ Betelgeuse states that El Paso further indicated that,

⁷ *Id.*

⁸ *Id.* at 4-5.

⁹ *Id.* at 5; *see also id.*, Ex. C (Jan. 30, 2020 email submitting Betelgeuse bids at 4:41 p.m. mountain time).

¹⁰ *Id.* at 5; *see also id.*, Ex. F (identifying contracts ranging from 66 to 6,991 years).

¹¹ *Id.* at 6.

¹² *Id.*; *see also id.*, Ex. E.

¹³ *Id.* at 6-7.

absent that determination, it may have rejected the bids based on the 64-year durations that were bid, but that there was no need to reach that determination in light of the non-conforming language finding.

Complaint

10. Betelgeuse filed its Complaint against El Paso pursuant to Rule 206 of the Commission's Rules of Practice and Procedure.¹⁴ Betelgeuse claims that El Paso unlawfully rejected the bids Betelgeuse submitted in two open seasons held pursuant to the ROFR provisions in El Paso's FERC Gas Tariff, Third Revised Volume No. 1A. Betelgeuse further claims that, in doing so, El Paso violated its tariff, established Commission policy, section 4(c) of the Natural Gas Act (NGA)¹⁵ and the Commission's regulations.¹⁶ Betelgeuse requests that the Commission issue an order granting the Complaint and directing El Paso to remedy the violations by accepting the Betelgeuse bids.

11. In the Complaint, Betelgeuse states that El Paso violated its tariff by failing to adhere to the bid evaluation criteria set forth in its open season notices and the suggestions made by El Paso's representatives that additional criteria could be added after the open season bidding periods had closed, i.e., establishing maximum end dates.¹⁷ Betelgeuse states that "the bid evaluation criteria established in the open season notices did not include any end date limitations."¹⁸ According to Betelgeuse, "El Paso's representatives contradicted these documents and their previous statements when discussing the issue with Betelgeuse's representative, Ms. Paez, and suggested that maximum end date limitations could be adopted after the open season bidding periods had closed."¹⁹ Furthermore, Betelgeuse states that even after the bidding period ended and its bids had been rejected, El Paso avoided providing any clarity, indicating that Betelgeuse's bids had been rejected for other reasons, while still holding out the possibility that the bids might also have been rejected based on the length of the

¹⁴ 18 C.F.R. § 385.206 (2019).

¹⁵ 15 U.S.C. § 717c(c) (2018).

¹⁶ Complaint at 1, 12 (citing 18 C.F.R. § 282.221(d)(2) (2019) (*sic*)).

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 8.

¹⁹ *Id.* (citing telephone calls made by its legal counsel, Stacy D. Paez).

contracts.²⁰ Betelgeuse states that this lack of clarity and consistency is unjust, unreasonable, and/or unduly discriminatory because it is a clear violation of section 4.14(b)(vii) of the General Terms and Conditions (GT&C) of El Paso's tariff, which states that open seasons posted by El Paso are to include "the criteria by which bids are to be evaluated," as well as a violation of established Commission policy, which has likewise been clear that bid evaluation criteria must be transparent and clearly stated in open season notices "so that all potential bidders will understand the relevant criteria and be placed on a level playing field."²¹

12. In addition, Betelgeuse states that the bids it submitted were not made "non-conforming" by including the phrase ". . . or maximum accepted term date" and that, even if they were, El Paso did not act in a just, reasonable, and not unduly discriminatory manner when it rejected the bids.²² Betelgeuse states that El Paso's reasoning is apparently based on language in the open season notices stating that El Paso reserved the right to reject bids that "contain additional or modified terms or are inconsistent with the provisions of Transporter's FERC Gas Tariff."²³ Betelgeuse states that it does not agree with El Paso's reasoning. Betelgeuse asserts that while the Commission does not appear to have ever specifically opined on what does and does not constitute an additional or modified term in the context of open season bidding, the Commission has applied a "fill in the blank" standard when analyzing conformity in other contexts.²⁴ Betelgeuse states that although it recognized that the inclusion of verbiage in the Term End Date field on the bid form may be unusual, the form did not specify that the blanks could not be filled in with that type of language.²⁵ Betelgeuse also states that it did insert March 31, 2084 as the specific and desired term end date in both bids, and that the additional language was added in response to El Paso's suggestion that El Paso could adopt a maximum accepted end date after the open season bidding had

²⁰ *Id.*

²¹ *Id.* (citing *Northern Border Pipeline Co.*, 164 FERC ¶ 61,150, at P 15 (2018); *Columbia Gas Trans., LLC*, 148 FERC ¶ 61,218, at P 43 (2014)).

²² *Id.* at 9.

²³ *Id.*

²⁴ *Id.* at 10 (referring to *El Paso Natural Gas Co.*, 109 FERC ¶ 61,146, at P 11 (2004)).

²⁵ *Id.*

closed.²⁶ Furthermore, Betelgeuse states that the specific bid end date in both its bids was correctly interpreted by El Paso in the public notices of bids on January 31, 2020.²⁷

13. Betelgeuse states that the open season notices did not require El Paso to reject bids that contained additional or modified terms, but instead reserved El Paso's right to do so. Betelgeuse states the notices also expressly reserved El Paso's right to "seek clarification of bids that have what appears to be an obvious error" and, as such, El Paso could have requested that Betelgeuse revise its bids by, for example, removing the additional language.²⁸

14. Betelgeuse states that, although difficult to quantify, El Paso's rejection of Betelgeuse's bids could potentially cost Betelgeuse tens of millions of dollars in lost revenue and profits that it may have earned on the capacity during the 64-year contract bids in the open seasons.²⁹ Thus, Betelgeuse requests that the Commission issue an order granting Betelgeuse's Complaint by finding that El Paso violated its tariff and established Commission policy, and that it acted in an unjust, unreasonable, and/or unduly discriminatory manner when rejecting Betelgeuse's bids. Betelgeuse also requests that the Commission direct El Paso to accept those bids at the specified term end date of March 31, 2084, and therefore award to Betelgeuse the capacity subject to the open seasons, as Betelgeuse's bids would represent the highest total present value of the bids submitted in the open season.

Public Notice, Interventions, and Answers

15. Public notice of the filing was issued on February 18, 2020. Answers, interventions and protests were due on or before March 4, 2020. Pursuant to Rule 214, all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted.³⁰ Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On March 4, 2020, El Paso filed an Answer to the Complaint as permitted by Commission regulations.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 11.

²⁹ *Id.* at 13.

³⁰ 18 C.F.R. § 385.214 (2019).

16. On March 9, 2020, Betelgeuse filed an Answer to El Paso's Answer. On March 11, 2020, Sempra Gas & Power Marketing, LLC (Sempra) filed a Reply to Betelgeuse's Answer.³¹ Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, answers to answers are prohibited unless otherwise ordered by the decisional authority.³² We accept the answers to answers because they have provided information that assisted us in our decision-making process.

17. In its Answer, El Paso states that it correctly rejected Betelgeuse's bids as being non-conforming because they stated terms with floating end dates.³³ El Paso states that it received 15 different bids in each open season and no other bidder had any problem submitting a bid with an acceptable term provision. El Paso states that the fundamental problem with Betelgeuse's bids is that they were crafted in such a way that Betelgeuse could not possibly lose, because the bids could be adjusted upward or downward to match whatever maximum term El Paso ultimately accepted.³⁴ El Paso states that it conducted the open season in a manner that was just, reasonable, and non-discriminatory in accordance with its tariff and the open season notices, and could not have accepted Betelgeuse's bids without disadvantaging all other bidders.³⁵ El Paso states that if all shippers would have submitted a bid with the same language that Betelgeuse used in its bids, it would be impossible to determine the shipper that values the capacity most.³⁶ El Paso also states that it cannot anticipate every possible non-conforming provision that a bidder may choose to submit, which is why it clearly and consistently states in its communications with potential bidders, as well as in the open season notices, that they are at risk of rejection should they choose to submit non-conforming bids that are deemed unacceptable or discriminatory.³⁷ El Paso states that Betelgeuse makes no mention in its

³¹ Sempra, which also filed a motion to intervene, is an energy marketing and trading company. Sempra submitted bids in the open seasons at issue in this proceeding and was awarded the capacity when the existing shipper failed to exercise its ROFR. Sempra Reply at 1.

³² 18 C.F.R. § 385.213(a)(2) (2019).

³³ El Paso Answer at 1.

³⁴ *Id.* at 6.

³⁵ *Id.* at 1.

³⁶ *Id.* at 10.

³⁷ *Id.* at 4-6.

Complaint of the repeated admonitions from El Paso's representatives about the possibility of being rejected.³⁸

18. El Paso mentions that it had no incentive to discriminate against Betelgeuse, as it did not award the capacity to an affiliate, and that had Betelgeuse not included the floating end dates in its bids, El Paso stood potentially to gain economically from accepting Betelgeuse's bids because the present value of those bids was significantly higher than the present value of the winning bidder's bid.³⁹ El Paso states that re-running the open season would disrupt the market and would reward Betelgeuse for submitting improper bids at the expense of other customers that submitted non-floating, conforming and fair bids.⁴⁰ Finally, El Paso requests that the Commission not discard El Paso's proven open season process, which has been effective and has had non-discriminatory results for a long period of time.⁴¹

19. In its Answer, Betelgeuse states that the additional language, whether non-conforming or not, never came into play because it would only have become relevant if El Paso had, in fact, established a maximum accepted term end date as it suggested it might but never did. Therefore, Betelgeuse states that El Paso should have accepted March 31, 2084 as the bid end date.⁴² In addition, Betelgeuse states that it wished to correct El Paso's factual representations to the effect that Betelgeuse indicated that it intended the term end date to float up as well as down.⁴³

20. In its Reply, Sempra states that it submitted the bids with the highest net present value that fully conformed with the open season notices, because its bids specified only fixed, certain end dates.⁴⁴ Sempra states that the Betelgeuse bids were "so ambiguous on their face that it is hard to imagine that any reasonable operator would have accepted them."⁴⁵ Sempra states that the non-conforming language ". . . or maximum accepted

³⁸ *Id.* at 6.

³⁹ *Id.* at 11.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 11.

⁴² Betelgeuse Answer at 2.

⁴³ *Id.* at 3-4.

⁴⁴ Sempra Reply at 1 n.1.

⁴⁵ *Id.* at 2.

term end date” rendered the term of Betelgeuse’s bid undefined and, according to Sempra, “irredeemably improper.”⁴⁶ Citing El Paso’s Answer, Sempra concurs that “Betelgeuse’s language could have been interpreted in multiple ways to adjust its bid up or down in correlation to the winning ‘accepted’ term bid in the open seasons.”⁴⁷

21. Sempra objects to Betelgeuse’s proposals that El Paso should have ignored the offending language or that the language should be interpreted less broadly as inappropriate. According to Sempra, the ambiguity of the bids is attributable squarely to Betelgeuse, and as the drafter of that language, it alone is responsible for creating the controversy at issue in this proceeding.⁴⁸ Sempra objects to Betelgeuse supplying a *post hoc* explanation of the language and states that “Betelgeuse is ultimately responsible for reading and complying with the clear terms of the open season notices.”⁴⁹

Discussion

22. We find that Betelgeuse’s proposed Requested Term End Date of “March 31, 2084 or maximum accepted term end date” is ambiguous. Therefore, as discussed below, we find that El Paso appropriately rejected Betelgeuse’s bids finding that the bids contained additional or modified terms that were improper and would have been discriminatory to other shippers. We deny Betelgeuse’s request that we find that El Paso was obligated to permit Betelgeuse to correct its bid. Accordingly, we deny Betelgeuse’s Complaint and its request that we direct El Paso to accept Betelgeuse’s bids.

23. El Paso properly rejected Betelgeuse’s bids based on the ground that Betelgeuse stated terms with floating end dates, which El Paso reasonably interpreted as an attempt to match bids from any other shipper. Neither the Commission’s policies nor El Paso’s tariff permit a potential shipper bidding on capacity to ensure for itself the ability to match other bids.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 2-3 (citing Commission cases applying contract law principle to interpret text against the drafter, including *KN Energy, Inc.*, 59 FERC ¶ 61,332, at 62,219 (1992)).

⁴⁹ *Id.* at 3.

⁵⁰ The right to match is only conferred upon the existing shipper. The Commission’s regulations require pipelines to provide firm maximum rate shippers holding contracts of one year or more a ROFR to renew their contracts and continue service. 18 C.F.R. §284.221(d). The ROFR protects gas customers from a pipeline’s exercise of monopoly power by allowing captive customers served by a single pipeline

24. Further, stated terms with floating end dates are inconsistent with the prohibition in El Paso's tariff against simultaneous bids. GT&C section 9.8(b) states that "[a] Bidding Shipper may not simultaneously submit multiple bids for the same package of capacity and may not have more than one bid posted at a given time for such package of capacity."⁵¹ Interpreting Betelgeuse's bids as having a floating end date to match other shippers' bids, Betelgeuse simultaneously proposed a bid featuring a term ending on a date certain (in 2084) and a bid featuring a term to match any other bid ("any other maximum accepted term end date"). El Paso's open season notices clearly state that El Paso reserved the right to reject bids that "contain additional or modified terms or are inconsistent with the provisions of Transporter's FERC Gas Tariff."⁵² Because we find that El Paso reasonably found Betelgeuse's non-conforming language to be inconsistent with the Commission's policies and El Paso's tariff, we find that El Paso properly rejected Betelgeuse's bids.

25. We also reject Betelgeuse's claim that El Paso was obligated to permit Betelgeuse to correct its bids.⁵³ As Betelgeuse acknowledges, the open season notice "reserves El Paso's 'right to seek clarification of bids that have what appears to be an obvious error.'"⁵⁴ Nothing in the open season notice or El Paso's tariff required El Paso to seek clarification.

26. Further, we do not find convincing Betelgeuse's attempt to lay blame on El Paso for Betelgeuse's bidding strategy that was contrary to El Paso's tariff. Although Betelgeuse claims that the guidance from El Paso was "unclear," we find this claim insufficient to justify a finding that El Paso had an obligation to police shippers' bids in an effort to correct such misunderstandings.⁵⁵

to match competing bids and retain long-term firm transportation service. *See United Distribution Cos. v. FERC*, 88 F. 3d 1105, 1140 (D.C. Cir. 1996).

⁵¹ *El Paso Nat'l Gas Co.*, 62 FERC ¶ 61,311, at 62,999 & n.51 (1993) (requiring El Paso to revise its tariff to preclude a bidder from simultaneously submitting multiple bids for the same package of capacity).

⁵² *E.g.*, Complaint, Ex. B, ROFR Open Season Notice at 2.

⁵³ Complaint at 11.

⁵⁴ *Id.*

⁵⁵ *Texican N. La. Transport, LLC v. So. Nat'l Gas Co.*, 129 FERC ¶ 61,270, at P 60 (2009) ("In these circumstances, we find that it would not be fair to shippers that

27. In sum, we find that Betelgeuse has failed to support its claim that El Paso has violated its tariff or the Commission's policies or that the award of capacity under the open seasons was otherwise unduly discriminatory or unjust and unreasonable. Consequently, we deny the Complaint.

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.

have justifiably relied on the capacity awards to undo that allocation due to a potential misunderstanding of the terms of the open season”).