

147 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Tennessee Gas Pipeline Company, LLC

Docket Nos. RP12-514-002
RP11-1566-014
RP11-2066-003

ORDER DENYING REHEARING

(Issued May 15, 2014)

1. On October 17, 2013, the Commission issued an order approving Tennessee Gas Pipeline Company, LLC's (Tennessee) proposal to modify its secondary in-the-path scheduling methodology.¹ On November 18, 2013, Indicated Shippers² filed a request for rehearing of the October 2013 Order. For the reasons discussed below, the Commission denies the request for rehearing.

I. Background

A. Procedural History

2. On March 23, 2012, Tennessee filed to revise its secondary in-the-path scheduling provisions so as to no longer to give all such nominations the same scheduling priority (Scheduling Priority Filing). Instead, Tennessee proposed that nominations for firm in-the-path service from secondary receipt points to primary delivery points would be given a higher priority and scheduled before nominations for service from primary receipt to secondary delivery points when there is a constraint within the shipper's primary path. The Scheduling Priority Filing was Tennessee's second attempt to modify its secondary

¹ *Tennessee Gas Pipeline Co., LLC*, 145 FERC ¶ 61,058 (2013) (October 2013 Order). The October 2013 Order also denied requests for rehearing of the Commission's April 2012 Order in this proceeding, *Tennessee Gas Pipeline Co., LLC*, 139 FERC ¶ 61,050 (2012) (April 2012 Order).

² For the purposes of this proceeding the Indicated Shippers are ConocoPhillips Company, Exxon Mobil Gas and Power Marketing Company, a division of ExxonMobil Corporation, Hess Corporation, Shell Energy North America (US), LP., and Shell Offshore Inc.

in-the-path scheduling priority after the Commission rejected its original proposal to elevate secondary receipt point to primary delivery point transactions to the same priority level as primary receipt to primary delivery point transactions.³ In rejecting that proposal, the Commission found that it was inconsistent with the Commission's policy that primary point to primary point transactions must be afforded the highest scheduling priority, and that Tennessee's proposal discriminated against shippers seeking to schedule through a primary path constraint from a primary receipt to a secondary delivery point by not providing those shippers with the same elevated priority.⁴

3. On rehearing of the 2011 Technical Conference Order, the Commission upheld its rejection of Tennessee's proposal on the primary point issue but clarified that its statement regarding discrimination was not intended to prohibit a pipeline from granting a higher priority to secondary transactions using primary delivery points than those using primary receipt points. Acknowledging that it had approved a similar scheduling methodology for Texas Eastern Transmission, LP,⁵ the Commission noted that it may be just and reasonable to give priority to primary delivery point service over service from primary receipt points in order to protect end-use consumers who have minimal flexibility to vary where they receive service. The Commission therefore concluded that a scheduling proposal that distinguished between receipt and delivery point services on the basis of their disparate impact on consumers may be supportable to the extent a pipeline can demonstrate differences between service at delivery points as compared to receipt points.⁶ Several parties sought rehearing of the April 2012 Order. As noted, the October 2013 Order denied those requests.

4. Tennessee proposed in the Scheduling Priority Filing to create two additional scheduling priority categories just below the scheduling priority of nominations for firm service from primary receipt points to primary delivery points, such that nominations for firm in-the-path service from secondary receipt points to primary delivery points would be given a higher priority and scheduled before nominations for firm service from primary receipt points to secondary delivery points when there is a constraint within the shipper's primary path. Tennessee claimed its proposal was just and reasonable because

³ See *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011)(2011 Technical Conference Order). Tennessee's first scheduling priority proposal was filed as part of its general NGA section 4 rate proceeding in Docket No. RP11-1566-000.

⁴ *Id.* P 27.

⁵ April 2012 Order at P 23. See also *Texas Eastern Transmission, LP*, 98 FERC ¶ 61,215, at PP 44-53 (2002), *order on reh'g*, 102 FERC ¶ 61,198, at PP 30-34 (2003) (*Texas Eastern*).

⁶ April 2012 Order at P 26.

it would promote access to diverse supply sources, including the new Marcellus shale gas in the middle of its system, by increasing the reliability of transportation transactions between secondary receipt points and primary delivery points. Tennessee stated its revised proposal also recognized the need to provide a higher scheduling priority to LDCs who have a purported obligation to serve human needs, and avoids the issue of placing secondary service on the same level as primary service. Tennessee also argued that the Commission had approved a similar scheduling priority for Texas Eastern as discussed in the April 2012 Order. Tennessee claimed that giving its existing long-haul shippers reliable access to supply sources across its system, including the Marcellus shale, would encourage those shippers to maintain long-haul contracts when those contracts expire, instead of switching to short-haul contracts.

5. Numerous parties filed adverse comments or protests to the Scheduling Priority Filing claiming it was discriminatory, anti-competitive, and could have a detrimental effect on the secondary capacity release market and the use of asset management arrangements (AMAs). On January 17, 2013, the Commission issued an order addressing the protests and directing that a technical conference be convened to discuss issues related to Tennessee's proposal.⁷ The 2013 Technical Conference Order questioned the necessity for Tennessee's proposal in light of the Commission's requirement that pipelines reserve sufficient mainline capacity between the primary receipt and primary delivery points of its firm shippers to be able to serve all those shippers' contract demand. Noting that Tennessee's firm agreements obligate it to reserve capacity along each shipper's "capacity path" such that if two shippers share a capacity path, Tennessee should be able to deliver both shippers' volumes without curtailment, the Commission questioned why the proposal was necessary at all, and under what particular circumstances Tennessee would implement it.⁸ The Commission also inquired whether Tennessee had previously experienced situations where the proposal would have been utilized, and whether it had experienced or anticipated points of constraint on its system that the proposal was meant to address.⁹

6. Based on these factual issues identified in the 2013 Technical Conference Order, Staff sent a data request to Tennessee requesting information about how often during the last four calendar years Tennessee experienced mainline constraints that required allocation of secondary in-the-path nominations, and regarding the number of electric

⁷ *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,033 (2013) (2013 Technical Conference Order).

⁸ *Id.* P 44.

⁹ *Id.* P 45.

generators connected to Tennessee's system and the nature of the contracts under which those generators received service.¹⁰

7. The Staff held a technical conference on April 10, 2013. Tennessee's responses to the data request indicated that Tennessee would only implement the new proposal in an extended maintenance or *force majeure* situation, and that it had not restricted secondary in-the-path service at all in the four years preceding its response. Supplemental data submitted by Tennessee showed that approximately 32 electric generators receive service from Tennessee, including at least 13 in New England. The supplemental data also show that over 99 percent of Tennessee's deliveries to the points serving those generators were made pursuant to firm transportation contracts. The data further show that approximately 56 percent of deliveries serving New England electric generators were made using firm contracts held by someone other than the generator, indicating that New England generators rely significantly on purchasing natural gas at their downstream delivery points from other shippers holding firm transportation contracts on Tennessee. Similarly, about 61 percent of deliveries to non-New England generators were also made using firm contracts held by someone other than the generator.

B. The October 2013 Order

8. In the October 2013 Order, the Commission accepted Tennessee's proposal to modify its scheduling priorities for secondary firm transactions within a shipper's primary path. Noting that under the statutory framework adopted by the NGA, the Commission must accept just and reasonable rates, terms, and conditions proposed by a pipeline, regardless of whether other rates, terms, and conditions may be just and reasonable, the Commission found that Tennessee's proposal reasonably gives a higher scheduling priority to secondary firm service using a primary delivery point than to secondary service using a primary receipt point, and that the opponents of Tennessee's proposal had not shown it to be unjust or unreasonable. The Commission's approval was based on several factors.

9. The Commission explained that while Order No. 637-A required pipelines to afford a higher priority over mainline capacity to shippers seeking to use secondary points in their capacity path than shippers seeking to use mainline capacity outside of their path, Order No. 637-A did not require a specific order of priority to allocate capacity between shippers that are either in or outside the path. Accordingly, consistent with *Texas Eastern*, a pipeline is free to choose any reasonable method for resolving scheduling conflicts over two secondary within-the-path transactions.¹¹

¹⁰ See Data Request dated February 8, 2013.

¹¹ October 2013 Order at P 27.

10. The Commission found that based on Tennessee's responses to the Staff data requests, Tennessee nearly always has sufficient capacity to schedule all requests for in-the-path firm service, whether to primary or secondary delivery points.¹² Based on this fact, Tennessee's proposal would only be implemented on the rare occasions when *force majeure* events or planned maintenance render Tennessee unable to accept all in-the-path scheduling nominations. The Commission noted that the record in this proceeding indicates that Tennessee has not rejected any request to schedule in-the-path secondary firm service since November 2008.¹³

11. The Commission also noted the record shows a broad spectrum of industry entities including local distribution companies (LDC), industrial plants, and electric generators have contracted for primary firm delivery rights on Tennessee at their high priority delivery points. The Commission found that because Tennessee's proposal would give such shippers greater certainty as to their ability to access low cost natural gas supplies on different parts of Tennessee's system, on the rare occasions when *force majeure* events or planned maintenance render Tennessee unable to accept all in-the-path scheduling nominations, Tennessee's proposal reasonably gives a higher scheduling priority to those shippers who need to make deliveries at a particular point to serve consumers located behind that point. The Commission concluded that Tennessee had proposed a reasonable method for allocating capacity during the rare occasions when it would not be able to schedule all requests for in-the-path secondary firm service.¹⁴

12. The Commission also found that Tennessee's proposal is not unduly discriminatory. Based on Tennessee's demonstration of the intrinsic differences between the need for natural gas to be delivered at a primary delivery point for a specific end-use, and the need for natural gas to be received by the pipeline at a primary receipt point, the Commission found that Tennessee may reasonably conclude that customers using secondary receipt to primary delivery point transactions are not similarly situated to customers using primary receipt point to secondary delivery point transactions for in-the-path scheduling purposes.¹⁵ The Commission reiterated its finding in the April 2012 Order that a pipeline may justify giving priority to primary delivery point service over service from primary receipt points to the extent it can demonstrate differences between service at delivery points as compared to receipt points. The Commission found that Tennessee had justified the disparate treatment in the rare instances where the

¹² See Tennessee's February 8, 2013 Response to Data Request No. 1.

¹³ National Fuel/National Grid Comments at 14; Motion for Reconsideration of National Fuel Gas Distribution Corporation, dated March 8, 2013 at 7.

¹⁴ October 2013 Order at PP 28-29.

¹⁵ October 2013 Order at P 31.

proposal would be implemented. The Commission further found that Tennessee's proposal would treat all similarly situated shippers transporting from secondary receipt to primary delivery points alike, whether those shippers are LDCs, producers, marketers or end-users.

13. The Commission rejected arguments by opponents of the proposal that changes in market conditions require a modification of the *Texas Eastern* policy that a pipeline may reasonably choose a method for prioritizing two secondary in-the-path transactions. The Commission found that contrary to opponents' claims that the approval of Texas Eastern's proposal was too remote in time to be relevant today, Texas Eastern had operated a pipeline system similar to Tennessee's, under a methodology extremely similar to that proposed by Tennessee, without Texas Eastern's customers experiencing any of the consequences predicted by the opponents. Further, the Commission pointed out that some of the very marketers and producers that challenge Tennessee's proposal on the grounds that it would have a chilling effect on participation in future expansions themselves signed long term contracts for expansion capacity on Texas Eastern's system.

14. The Commission also found that the proposal could benefit all customers on Tennessee's system because the revised scheduling method should provide an incentive for shippers with primary receipt points in the Gulf to retain those agreements instead of moving their primary receipts to the shale supply regions. The Commission reasoned that Tennessee's long haul primary firm contracts should become more valuable with the added assurance that end-use deliveries on those contracts are less likely to be curtailed under the revised priority method, thus improving Tennessee's ability to retain and market long haul transportation contracts.

C. Request for Rehearing

15. In its request for rehearing, Indicated Shippers argue that the Commission erred in approving Tennessee's scheduling proposal, and that it should reject the tariff proposal on rehearing. Indicated Shippers contend that the October 2013 Order: (1) is unduly discriminatory; (2) conflicts with the Commission's open access regulations and policies; (3) impairs the "tradeable capacity" objective of Order No. 637-A; (4) is unsupported by substantial record evidence; and (5) failed to address the discriminatory and preferential advantage Tennessee's proposal would provide to shippers with redundant delivery rights. For the reasons discussed below, we deny the request for rehearing.

II. Discussion

16. Under the statutory framework adopted by the NGA, a pipeline has the primary initiative to propose the rates, terms, and conditions for its services under NGA section 4. If the rates, terms, and conditions proposed by the pipeline are just and reasonable, the Commission must accept them, regardless of whether other rates, terms,

and conditions may be just and reasonable.¹⁶ For the reasons discussed below, we reaffirm our holding in the October 2013 Order that Tennessee's proposal reasonably gives a higher scheduling priority to secondary firm service using a primary delivery point than to secondary firm service using a primary receipt point.

17. Indicated Shippers object to the October 2013 Order on two basic grounds. First, they contend that the October 2013 Order is contrary to the Commission's policies adopted in Order No. 637 concerning within-the-path scheduling and that Tennessee's proposal will adversely affect capacity release and AMAs. Second, Indicated Shippers contend that the October 2013 Order erred in rejecting their contentions that Tennessee's proposal is unduly discriminatory. We address these contentions in turn.

A. Consistency with Order No. 637 and effect on Capacity Release

18. Indicated Shippers contend that the Commission failed to reconcile Tennessee's proposal with what they contend is the purpose behind Order No. 637-A's adoption of a scheduling priority for secondary in-the-path service, namely to create "tradeable" capacity rights so as to enhance the capacity release mechanism. Indicated Shippers state that Order No. 637 found that this would promote competition and the efficient allocation of capacity as compared with *pro rata* allocation. Indicated Shippers argue that secondary in-the-path rights created by Order No. 637 were intended to be equal for all secondary in-the-path shippers. Indicated Shippers claim that Tennessee's proposal, however, creates a new secondary in-the-path tier that results in some secondary in-the-path shippers losing some of those rights, leaving them with inferior capacity compared to what they held previously. According to Indicated Shippers, those shippers' capacity has been devalued without explanation.

19. According to Indicated Shippers, Order No. 637-A did not find that the in-path scheduling priority would be justified if it led to shippers with firm capacity rights in the same zone being disadvantaged by one shipper being given a higher scheduling priority. Indicated Shippers claim that while the Commission has allowed some minor expansions of the definition of "secondary in-path" in specific Tennessee proceedings, those proposals were based on the understanding that all shippers' primary points would receive equal priority.¹⁷

20. Indicated Shippers contend that, contrary to Order No. 637's objective of enhancing capacity release, Tennessee's proposal would adversely affect competition, the secondary capacity release market and the use of AMAs. The Indicated Shippers

¹⁶ *Consolidated Edison Co. v. FERC*, 165 F.3d 992, 998, 1002-1004 (D.C. Cir. 1999), and cases cited.

¹⁷ Rehearing Request at 16-17.

reiterate their claim that despite framing the service at issue as that to primary delivery points, the practical effect is to provide an advantage to LDCs by enhancing their ability to provide more reliable service. Indicated Shippers assert that replacement shippers, including those that obtain firm capacity from an LDC through a state retail unbundling program or otherwise, can access competitive supply and compete with the LDC to provide the lowest cost service to those consumers. However, Indicated Shippers claim such competition would be diminished if the LDC can present itself as offering more reliable service by virtue of its higher scheduling priority. Indicated Shippers assert that this concern extends beyond capacity release. To this end, they assert even if the LDC chooses not to release capacity, other entities with firm capacity can compete to provide supply on a secondary basis at the LDC's delivery points. Indicated Shippers contends that if the competing firm secondary in-path shipper cannot match the reliability of secondary in-path service provided by the LDC, the competing shipper would be at a disadvantage solely due to the priority proposal. Indicated Shippers argue that October 2013 Order acknowledges those concerns were raised but does not address them.

21. We reject Indicated Shippers' arguments that approval of Tennessee's proposal is inconsistent with the objectives of Order No. 637-A. In Order No. 637-A, the Commission changed its policy mandating the allocation of all mainline capacity using secondary points on a *pro rata* basis and instead required each pipeline to afford a higher priority over mainline capacity to shippers seeking to use secondary points within their capacity path than to shippers seeking to use mainline capacity outside of their path.¹⁸ The Commission found that an in-the-path scheduling priority better promotes efficient allocation of capacity because it gives shippers greater certainty as to their scheduling rights for secondary transactions. The Commission explained that providing all firm shippers with equal, *pro rata* scheduling rights to secondary points creates uncertainty as to how much pipeline capacity any shipper seeking to use secondary points will receive, because all such shippers are subject to a *pro rata* reduction in their scheduling nominations. As a result, no shipper "has a guaranteed right to the mainline capacity for purposes of making deliveries to [a particular secondary point] and therefore neither can trade those rights."¹⁹ By contrast, the Commission stated that, under the in-the-path allocation approach, the shipper using a secondary point within its primary path "has a firm right to mainline capacity to [the secondary point] within its capacity path."²⁰

¹⁸ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, at 31,596-98 (2000).

¹⁹ *Id.* at 31,597.

²⁰ *Id.*

22. The Commission first addressed the issue whether Order No. 637 permits a pipeline to provide two tiers of in-path scheduling priorities in its orders on Texas Eastern's Order No. 637 compliance filing. Texas Eastern proposed to comply with Order No. 637-A by providing the same two tiers for prioritizing in-the-path scheduling as Tennessee proposes here.²¹ The Commission found that proposal was consistent with Order No. 637-A. The Commission explained that Order No. 637 only required that all in-the-path secondary transactions have priority over all outside the path secondary transactions. Order No. 637 did not require a specific order of priority to allocate capacity between two shippers that are either both within the path or both outside the path. The Commission did not, for example, specify whether a shipper moving from a secondary receipt point inside its path to a primary delivery point should have priority over a shipper moving from a primary receipt point to a secondary delivery point inside its path. Thus, to the extent there are scheduling conflicts over two secondary in-the-path transactions, the pipeline is free to choose any reasonable method of resolving such a conflict.²²

23. Indicated Shippers' contentions concerning "tradeable capacity" do not justify reversal of the *Texas Eastern* precedent. Order No. 637's finding that a scheduling priority for secondary in-path transactions would create "tradeable capacity" was based on the premise that such a priority would give shippers "a firm right to mainline capacity to [the secondary point] within its capacity path." The Commission believed this was true, because pipelines must reserve sufficient mainline capacity between a shipper's primary points in order to provide primary firm service to that shipper. As the Commission explained in *Texas Eastern*:

As long as the shipper has reserved the capacity path, there should be sufficient capacity for both transactions to flow as long as the shippers have the necessary injection or take-away rights on the upstream and downstream entities. For instance, if the pipeline has two shippers each with contract demands of 10,000 dth/day, and one shipper uses a secondary receipt point within its path and the other uses a flexible delivery point within its path, the pipeline has sufficient capacity to serve both shippers, because at no point does the total contract demand exceed 20,000 Dth/d.²³

24. However, both Texas Eastern and Tennessee's in-path priority proposals address the rare occasions when this premise does not hold true and the pipeline is not able to

²¹ *Texas Eastern*, 98 FERC ¶ 61,215, at PP 44-53, *order on reh'g*, 102 FERC ¶ 61,198 at PP 30-34.

²² *Texas Eastern*, 102 FERC ¶ 61,198 at P 33.

²³ *Id.* at P 34.

schedule all in-path transactions, for example because of a *force majeure* event. On those rare occasions, Order No. 637-A's objective of creating firm, tradeable capacity, cannot be accomplished in full. Even if Tennessee retained its current *pro rata* within-path scheduling priority, as Indicated Shippers' request, Tennessee would have to partially reject requests to schedule service from primary receipt points to within-path secondary delivery points.

25. Given this fact, we find that Tennessee's proposal is a reasonable method of addressing the rare occasions when it cannot schedule all in-path secondary firm transactions. Tennessee's proposal has the benefit over *pro rata* scheduling of potentially enabling within-path transactions to primary delivery points to be scheduled in full, consistent with Order No. 637-A's objective of creating tradeable capacity, rather than necessarily requiring all within-path transactions to be cut back under a *pro rata* method.

26. In addition, Indicated Shippers fail to demonstrate how Tennessee's proposal would have any significant adverse effect on the competitive goals of Order No. 637-A. The very fact that the proposal would come into play in limited circumstances will likely minimize its effect on capacity release or competition between LDCs and other entities generally. Moreover Indicated Shippers incorrectly assume that Tennessee's proposal would always disadvantage the replacement shippers in capacity releases by reducing their scheduling priority. This is not so. In Tennessee's Order No. 637 compliance proceeding, the Commission required Tennessee to revise its tariff to permit replacement shippers to obtain available primary points up to their contract demand, including in segmented releases.²⁴ Therefore, when a firm shipper releases a segment of its capacity which is upstream of its primary delivery point, the replacement shipper is entitled to designate the point where it will take deliveries as a primary delivery point, subject to availability of capacity.²⁵ This would enable an industrial or electric generator directly connected to Tennessee to obtain the benefit of Tennessee's proposal by taking a segmented release from a marketer or LDC.

²⁴ *Tennessee Gas Pipeline Co.*, 104 FERC ¶ 61,063, at P 20 (2003), *order on reh'g*, 108 FERC ¶ 61,177, at PP 12–21 (2004). *See also* Tennessee's FERC Gas Tariff, 6th Revised Volume No. 1, [Sheet No. 342, , 1.0.0](#), at General Terms and Conditions, Article VI, sections 1.11 (n) and (o). If a releasing shipper releases a portion of its capacity that includes its primary receipt and/or delivery point, the releasing shipper typically prohibits the replacement shipper from changing that point, as permitted by Commission policy.

²⁵ Because the released segment would not include the releasing shipper's primary delivery point, any release condition prohibiting changing of the releasing shipper's primary points should not come into play.

27. Similarly, we do not find that Tennessee's proposal would have any significant adverse effect on retail unbundling programs or AMAs. In retail unbundling programs, the LDC typically releases proportionate shares of its interstate pipeline capacity to participating marketers. Such releases would include a corresponding share of the LDC's primary delivery point rights at its city gate. Thus, the participating marketers should benefit from Tennessee's proposal in the same manner as LDCs. Also, to the extent permitted by the retail unbundling program, the participating marketers could make releases of upstream capacity segments, as described above.

28. The same analysis also applies to delivery AMAs, in which an LDC or other entity enters into an AMA with a marketer for the marketer to obtain natural gas for the releasing shipper and maximize the value of its pipeline capacity when the releasing shipper does not require deliveries. The asset manager would obtain the releasing shipper's primary delivery point rights for the purpose of making deliveries to the releasing shipper pursuant to the AMA. Thus, when Tennessee cannot schedule all within-path transactions, Tennessee's proposal will help provide greater certainty that the asset manager can access low cost supplies on different parts of Tennessee's system on behalf of its releasing shipper. In addition, when the releasing shipper does not require natural gas deliveries, the asset manager could make segmented upstream re-releases in which the new replacement shipper could potentially obtain primary delivery point rights. To the extent Tennessee's proposal does make it somewhat more difficult for the asset manager to maximize the value of the released capacity during situations such as *force majeure* and when the capacity is not needed to serve the releasing shipper, that disadvantage would seem to be offset by the benefit of the higher priority for the asset manager's service to its releasing shipper.

29. The Commission also finds that Tennessee's proposal would not significantly inhibit competition between LDCs and marketers attempting to provide service behind an LDC's city gate. Given the infrequency with which it appears Tennessee would actually implement the new scheduling methodology, it should not be a significant factor or have a substantial effect on such competition.

30. Acknowledging that *Texas Eastern* established the Commission's current policy that pipelines may choose a reasonable method for allocating secondary in-the-path transactions, Indicated Shippers claim that because the *Texas Eastern* order was issued over a decade ago, it has little or no bearing on the reasonableness of Tennessee's proposal today. Indicated Shippers also assert that, unlike in *Texas Eastern* where the Commission found that the pipeline's proposal would have little "practical significance,"²⁶ implementation of Tennessee's scheduling priority proposal would have a significant practical effect on Tennessee's shippers. According to Indicated Shippers, the increased production from the Marcellus shale, upon which Tennessee relies as the

²⁶ *Texas Eastern*, 102 FERC ¶ 61,198 at P 34.

basis for its proposal, has created mainline constraints on Tennessee's system, and the scheduling proposal is just one of the attempts that Tennessee has made to address the situation. Indicated Shippers assert that Tennessee's recent proposal to relocate several pooling points in Zones 1 and 4 was also an effort to reduce the potential for mainline restrictions in recognition of the substantial increases in Marcellus production.²⁷ Indicated Shippers conclude that the added potential for mainline constraints caused by the Marcellus shale volumes render secondary in-the-path scheduling priorities on Tennessee critical.²⁸ Indicated Shippers also argue that Tennessee's repeated attempts to revise its secondary scheduling priority and the support of LDCs for it to do so, demonstrate that the change is not of little "practical significance."

31. We find no record support for the claim that Marcellus production has created mainline constraints on Tennessee's system. In analyzing Tennessee's proposal, the Commission recognized that there may have been changed circumstances from the time *Texas Eastern* issued, particularly as a result of increases in shale gas production. Accordingly the Commission established a technical conference and sent Tennessee data requests to gather more information about Tennessee's system, and to investigate whether there were any particular constraints on Tennessee's system that its proposal was intended to address. As Indicated Shippers point out, the existence of such constraints would give more practical significance to Tennessee's proposal, and if located downstream of Marcellus shale gas receipt points, such information would be a factor in considering whether Tennessee's proposal is just and reasonable.

32. Tennessee's responses to the data requests, however, support the conclusion that that Tennessee's proposal would have little practical significance because there are no such constraints on Tennessee's system. In fact, Tennessee stated that it would not have had to implement the new scheduling methodology to allocate in-the-path capacity due to a constraint in the past four years. Moreover, there is nothing in the record to indicate constraints on any particular portion of Tennessee's system that would require Tennessee to allocate in-the-path capacity in one part of its system more than in another part. According to Tennessee, it has sufficient mainline capacity to schedule all in-the-path firm transactions, absent a *force majeure* or maintenance event requiring the reduction of available capacity below its system design level. Indeed, even Indicated Shippers acknowledge elsewhere in their rehearing request that the "uncontradicted record" shows that Tennessee has not rejected any request to schedule in-the-path secondary firm service since November 2008.²⁹

²⁷ Rehearing Request at 25.

²⁸ *Id.*

²⁹ Rehearing Request at 13.

33. Finally, as we explained in the October 2013 Order, the arguments that recent market changes, particularly the development of shale gas supplies in the middle of Tennessee's system, require modification to Commission policy set forth in *Texas Eastern* are not compelling.³⁰ Texas Eastern operates, and has operated for some time, a long line pipeline system similar to Tennessee's, under a scheduling methodology substantially similar to that proposed by Tennessee. Moreover, Texas Eastern has also recently experienced some of the very changes to which the Indicated Shippers refer in relation to increased production from the Marcellus Shale.³¹ Yet, Indicated Shippers provide no evidence to suggest that any Texas Eastern customers have experienced any of the negative consequences that Indicated Shippers claim will occur on Tennessee as a result of implementing a similar scheduling methodology. Moreover, some of the very marketers and producers that challenge Tennessee's proposal on the grounds that it would have a chilling effect on participation in future expansions have themselves signed long term contracts for expansion capacity on Texas Eastern's system.³² While Indicated Shippers state that they did not know that Tennessee would shift from *pro rata* scheduling of in-path secondary transactions when they became shippers on Tennessee's system, they presumably were aware of Texas Eastern's scheduling priorities when they became shippers on Texas Eastern's system and when they participated in its recent expansions.

34. As discussed in the next section, Tennessee's proposal reasonably responds to market changes since *Texas Eastern*, including the availability of gas supplies in the middle of Tennessee's system and the increased use of natural gas for electric generation.

B. Undue Discrimination

35. Indicated Shippers claim that the October 2013 Order contravenes the NGA's prohibition against unreasonable differences in service because it allows Tennessee to discriminate between in-the-path services based on the identity of the shipper. They claim that although Tennessee's proposal and the Commission's order frame the holding in terms of service to a primary delivery point instead of in terms of shippers affected, the rationale is based on the identity and purported need of LDCs.³³ According to

³⁰ October 2013 Order at P 32.

³¹ See *e.g.* Texas Eastern's June 28, 2013 Filing in Docket No. RP13-1015 to establish a gas quality control point due to large volumes of Marcellus shale natural gas altering the traditional flow patterns on its system.

³² See *Texas Eastern Transmission LP and Algonquin Gas Transmission, LLC*, 139 FERC ¶ 61,138, at P 6 (2012).

³³ Rehearing Request at 14.

Indicated Shippers, the Commission's open access regulations are premised on maximizing competition and allocating capacity to the shipper that values it most, and do not distinguish between different types of business entities in determining firm rights. According to Indicated Shippers, replacement shippers, including marketers and others serving customers behind LDC city gates, can and do serve human needs customers the same as LDCs.

36. The Indicated Shippers' discrimination arguments are substantially similar to those raised in the protests to Tennessee's filing, and fail here as they did there. As we stated previously, "a scheduling proposal that distinguished between receipt and delivery point services on the basis of their disparate impact on consumers may be supportable to the extent a pipeline can demonstrate differences between service at delivery points as compared to receipt points."³⁴ As we found in the October 2013 Order, Tennessee's proposal is not discriminatory because Tennessee "may reasonably conclude that customers using secondary receipt to primary delivery point transactions are not similarly situated to those using primary receipt point to secondary delivery point transactions for in-path scheduling purposes." Specifically, Tennessee may reasonably presume that secondary firm transactions scheduled to primary delivery points generally serve a higher priority use than transactions scheduled to a secondary delivery point.

37. For this analysis, Tennessee may reasonably rely on the contracting decisions of its shippers as an indication of how much flexibility a shipper has, and the priority that shipper places on having a guaranteed supply of gas for itself or the customers it serves. It is a reasonable presumption that a shipper that places a high value on guaranteed deliveries, and/or serves end uses which have little ability to use alternative energy supplies, would contract for a service that uses a primary delivery point to deliver gas to it. This presumption would hold whether the shipper scheduling deliveries at a primary delivery point is an electric generator or industrial which will itself consume the gas being shipped or an LDC or marketer selling gas to their high-priority end use customers. In this regard, marketers have the same ability as LDCs to contract for primary delivery points at those points where the customers they serve have the greatest need for high priority deliveries.

38. As noted in the April 2012 Order, it may be just and reasonable under the NGA to give a priority to service to primary delivery points over service from primary receipt points in order to protect end-use consumers who have minimal to no flexibility to vary where they receive their service.³⁵ The Commission's responsibility under the NGA is to protect the consumers of natural gas from the exercise of monopoly power by pipelines in order to ensure consumers access to an adequate supply of natural gas at a

³⁴ April 2012 Order, 139 FERC ¶ 61,050 at PP 24-26.

³⁵ *Id.* P 24.

reasonable price.³⁶ While the open access requirements of Order No. 636 generally allow shippers to have access to various supply areas, shippers serving end-use consumers have less flexibility in which pipeline delivery points they use.

39. The Indicated Shippers contend that the Commission's finding of intrinsic differences is unsupported and contrary to the record in this proceeding. They argue that the Commission's findings favor the secondary in-the-path rights of LDCs holding firm capacity over the secondary in-the-path rights of other firm shippers. Indicated Shippers also argue that the Commission's finding of intrinsic differences based on the fact that "LDCs, power plants and other industrial operations with primary delivery points at their end use consumption are unable to move their primary delivery points" is invalid because some power plants and industrials,³⁷ as well as several LDCs,³⁸ oppose Tennessee's proposal, despite the Commission's assertion that such entities should support Tennessee's methodology based on their inability to move their primary delivery points at their end-use locations.

40. We reject Indicated Shippers' contention that Tennessee's proposal discriminates in favor of LDCs and elevates their rights above the rights of all other firm shippers. In fact, as Indicated Shippers themselves asserted in their protest to Tennessee's filing, "Tennessee's proposal, as structured, treats all secondary-to-primary service as higher in priority than all other Secondary-in-Path services, regardless of whether the shipper is an LDC."³⁹ Indicated Shippers also contradict themselves by claiming that the Commission's decision only advantages LDCs but acknowledging that at least some LDCs also oppose Tennessee's proposal (New Jersey Natural, for example). As a factual matter, it cannot be disputed that, as the October 2013 Order found, an industrial plant or electric generator must deliver gas to the delivery point serving the location of its plant or generator, regardless of where it purchases that gas. Thus, an industrial plant

³⁶ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir.1990). Order No. 636 at 30,392.

³⁷ Rehearing Request at 18 & n.55 (citing to Initial Post Technical Conference Comments of Calpine Energy Services LP and United States Gypsum Company (Calpine/USGC Comments)).

³⁸ Rehearing Request at 18 & n.56 (citing Joint Post-Technical Conference Comments of New Jersey Natural Gas Company, NJR Energy Services Company, and PSE&G Energy Resources and Trade, LLC (New Jersey Natural Comments)).

³⁹ Protest of Indicated Shippers' dated April 4, 2012 at 12. Other opponents' of Tennessee's proposal have similarly asserted that the proposed priority benefits any firm shippers seeking to transport gas to their primary delivery points, and not just LDCs. *See e.g.* Calpine/USGC Comments at 8.

or electric generator with a firm contract and a primary delivery point at the location of its plant or generator will benefit from Tennessee's proposal in the same manner as an LDC will benefit from that proposal.

41. Indicated Shippers' reference to the opposition of some power plants and industrials also fails to recognize the support of power generators that hold their own firm agreements on Tennessee, such as TVA.⁴⁰ Because Tennessee's proposal gives firm shippers scheduling deliveries at their primary delivery points greater certainty as to their ability to access low cost supplies on different parts of Tennessee's system during the rare occasions when it cannot schedule within-the-path scheduling nominations, the proposal is naturally supported by those firm shippers who place the highest value on reliable service at their primary delivery points. That is true whether the shipper is an LDC seeking service at its city gate in order to serve its end-use customers or an electric generator such as TVA.

42. As to Indicated Shippers' contention that the Commission's reasoning was flawed because certain power plant operators and an LDC oppose Tennessee's proposal, the entities to which they point express reasons unrelated to their inability to move their primary delivery points for their opposition. Calpine, for example, while acknowledging that it would benefit from the proposal at certain power plants served by a primary delivery point on the southern part of Tennessee's system, is against the proposal based on its ownership of generation units located behind utility city gates where service is generally on a secondary basis.⁴¹ Likewise, New Jersey Natural's opposition relates principally to the potential effect of Tennessee's proposal on the secondary capacity release market or on LDCs serving generators behind their city gates.⁴² In any event it appears that Indicated Shippers may have overestimated those entities' opposition to Tennessee's proposal as only Indicated Shippers, and not the entities they reference as opposed, sought rehearing of the October 2013 Order.

43. Indicated Shippers also argue that the Commission's approval of a higher scheduling priority for service to primary delivery points based on the uses at those points, and the inability of LDCs and other end-users to move their primary delivery points, was flawed because it failed to address how producers holding firm contracts could move their production wells from their primary receipt points.⁴³ While Indicated

⁴⁰ Motion for Leave to Intervene of Tennessee Valley Authority and Comments in Support, dated March 30, 2012 at 3

⁴¹ Calpine/USGC Comments at 13.

⁴² New Jersey Natural Comments at 5.

⁴³ Rehearing Request at 11.

Shippers are correct that producers cannot move their production from their primary receipt points any more than an LDC can move its city gate, Indicated Shippers have not shown that they would be significantly disadvantaged as compared with Tennessee's existing *pro rata* allocation method, in the limited situations when Tennessee is unable to schedule its design capacity and thus would implement the proposed methodology. Under the existing tariff, a producer's secondary firm nomination would necessarily be cut if Tennessee could not make all in-the-path deliveries. We recognize that, under the revised scheduling provisions, the producer's secondary firm nominations are more likely to be cut. However, such producer would still have the right to transport gas to its primary delivery point and sell its gas there, or to sell its gas at its primary receipt point to an entity that can schedule transportation service to a primary delivery point. In addition, as discussed in the previous section, such a producer could release a segment of its capacity to a replacement shipper who could designate its delivery point as a primary point, including a replacement shipper making gas purchases from the producer. In short, producers should have a wider range of options to continue to market their gas in these very limited situations than an LDC or other gas consumer seeking to arrange deliveries to their primary delivery points.

44. Indicated Shippers also assert that the Commission's analysis in the October 2013 Order that scheduling priority proposal would entice long haul shippers to retain those contracts in lieu of moving to short haul agreements is flawed. Indicated Shippers argue that the Commission's determination ignores the fact that because the Commission has previously rejected a shipper's ability to contract for a geographic portion of its historical capacity without relinquishing its right of first refusal (ROFR) with regard to the contract. Indicated Shippers claim the same holds for those shippers on Tennessee holding grandfathered redundant delivery rights that allow a shipper with those rights to shift its contract amount between its primary delivery points without losing its primary point scheduling priority, i.e. a party with such rights would risk losing them were it to terminate its existing long-haul firm contract containing those rights. Indicated Shippers further claim that Tennessee's new scheduling methodology will only exacerbate the considerable scheduling advantage that those shippers already have.

45. As noted by the Commission and Tennessee, the incentive to retain long haul contracts was one of several factors weighing in support of Tennessee's proposal. We recognize that the fact that an existing shipper would have to put its capacity up for bid if it wanted to move its receipt point without protection of a ROFR limits the likelihood of an existing shipper seeking to give up a portion of its long haul agreement. However, that does not alter the fact that Tennessee's proposal may make a long-haul contract somewhat more attractive to an entity placing a high value on reliability of service, and therefore the proposal may enhance Tennessee's ability to market long-haul capacity.

46. As to the redundant delivery rights, aside from the bald assertion that Tennessee's proposal would "increase considerably the scheduling advantage" of such a shipper

transporting from a secondary receipt to primary delivery point, Indicated Shippers do not state or explain how or why that would be the case. As Indicated Shippers themselves acknowledge, a grandfathered shipper with redundant delivery rights cannot exceed the maximum capacity of its agreement but may only shift quantities between its primary delivery points.⁴⁴ Thus, should Tennessee need to implement the new scheduling priority methodology, redundant right shippers would be scheduled with the same priority of any other shippers transporting from a secondary receipt point to a primary delivery point, in accordance with pre-existing rights under their contract. Tennessee's proposal does not provide redundant right contract holders with any additional rights not afforded under their existing agreements or not provided to similarly situated shippers.

The Commission orders:

The Indicated Shippers' request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁴ Rehearing Request at 21.