

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
102 FERC ¶ 61,124

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

PG&E Gas Transmission, Northwest Corporation

Docket No. RP99-518-032

ORDER ON REHEARING

(Issued February 4, 2003)

1. On September 23, 2002, the Commission issued an order in this proceeding that approved a contested settlement without modification.¹ On rehearing, the Public Utilities Commission of the State of California (CPUC) argues that the Commission arbitrarily and capriciously approved the Offer of Settlement by PG&E Gas Transmission, Northwest Corporation (GTN). For the reasons discussed below, we will deny the request for rehearing.

Background

2. The captioned proceedings and Settlement involve negotiated rate transactions between GTN and various shippers.² On September 13, 2001, the Commission issued an order (2001 Order)³ establishing hearing procedures to further explore the issues raised

¹100 FERC ¶ 61,291 (2002) (September 23 Order).

²The Settlement specifically addressed negotiated rate contracts with Sempra Energy Trading Corp. in Docket No. RP99-518-019 and negotiated rate contracts with Dynegy Marketing and Trade, Reliant Energy Services Canada Ltd., Western Gas Resources and Enserco Energy, Inc. in Docket No. RP99-518-020. Other negotiated rate contracts addressed include contracts with Mirant in Docket No. RP99-518-021 and CEG Energy and BP Energy in Docket No. RP99-518-022.

³96 FERC ¶ 61,276 (2001).

by GTN's negotiated rate filings.⁴ The 2001 Order, set the following four issues for hearing: (1) whether the transportation capacity was advertised and awarded in an accurate and fair manner consistent with GTN's tariff; (2) whether the transportation rates negotiated by GTN with the shippers were the product of an exercise of market power (i.e., whether GTN withheld capacity that otherwise could have been made available under recourse service in order to make the capacity available under negotiated rate charges at higher rates); (3) why the shippers agreed to these rates when lower recourse rates should have been available under the Commission's negotiated rate program; and (4) whether the practice of improving a shipper's standing in the scheduling process by selling firm transportation to undesirable primary points so an alternative point can be nominated is discriminatory against interruptible transportation shippers since the alternate point is also available on a somewhat best-efforts basis.

3. In compliance with the 2001 Order, GTN filed revised tariff sheets in Docket No. RP99-518-023 on September 28, 2001.⁵ The revised tariff sheets clarified its business practices for posting available system capacity, and directed shippers to its website for capacity posting information.

4. The Presiding Administrative Law Judge (ALJ) convened a pre-hearing conference on September 20, 2001. GTN filed its direct testimony on October 4, 2001. Trial Staff filed answering testimony on November 1, 2001. No one else submitted testimony. Both Trial Staff and GTN's testimony agreed with respect to the four issues set for hearing; therefore, the ALJ concluded there was no basis to proceed to hearing. Trial Staff did express certain concerns and proposed specific recommendations regarding GTN's tariff and procedures for awarding capacity. GTN filed an Offer of Settlement on January 28, 2002 that responded to Trial Staff's concerns. The CPUC filed comments opposing the Settlement. On April 4, 2002, the ALJ certified the contested settlement, concluding that it fairly and appropriately addressed each issue raised in the Commission's 2001 Order on the merits.⁶

⁴The negotiated rates were based in whole or in part on the natural gas spot market price differentials between Stanfield, Oregon (where GTN's system interconnects with Northwest Pipeline) and Malin, Oregon.

⁵First Revised Sheet No. 54C and Fifth Revised Sheet No. 87 to FERC Gas Tariff, First Revised Volume No. 1-A. GTN proposed an effective date of October 29, 2001.

⁶99 FERC ¶ 63,003 (2002).

5. On September 23, 2002, the Commission issued an order approving the Settlement. Since the CPUC failed to comply with the Commission's Rules of Practice and Procedure, which require an affidavit detailing any issues of material fact, the Commission affirmed the ALJ's conclusion that no genuine issue of material fact existed with respect to the issues raised by the CPUC, and with regard to the proposed Settlement. Among the issues discussed that are relevant on rehearing, the Commission concluded that the negotiated rates were just and reasonable and were not the product of an exercise of market power. The Commission also rejected as a generic attack on the negotiated rate policy the CPUC's argument assailing negotiated rate transactions that use spot-market indices and encouraged the CPUC to bring its concerns to the Notice of Inquiry⁷ established to examine the negotiated rate policy. The Commission also concluded that, contrary to CPUC's claims, a negotiated rate transaction based on index differential pricing is not per se unjust and unreasonable when the resulting rates exceed the maximum recourse rate. GTN offered a viable recourse rate option and the parties offered valid reasons for entering these negotiated rate transactions.

6. With respect to Docket No. RP99-518-023, the September 23 Order accepted GTN's revised tariff sheets, which were designed to address the Commission's concerns regarding whether GTN was using firm contracts to award operational capacity.

Discussion

7. On rehearing, CPUC first argues that the Commission's analysis of whether GTN exercised market power should have considered whether GTN's use of index-differential negotiated rates amounted to an impermissible use of market-based prices, or bundled commodity prices, to set transportation rates. In the ALJ's certification of the contested settlement, she rejected the CPUC's argument as an improper policy argument.⁸ In the order approving the contested settlement, the Commission agreed and referred the CPUC to the Notice of Inquiry. The CPUC now explains that its concerns are more appropriately aired here than in the Notice of Inquiry. As support, the CPUC cites language from Commission precedent explaining that the Commission will implement

⁷Notice of Inquiry Concerning Natural Gas Pipeline Negotiated Rate Policies and Practices, FERC Stats. & Regs. ¶ 35,543 (2002).

⁸99 FERC at P 71.

the negotiated rate policy and evaluate the particulars of each negotiated rate proposed presented on a case-by-case basis.⁹

8. Contrary to the CPUC's argument, the ALJ's Certification of the Contested Settlement and September 23 Order both evaluated the particulars of the GTN negotiated rate proposal and concluded that the negotiated rates were just and reasonable because the recourse rate was a viable option that protected the shippers from the use of market power. The CPUC's argument thus amounts to a generic attack on all negotiated rates using index-differential pricing, rather than an attack on the specific findings here. In fact, the CPUC has raised this argument in its comments on the Notice of Inquiry.¹⁰ Thus, we affirm that the appropriate venue for considering this argument is the Notice of Inquiry proceeding.

9. The CPUC then argues that the Commission did not provide adequate support for its conclusion that, "it was not clear [at the time the contracts were consummated] that the index-based negotiated rates would . . . exceed the otherwise applicable maximum recourse rate."¹¹ When the ALJ certified the contested settlement, she listed several facts underlying the settlement, one of which was that "no one anticipated the price spread that actually occurred."¹² The Commission, in turn, identified this fact as the "most important."¹³ The CPUC on rehearing contends that the order approving the settlement lacked sufficient evidence for accepting this proposition and concluding that the Settlement should be accepted and the hearing denied.

⁹See *Transwestern Pipeline Co.*, 79 FERC ¶ 61,021 at 61,095, reh'g denied, 79 FERC ¶ 61,310 (1997).

¹⁰See, e.g., CPUC Comments in Notice of Inquiry proceeding (PL02-6-000) at 27-30.

¹¹See 100 FERC ¶ 61,291 at P 20.

¹²99 FERC at P 56. The ALJ identified four other factors: (1) "the shippers were aware that they could purchase capacity at the recourse rate"; (2) "GTN's tariff is publicly available"; (3) "the maximum tariff rate is always available as a recourse to a negotiated rate"; and (4) "none of the shippers that accepted negotiated rates indicated that GTN withheld maximum recourse rate service." Id.

¹³Id.

10. On rehearing, the Commission has no basis for concluding that forecasts indicated that the negotiated rates would exceed the recourse rate since the ALJ accepted the factual presumption underlying the forecasts when the Settlement was certified, and the CPUC did not offer any factual basis for concluding that contrary forecasts existed. Moreover, by noting the "most important" fact, the Commission intended to distinguish the facts in this proceeding from those of another proceeding that involved negotiated rate agreements consummated when a price spread that far exceeded the recourse rate was apparent.¹⁴

11. The CPUC next argues that these negotiated rate agreements effectively involve GTN in wholesale gas sales even though GTN's predecessor Pacific Gas Transmission Company unbundled and terminated its gas sales services. Since the contract rates are based on spot-market differential between two delivery points, the CPUC reasons, the contract rates require shippers to pay GTN a portion of their sales revenues. In this way, GTN has become a partner in gas sales. The CPUC argues that the Commission failed to justify its conclusion that this practice is acceptable and not unjust and unreasonable.

12. It does not appear that the CPUC raised this argument when it opposed the offer of settlement. Because this argument is generic to the negotiated rate policy currently in effect, the Commission will consider it in the Notice of Inquiry proceeding.¹⁵

13. Finally, the CPUC requests that the Commission clarify that the order applies only to the Settlement dockets (i.e., Docket Nos. RP99-518-019 through -022), which is consistent with the ALJ's certification. The Commission included RP99-518-023 in the September 23 Order because the same order that initiated the procedures that produced the Settlement also asked GTN to clarify certain matters related to its positing of operational capacity. Since this matter was pending at the time of the Settlement, the Commission included the compliance proceeding subdocket in its order on the Settlement. By doing so, the Commission did not intend to suggest that the compliance subdocket was considered a part of the Settlement.

¹⁴See Transwestern Pipeline Co., 100 FERC ¶ 61,058 (2002).

¹⁵The CPUC has raised this issue in the Notice of Inquiry proceeding. See, e.g., CPUC Comments in Notice of Inquiry proceeding (PL02-6-000) at 2-3.

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The Commission orders:

The CPUC's request for rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary,