

103 FERC ¶ 61,061

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PG&E Gas Transmission, Northwest Corporation

Docket Nos. RP02-362-003
and RP02-362-004

ORDER ON REHEARING, CLARIFICATION, AND COMPLIANCE

(Issued April 14, 2003)

1. On February 19, 2003, PG&E Gas Transmission, Northwest Corp. (GTN) filed a request for rehearing of the Commission's January 16, 2003 Order.¹ The Public Utilities Commission of the State of California (CPUC) also seeks clarification or, alternatively, rehearing of the January 16 Order. On February 5, 2003 GTN submitted revised tariff sheets in compliance with the Commission's January 16 Order.² The Commission denies rehearing, grants clarification, and conditionally accepts the tariff sheets, effective November 14, 2002, as discussed below.

Background

2. The January 16 Order accepted, subject to conditions, certain tariff sheets filed by GTN to comply with a Commission order issued on July 5, 2002.³ The tariff sheets added language to Paragraph 18.1(b) of GTN's General Terms and Conditions (GT&C) related to the posting and awarding of prearranged capacity. GTN proposed making prearranged service agreements for unsubscribed capacity (after an open season) and capacity that is expected to become available in the future.

¹102 FERC ¶ 61,044 (2003) (January 16 Order).

²Third Revised Sheet No. 127 and Fourth Revised Sheet No. 128 to FERC Gas Tariff, Second Revised Volume No. 1-A.

³100 FERC ¶ 61,040 (2002) (July 2002 Order).

3. The Commission concluded that GTN should be permitted to enter into pre-arranged deals prior to an open season. GTN was directed to clarify in its tariff that before it enters into a pre-arranged deal for capacity that will become available in the future, GTN will post such capacity as it becomes available to afford similarly situated shippers the same bidding opportunities. Rejecting GTN's proposed minimum contract term of five years on pre-arranged service agreements, the Commission explained that such a restriction was unduly discriminatory.

4. GTN also proposed making available pre-arranged capacity on an interim basis, but without a Right of First Refusal (ROFR), before the commencement date of the pre-arranged service agreement. The Commission rejected GTN's proposal to unilaterally deny an interim shipper its ROFR. The Commission concluded that the denial of a ROFR would insulate the pipeline from the risk of its decision to enter into pre-arranged agreements for future service at the expense of shippers who entered into interim service agreements.

The request for rehearing and clarification, Docket No. RP02-362-004

5. On rehearing, GTN makes several arguments in support of its position that the Commission erred when it rejected GTN's proposal to limit an interim shipper's ROFR commensurate with the commencement of a pre-arranged service agreement. GTN first argues that its proposed pre-arranged capacity program promotes the efficient allocation of capacity and may eliminate the need for future expansion by satisfying future demand with existing capacity. Without a restriction on interim capacity ROFR, GTN reasons, the only way that GTN would be able to guarantee capacity on a prospective basis would be to commit to constructing additional capacity to serve a prospective capacity need.

6. The Commission disagrees. The Commission's regulations require a ROFR to be given to shippers with contracts of a year at more at maximum rates.⁴ GTN is seeking a waiver of that regulation and the Commission finds that it has not justified its waiver request. As the Commission clarified in Order No. 637, a significant concern underlying the availability of a ROFR is to protect existing long-term maximum rate customers from pipelines' exercise of market power.⁵ While efficiency remains a goal of the

⁴See 18 C.F.R. § 284.221(d) (2002).

⁵ Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,336-37, order on rehearing, Order No. 637-A, FERC Stats. & Regs.

Commission, in this instance efficiency concerns alone are an insufficient basis for denying shippers a ROFR.

7. GTN also assails the Commission's decision to give interim shippers a ROFR because doing so, according to GTN, practically ensures that GTN's pre-arranged tariff mechanism will never be used as intended. GTN argues that a ROFR for interim shippers forecloses GTN from being able to offer long-term firm pre-arranged capacity because the pre-arranged shipper would not be assured that the capacity it had contracted for would be available at the commencement of the pre-arranged agreement. GTN also argues that, contrary to the Commission's contention in the January 16 Order, it is unlikely that a shipper would purchase capacity now with the hope of being able to release it until it needs the capacity at a future date. GTN explains that it is because this currently available option is not meeting the commercial needs of GTN's shippers that GTN proposes the pre-arranged tariff mechanism. GTN further argues that by requiring GTN to offer interim capacity with a ROFR, the January 16 Order is at odds with Commission regulations that define firm service as service "not subject to a prior claim by another customer."⁶

8. GTN's arguments are unpersuasive. In the January 16 Order, the Commission prohibited GTN from unilaterally denying interim shippers a ROFR. In spite of this prohibition, if the capacity in question is not subject to a ROFR, then GTN could provide its prearranged shippers with the greater certainty GTN promises. By modifying GTN's proposal, the Commission is not imposing a new condition that defeats the goals the mechanism seeks to advance. Rather, because providing a ROFR is an existing requirement, GTN must account for this restriction when it administers its prearranged capacity program. It is GTN's responsibility to propose a program that works with current Commission policy to address perceived needs on its system. We therefore conclude that the GTN proposal as modified by the January 16 Order conforms to current Commission policy and regulations.

9. Finally, GTN argues that the Commission erred by citing the order in Williams Gas Pipelines Central, Inc.⁷ as support for its holding that interim shippers should not be subject to a limited ROFR when contracting for capacity that is subject to a pre-arranged

⁵(...continued)
¶ 31,099 (2000).

⁶18 C.F.R. § 284.7(a)(3) (2002).

⁷97 FERC ¶ 61,249 (2001) (Williams).

deal. To the contrary, the rationale underlying the Williams order – that a regulatory right of first refusal may be broadened, but not curtailed – also underlies our conclusion to reject GTN's denial of a ROFR.

10. The CPUC requests clarification of the Commission's Order or, alternatively, rehearing. The CPUC requests clarification that the Commission did not grant GTN more authority than it requested with respect to the request for authority to enter prearranged deals for unsubscribed capacity that has been posted and already subject to an open season. Although it is unclear from its filing, the CPUC appears to suggest that the Commission may have mistakenly allowed GTN to enter prearranged deals for currently posted capacity with a term beginning immediately rather than a term beginning sometime in the future. The Commission clarifies that as long as the capacity already has been posted and subject to a completed open season, GTN may enter into prearranged deals for available capacity, whether those deals are set to begin immediately or in the future. CPUC then asks for the Commission to address how this program assures that such contracts will not become the subject of speculative transactions and price manipulation. As noted in the January 16 Order, as long as other parties have an opportunity to bid on capacity prior to the awarding of prearranged deals, then the proposal is consistent with Commission policy.

11. CPUC also argues that paragraphs 8 and 9 of the January 16 Order are inconsistent. Paragraph 8 broadly states GTN may "enter into a pre-arranged deal from capacity prior to holding an open season, provided that GTN will post the terms of the pre-arranged deal and other parties will have an opportunity to bid on the capacity" while paragraph 9 more narrowly states that GTN must "provide that before it enters into a pre-arranged deal for capacity becoming available in the future, GTN will post the availability of such capacity to afford similarly situated shippers the same opportunities" (emphasis added). CPUC further argues that the Commission did not explain why it would allow GTN to pre-arrange rates and services with a selected shipper prior to posting and initiating competitive bidding in an open season for presently available capacity. Such arrangements, CPUC continues, are contrary to the Commission's regulations,⁸ which require posting of capacity as it becomes available, and equal and timely notice of all available capacity.

12. The Commission clarifies that GTN cannot enter into any prearranged deals before capacity is posted as available. Further, a prearranged deal that is subject to posting and bidding cannot be awarded until the bidding procedures are complete. As

⁸Citing 18 C.F.R. § 284.13(d)(1) (2002).

for pre-arranging rates and services, the proposal conforms to the Commission's regulations in both respects. As the capacity becomes available, it will be subject to notice and made available to competing bidders.

Compliance Filing, Docket No. RP02-362-003

13. On February 5, 2003, GTN filed tariff sheets⁹ to comply with the January 16 Order. Public notice of the filing was issued on October 8, 2002. Protests were due as provided in Section 154.210 of the Commission's regulations.¹⁰ Pursuant to Rule 214,¹¹ all timely filed motion to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. No protests were received.

14. The January 16 Order directed GTN to (1) clarify in its tariff that before it enters into a pre-arranged deal for capacity becoming available in the future, GTN will post the availability of such capacity to afford similarly situated shippers the same opportunities; (2) remove the five year minimum contract requirement for pre-arranged deals; and (3) remove tariff language that relates to the rejected provision¹² that a shipper who enters into an interim service agreement will not have a ROFR unless GTN and the shipper expressly agree otherwise. The tariff sheets referenced in Footnote No. 2 are accepted as being in compliance with the January 16 Order effective November 14, 2002, subject to the conditions discussed below.

15. GTN revised Paragraph 18.1(b) of its GT&C by adding language stating that GTN will not enter into any pre-arranged deals for capacity that has not previously been posted on its Internet website. In addition, GTN added language providing that GTN will separately identify on its Internet website all capacity that is anticipated to become available within the next thirty-six months. The Commission finds that GTN's revision provides shippers with equal and timely notice of all capacity that GTN anticipates to become available within thirty-six months, affording all similarly situated shippers the

⁹See supra footnote 3.

¹⁰18 C.F.R. § 154.210 (2002).

¹¹18 C.F.R. § 385.214 (2002).

¹²The January 16 Order rejected First Revised Sheet No. 213 to FERC Gas Tariff, Second Revised Volume No. 1-A which proposed a provision that a shipper who enters into an interim service agreement pursuant to Paragraph 18.1(b) will not have a ROFR unless GTN and the shipper expressly agree otherwise.

same opportunity to request capacity on a pre-arranged basis. Finally, GTN clearly states that all capacity will be posted before GTN enters into a pre-arranged deal. GTN must, of course, enter into all pre-arranged deals on a non-discriminatory basis. The Commission will accept the proposed tariff revisions as being in compliance with the January 16 Order.

16. GTN removed declaratory language from the Available Capacity section in Paragraph 18.1(c) of its GT&C that provided that GTN will separately identify on its Internet website all capacity that is anticipated to become available within the next thirty-six months. The Commission finds that the removal of this language makes GTN's tariff confusing because a declaration of when capacity will be posted, even if it is capacity that is anticipated to become available, must be in the main Available Capacity section in Paragraph 18.1(c) of GTN's GT&C. Therefore, GTN is directed to revise Paragraph 18.1(c) of its GT&C within 15 days of the date of this order to reinstate the declaratory language.

17. In addition, GTN revised Paragraph 18.1(b) of its GT&C to remove language requiring all pre-arranged service agreements to have a minimum contract term of five years. The Commission will accept this proposed tariff revision as in compliance with the January 16 Order.

18. Finally, GTN revised Paragraph 18.1(b) of its GT&C to remove language that limited the availability of capacity that is subject to a pre-arranged deal to an interim basis up to the commencement of the pre-arranged service agreement with no ROFR unless GTN and the shipper expressly agree otherwise. The Commission finds that GTN's revision is in compliance with the January 16 Order and is accepted.

The Commission orders:

(A) The Commission denies GTN's request for rehearing, and grants CPUC's request for clarification, as discussed in the body of this order.

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(B) The Commission accepts GTN's proposed tariff sheets shown in footnote 3, effective November 14, 2002, conditioned upon GTN filing revised tariff language consistent with the discussion above within 15 days of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.