

122 FERC ¶ 61,137
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer, and
Jon Wellinghoff.

Southern LNG, Inc. Docket Nos. CP06-470-001

Elba Express Company, L.L.C. CP06-471-002
CP06-472-002
CP06-473-002

Southern Natural Gas Company CP06-474-002

ORDER DENYING REHEARING AND GRANTING RECONSIDERATION

(Issued February 19, 2008)

1. On April 4, 2007, the Commission issued a preliminary determination addressing the non-environmental issues raised by applications filed on September 29, 2006, by Southern Natural Gas Company (Southern) and Elba Express Company, LLC (Elba Express) under section 7 of the Natural Gas Act (NGA), requesting, among other things, certificate authority to construct and operate a new interstate natural gas pipeline in Georgia and South Carolina to transport new volumes of vaporized liquefied natural gas (LNG) from Southern LNG, Inc.'s (Southern LNG) Elba Island, Georgia, LNG terminal to interconnections with Transcontinental Gas Pipe Line Corporation (Transco).¹ In the April 4 Order, the Commission issued its conditional approval of the Elba Express and Southern proposals pending completion of its environmental review. The April 4 Order stated that the Commission would address in a subsequent order the issues associated with Southern LNG's related application in this proceeding pursuant to NGA section 3 to expand its Elba Island LNG terminal and its request to abandon certain dock facilities pursuant to NGA section 7. On May 4, 2007, Shell NA LNG LLC (Shell) filed a timely request for rehearing of the April 4 Order.

2. On September 20, 2007, the Commission, having completed its analysis of all of the proposals filed by Southern LNG, Southern, and Elba Express, granted the requested

¹ *Elba Express Company, L.L.C., et al.* 119 FERC ¶ 61,015 (2007) (April 4 Order).

authorizations subject to certain conditions. Further, the Commission denied Shell's rehearing request.² Several rehearing requests have been filed regarding the September 20 Order.

I. Background

A. Southern LNG

3. Southern LNG operates an LNG import terminal on Elba Island in Chatham County, Georgia, five miles downstream from the city of Savannah, Georgia, on the Savannah River. In the September 20 Order the Commission approved Southern LNG's proposal in Docket No. CP06-470-000 (Elba III Expansion) to expand the storage capacity of its Elba Island LNG import terminal by 8.44 Bcf and its vaporization capacity by 900 MMcf per day in two phases commencing in 2010 and 2012, respectively.

4. Southern LNG has entered into agreements with Shell and BG LNG Services, LLV (BG) for the entire firm capacity created by the Elba III Expansion under new Rate Schedule LNG-3. Both Shell and BG have agreed to pay a negotiated rate for service from Southern LNG.

B. Southern

5. Southern's pipeline system includes the two 13.25-mile, 30-inch diameter Twin 30s pipelines, which extend from Southern LNG's Elba Island LNG terminal to an interconnection with the rest of Southern's pipeline system near Port Wentworth, Georgia. In the September 20 Order the Commission granted approval to Southern in Docket No. CP06-474-000, to transfer to Elba Express, at net book value, an undivided ownership interest up to a volume equal to 1,175 MMcf per day in the Twin 30s pipelines.

6. The Commission also granted Southern's request to acquire an undivided ownership interest in Elba Express' proposed pipeline between Port Wentworth and Rincon, Georgia, up to a volume equal to 500 MMcf per day, if Southern elects to proceed with Phase III of its previously authorized Cypress Expansion Project or, in the alternative, if it does not proceed with Phase III of the Cypress Expansion Project, to acquire an undivided ownership interest equal to 55 MMcf per day in the Elba Express pipeline between Port Wentworth and an interconnection with Southern at Wrens, Georgia.

² *Southern LNG, Inc., et al.*, 120 FERC ¶ 61,258 (2007) (September 20 Order).

C. Elba Express

7. In the September 20 Order the Commission granted Elba Express, a subsidiary of Southern, authority to: (1) acquire an undivided ownership interest in Southern's Twin 30s pipelines; (2) construct and operate a new 42-inch and 36-inch diameter pipeline extending approximately 189 miles, from Port Wentworth through Effingham, Screven, Jenkins, Burke, Jefferson, Glascock, Warren, McDuffie, Wilkes, and Elbert Counties, Georgia, to interconnections with Transco in Hart County, Georgia, and Anderson; County, South Carolina, coincident with the first phase of Southern LNG's expansion; and (3) construct a 10,000 horsepower compressor station on the 42-inch diameter segment in Jenkins County, Georgia, coincident with the second phase of Southern LNG's expansion. Upon completion of all of the facilities Elba Express will be able to provide a total of 1,175 MMcf per day of firm transportation service to the Transco interconnections. Elba Express has entered into agreements with Shell and BG for the entire capacity of the pipeline. Elba Express was also authorized to provide open-access transportation service under Part 284 of the Commission's regulations and was granted a Part 157 blanket certificate authorizing it to construct, operate, and/or abandon certain eligible facilities and services. Finally, Elba Express was authorized to transfer ownership interests as described above.

II. Rehearing Requests

8. Rehearing requests of the September 20 Order filed by Marathon LNG, Elba Express, Shell, and Latha Anderson, *et al.* (Anderson)³ are discussed below. The Commission denies each of the rehearing requests, but grants reconsideration of one of the tariff provisions filed by Elba Express.

A. Southern LNG's Authorizations

1. Commission Jurisdiction

9. Southern LNG currently provides terminal service at its Elba Island plant under its existing Rate Schedules LNG-1 (firm transportation) and LNG-2 (interruptible transportation). Southern LNG has proposed to perform open-access expansion service under a new rate schedule, LNG-3, which it filed under Part 284 of the Commission's regulations on a pro forma basis for Commission review. Southern LNG also filed exhibits estimating the construction cost of the project, the cost of service, and deriving the recourse rates it proposes for the new capacity. The cost of service for the new facilities is estimated to exceed the revenues at the existing Rate Schedule LNG-1 rates, and Southern LNG proposes incremental rates under Rate Schedule LNG-3 in order to

³ Anderson comprises a group of landowners in Georgia.

avoid subsidization by existing shippers. The existing customer rates under Rate Schedule LNG-1 currently remain subject to a moratorium extending until October 2010 in the settlement approved in Docket No. CP99-579-003.⁴

10. Marathon LNG argues that the Commission exceeded its statutory authority in approving Southern LNG's proposed LNG-3 rate because section 311 of the Energy Policy Act of 2005⁵ removes the Commission's jurisdiction to regulate the rates, charges, terms, or conditions of service of any expansion of an LNG terminal authorized in any Commission order issued before January 1, 2015.⁶ Marathon LNG states that the Commission's rationale for approving the incremental rate proposed by Southern LNG is that the Commission does not read the amended NGA section 3 as precluding the Commission from issuing and enforcing such authorization when proposed by the applicant.⁷ Marathon LNG now states that the Commission's reasoning is not consistent with EAct 2005⁸ or with caselaw holding that only Congress, not individual parties, can confer jurisdiction.⁹

Commission Response

11. As amended by EAct 2005, NGA section 3(e)(1) immediately reaffirms the Commission's "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." That provision goes on to state that except "as specifically provided in this Act, nothing in this Act is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals." Thus, any limitation on the Commission's existing authority to approve and condition LNG applications must be "specifically provided" by the language of EAct 2005.

⁴ *Southern LNG, Inc.*, 112 FERC ¶ 61,314 (2005).

⁵ Energy Policy Act of 2005, Pub. L. 109-58, 199 Stat. 594 (2005) (EAct 2005).

⁶ *Citing Columbia Gas Transmission v. FERC*, 404 F.3d 459 (D.C. Cir. 2005); *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005); *American Mail Line Ltd. v. FMC*, 503 F.2d 157 (D.C. Cir. 1974).

⁷ *Citing* September 20 Order at P 52.

⁸ We note that in a protest filed October 31, 2006, Marathon LNG requested that "the incremental recourse rates for service under Rate Schedule LNG-3 be properly determined if the Commission's order is to be consistent" with EAct 2005.

⁹ *Citing Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 at 463 (D.C. Cir. 2005).

12. NGA section 3(e)(3)(A) as amended states that, “[e]xcept as provided in subparagraph (B), the Commission may approve an [LNG] application . . . , in whole or part, with such modifications and upon such terms and conditions as the Commission find [sic] necessary or appropriate.” Subparagraph B’s two limitations on the Commission’s power to conditionally approve and regulate are specific:

Before January 1, 2015, the Commission shall not (i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility, or (ii) condition an order on (emphasis supplied)

any of three requirements, including (a) operation as an open-access facility, (b) any regulation of the rates, charges, terms, or conditions of service, or (c) a requirement to file with the Commission schedules or contracts related to such rates, charges, terms, or conditions of service. Marathon LNG asserts that the prohibition against conditioning orders applies here and construes this prohibition very broadly. Thus, Marathon LNG argues that EAct 2005 removes the Commission’s statutory authority to “approve” rates and terms and conditions proposed by any applicant. We disagree.

13. The issue Marathon LNG presents here is whether the Commission can reasonably be said to have “condition[ed]” its September 20 Order approving Southern LNG’s application within the meaning of EAct 2005. We think not. Southern LNG has selected and proposed what the Commission has approved, i.e., to expand its LNG terminal and provide expanded tariffed service under continuing and limited Commission review. Where an applicant seeks to establish and implement a business plan based on and incorporating the body of regulatory law provided by existing Commission policies, only a tortured reading of the word “condition” can make the statute’s prohibition applicable. We note again that the prohibition itself is to be construed narrowly. Section 3(e)(1)’s second sentence states that “[e]xcept as specifically provided in this Act, nothing in this Act is intended to affect otherwise applicable law related to any Federal agency’s authorities or responsibilities related to LNG terminals (emphasis supplied).”

14. Were the Commission to impose as a pre-condition for NGA section 3 approval that applicants seeking LNG terminal authority comply with Part 154 of the Commission’s regulations, the claims of Marathon LNG would require close consideration. However, the Commission has not required traditional rate and service regulation as a condition of such approval. Indeed, as we made clear in the September 20

Order (P 21, and P 52-53),¹⁰ our policy has been to respect to the maximum extent possible the commercial arrangements reached between LNG terminal operators and their customers.

15. Marathon LNG cites the September 20 Order's Ordering Paragraph (K) as evidence of the Commission's attempt to regulate without jurisdiction. That Ordering Paragraph required Southern LNG to place into effect by a certain date the Rate Schedule LNG-3 rates and Rate Schedule LNG-3 specific changes to its tariff discussed in the order, including the red-lined tariff sheets reflecting how its actual tariff filing differs from its pro forma sheets.

16. The Commission does not agree that this condition is contrary to section 311 of EAct 2005. Southern LNG proposed Rate Schedule LNG-3 as a Part 284 open-access service.¹¹ Consistent with that proposal, Southern LNG proposed to file tariff sheets in compliance with Part 284. Further, the introduction of Rate Schedule LNG-3 required many changes to other parts of Southern LNG's tariff to integrate the new service with existing services. As noted above, some of these proposed changes the Commission approved and others we rejected. Ordering Paragraph (K) is consistent with Southern LNG's open-access proposal, the Commission's Part 284 tariff requirements, and the Commission's tariff filing regulations to implement the proposal.

17. Southern LNG has argued that EAct 2005 neither prohibits Southern LNG from extending tariffed service to expansion customers nor precludes the Commission from reviewing proposed tariff changes.¹² We agree. We conclude that we are not conditioning our approval in contravention of the terms of the statute, as discussed above.¹³ Rather, the applicant has chosen not to avail itself of the limitation of Commission regulatory authority provided in EAct 2005 but rather has elected to submit for Commission review and approval, in accordance with existing regulatory policies, an incremental rate and service terms underlying its expansion.

¹⁰ *Citing Hackberry LNG Terminal L.L.C.*, 101 FERC ¶ 61,294 (2002), *Order Issuing Certificates and Granting Reh'g*, 104 FERC ¶ 61,269 (2003).

¹¹ Rate Schedule LNG-3, section 2.

¹² February 9, 2007 Answer of Southern LNG to Motion of Marathon LNG at 4. No language in EAct 2005 section 311 prohibits applicants from proposing open access services under Part 284, and the Commission's NGA section 4 jurisdiction is thus not affected if an applicant does make such a proposal.

¹³ *See also Trunkline Gas Co., LLC*, 119 FERC ¶ 61,078 (2007).

18. Marathon LNG argues that a *Columbia Gas* case supports its contention that the Commission exceeded its statutory authority in approving a recourse rate and Rate Schedule LNG-3 for the Elba III Expansion.¹⁴ Marathon's reliance on *Columbia Gas* is misplaced. In that case, the court disagreed with the Commission's contention that it had jurisdiction to compel compliance with a pipeline's tariff provision regarding installation of meters on gathering facilities solely because the tariff was "voluntarily filed by the pipeline," even if the Commission would not otherwise have jurisdiction over such meters. The Commission argued that the filed rate doctrine, which is derived from NGA sections 4 and 5, authorizes it to enforce a pipeline's tariff language regarding installation of meters on gathering facilities. In response, the court cited NGA section 1(b) which states that the "the provisions of this chapter" (of which sections 4 and 5 are two) "shall not apply to . . . the production or gathering of natural gas." The court stated that a doctrine that rests on sections 4 and 5 likewise cannot apply to the gathering of natural gas and therefore vacated the Commission's order requiring the pipeline to install meters on gathering facilities. The court stated that the Commission may neither accept the filing of a tariff provision that covers non-jurisdictional activity nor assert jurisdiction over such an activity.¹⁵

19. In this case, the NGA specifically states that the Commission has exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Marathon points to the NGA sections which state that the Commission cannot *condition* an order authorizing an LNG terminal on any regulation of rates, charges, terms, or conditions of service or on a requirement to file schedules or contracts related to rates, charges, terms or conditions of service. Marathon LNG contends that this removes all Commission jurisdiction over rates and terms and conditions of service for LNG terminal service. We interpret the statute to preclude the Commission from requiring any particular rate, term or condition of service on new or expanded LNG terminal facilities. In other words, the proponent of the LNG terminal may voluntarily propose to offer services under our open-access transportation program. In this case, Southern LNG specifically wishes to provide open-access Part 284 service which it has proposed and we have accepted.

2. Immediate Complete Cost Allocation Analysis

20. Marathon LNG states that the failure of the September 20 Order to examine fully the derivation of Southern LNG's proposed LNG-3 rate and how Southern LNG allocates

¹⁴ *Columbia Gas Transmission v. FERC*, 404 F.3d 459 (D.C. Cir. 2005) (*Columbia Gas*).

¹⁵ *Citing Detroit Edison Co. v. FERC*, 334 F.3d 48 at 54-55 (D.C. Cir. 2003).

the shared costs of the expansion results in a subsidy.¹⁶ Marathon LNG states that the Commission must conduct a full examination of the subsidy issue in this proceeding, instead of relying on later rate proceedings and Commission regulations requiring the filing of costs and revenues from expansions. Marathon LNG argues that the Commission's reliance on its Certificate Policy Statement¹⁷ to support the finding that the expansion service will not be subsidized by the existing service is incorrect, since the Certificate Policy Statement cannot be applied to what is now (post-EPAAct 2005) a non-jurisdictional service. Further, Marathon LNG states that the Commission's failure to develop an adequate record ensuring no subsidies and to consider the fact that the expansion shippers will not be paying the incremental recourse rate renders the September 20 Order lacking in reasoned decision-making.¹⁸

Commission Response

21. NGA section 3(e)(4) provides that:

An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers as to their terms or conditions of service at the facility, as all of the terms are defined by the Commission [emphasis supplied].

22. Marathon LNG construes this statute as requiring the Commission to conduct in this proceeding an immediate and comprehensive review of Southern LNG's actual costs of providing the expansion service scheduled to begin in 2010. Marathon LNG states that the Commission must conduct such an immediate review because (and in spite of the alleged fact that) the Commission no longer has authority to regulate Southern LNG's rates, or terms and conditions, for such service. Marathon LNG asserts that only by such

¹⁶ Marathon LNG states that it has a contractual obligation to reimburse BG for a significant portion of the Elba Island terminalling costs paid by BG under Southern LNG's Rate Schedule LNG-1, an open-access service offered under Southern LNG's Commission-approved tariff.

¹⁷ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹⁸ *Citing 5 U.S.C. § 706; Trunkline Gas Company, LLC*, 119 FERC ¶ 61,078 (2007).

a full and immediate cost review in the certificate order can the Commission assure that subsidization and degradation of service “shall not result” within the meaning of the statute. We disagree.

23. In the September 20 Order, the Commission established measures to protect Southern LNG’s existing customers from subsidizing the proposed expansion service. In doing so, the Commission exercised its existing NGA authority to regulate the provision of jurisdictional service, as requested and proposed by Southern LNG, and in accord with applicable Commission policies. As discussed above regarding Marathon LNG’s basic EAct 2005 jurisdictional arguments, we believe such an approach is fully consistent with the terms of NGA section 3, as amended by EAct 2005.

24. As to the substance of how the September 20 Order exercised such authority, we note that Marathon LNG misreads the Commission’s citation to the Certificate Policy Statement. The Commission did not use the Certificate Policy Statement to analyze the expansion rates. The Commission was citing the Certificate Policy Statement for the standards used to evaluate existing customers’ rates in situations involving new services and facilities. In this case the existing rates are provided under Rate Schedules LNG-1 and LNG-2, both rate schedules being subject to the statutory, regulatory and policy requirements of NGA sections 4 and 5. EAct 2005 section 311 did nothing to change any of those requirements, and the Commission applied the appropriate standard of review for existing services.

25. Further, when the Commission reviewed Southern LNG’s proposal in the September 20 Order, the Commission found that several proposed provisions would change Rate Schedules LNG-1’s and LNG-2’s rates and terms and conditions of service. The Commission rejected each of these changes, thus protecting existing customers.¹⁹ Finally, the Commission established measures to ensure that Southern LNG does not shift costs to existing customers in the future, thereby providing the tools necessary for protecting existing customers in the future.²⁰ Requiring the pipeline to isolate costs and keep separate books and records to protect the existing customers²¹ from subsidizing the

¹⁹ September 20 Order at P 73-75 and Appendix A.

²⁰ *Id.*, at P 66 and 91, requires Southern LNG to maintain its accounts in such a manner to facilitate review of incremental facilities and services in future rate proceedings, and P 76-77 requires Southern LNG to file the rate terms of negotiated rate agreements.

²¹ BG and Shell hold all the existing and proposed capacity at the Elba Island Terminal.

incremental project is consistent with Commission policy.²² The Commission also noted that Southern LNG will not be permitted to recover from existing shippers any revenue shortfall due to the charging of negotiated rates.²³ The Commission does not approve negotiated rate agreements in certificate proceedings as a matter of policy and did not do so here.²⁴ Further, Marathon LNG's citation to *Trunkline Gas Company LLC* is inapposite.²⁵ There, the Commission denied a request for a pre-determination of rolled-in rate treatment because costs were shown to exceed revenues. Southern LNG has not requested such a pre-determination here.

26. The Commission reiterates its finding in the September 20 Order that it has implemented sufficient measures to protect Southern LNG's existing customers by authorizing incremental rates and requiring separate books and records so that customers can question the proposed rate treatment when Southern LNG files a rate case. Prior to that time, the terms and conditions imposed by the September 20 Order will preclude the order's "result[ing] in" subsidization.

B. Elba Express' Authorizations

27. In response to the April 4 Order, Shell requested rehearing of the Commission's findings regarding sections 8.5 and 44 of Elba Express' General Terms and Conditions (GT&C). Elba Express did not seek rehearing of the April 4 Order. The September 20 Order denied Shell's request for rehearing. Elba Express and Shell request rehearing of the Commission's September 20 Order with respect to the two sections of Elba Express' GT&C. As discussed below, neither Shell nor Elba Express identify any new claims of error in either the Commission's April 4 or September 20 Orders; nor do they raise any new arguments. Therefore, the Commission denies Shell's and Elba Express' requests for rehearing.

²² *El Paso Natural Gas Co.*, 104 FERC ¶ 61,303 (2003); *Texas Eastern Transmission, L.P.*, 101 FERC ¶ 61,120 (2002); *Iroquois Gas Transmission System, L.P.*, 100 FERC ¶ 61,275 (2002); *East Tennessee Natural Gas Co.*, 98 FERC ¶ 61,331 (2002); Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 at pp. 61,746-47 (1999); order clarifying statement of policy, 90 FERC ¶ 61,128 (2000); order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000).

²³ September 20 Order at n.62.

²⁴ *Id.* at P 76-77.

²⁵ 119 FERC ¶ 61,078 (2007).

28. In the event rehearing is denied, Elba Express proposed new tariff language for sections 8.5 and 44. As discussed below, the Commission approves Elba Express' alternative section 8.5 tariff language and rejects alternative section 44.

1. Section 8.5: Southern LNG Force Majeure

29. The Commission's April 4 Order rejected Elba Express' proposed GT&C section 8.5 as discriminatory and preferential. Specifically, GT&C section 8.5 provides that if an "event of force" is declared at Southern LNG's Elba Island terminal that makes Southern LNG unable to render at least 80 percent of a shipper's aggregate deliveries, and if the Elba Express shipper's contract is for at least 25 years, at maximum or negotiated rates, and other conditions precedent as defined in section 8.5 of Elba Express' tariff prevail, then the shipper may buy out its contract with Elba Express. The Commission was concerned that this provision appears to be a unique tariff provision specifically designed for one class of shippers without any explanation as to why it is not unduly discriminatory or preferential. Why only shippers holding capacity on Southern LNG's facilities with contracts of at least 25 years should receive the option of buying out their contracts was not clear.²⁶

30. Shell requested rehearing of the April 4 Order, noting its unique position in supporting both the Southern LNG expansion and the construction of Elba Express' facilities. The Commission's September 20 Order rejected Shell's request for rehearing, noting that the Shell failed to address the Commission's concern as to why other shippers may not also be considered worthy of the benefits Elba Express proposed. The Commission noted that Elba Express was free to submit a non-discriminatory provision.²⁷

31. In the instant request for rehearing, Shell repeats the arguments we addressed in the September 20 Order. The Commission rejects Shell's request for rehearing. The September 20 Order fully addressed all of Shell's arguments and made no changes to the Commission's April 4 Order on this issue. However, the Commission's April 4 and September 20 Orders rejected section 8.5 only as proposed, noting: "[t]his finding is without prejudice to Elba Express proposing and supporting a force majeure buyout provision that is not unduly discriminatory or preferential."²⁸ Below the Commission addresses new tariff language proposed by Elba Express. That language the Commission finds acceptable, and it should be responsive to Elba Express' and to Shell's needs.

²⁶ April 4 Order at P 35-37.

²⁷ September 20 Order at P 26-29.

²⁸ April 4 Order at P 37, *affirmed* September 20 Order at 28-29.

32. Elba Express also requests rehearing of the September 20 Order's findings with regard to section 8.5. The Commission's findings regarding section 8.5 were made in the April 4 Order and were not altered in the September 20 Order. Elba Express did not request rehearing of the April 4 Order within the statutory period of 30 days.²⁹ Therefore, Elba Express' request for rehearing is dismissed as untimely. We will, however, address the merits of the request.

33. Elba Express argues that the Commission should not have ignored the special position the Southern LNG shippers hold on the Elba Express system. If it were not for them, Elba Express explains, neither its pipeline proposal nor the Southern LNG expansion could proceed. Elba Express believes it is unreasonable for the Commission to ignore this clear linkage, and arbitrary to base its decision on the assumption that singling out the Elba Island Terminal receipt point creates a discrimination issue with regard to receipt points that do not exist. Elba Express notes that there are no other proposed receipt points on the Elba Express pipeline except for the two pipeline interconnections in which receipts would most likely occur on a displacement basis. Elba Express argues that the scope of a force majeure event at Southern LNG's terminal and the impact that it would have on the Elba Express firm shippers and their markets when compared with any phantom or displacement receipt points makes the buyout provision nondiscriminatory. Elba Express also believes that the Commission's assumption of future firm customers or additional receipt points is unsupported. Even if firm backhaul service could be provided, Elba Express explains, there are no tariff provisions describing such a service.

34. Elba Express' arguments fail to acknowledge that future customers may emerge. In Docket No. CP06-472-000, Elba Express requested a Part 157, subpart F blanket certificate authorizing it to construct, operate, and/or abandon certain eligible facilities and services, and in Docket No. CP06-473-000, Elba Express requested a blanket certificate pursuant to Part 284, subpart G to provide open-access transportation services.³⁰

35. The Part 157, subpart F certificate permits automatic and prior notice authorizations for the construction and abandonment of receipt and delivery points for as long as the certificate remains valid. The open-access transportation service certificate permits automatic authorization for transportation services and their abandonment for as long as the certificate remains valid. What future shippers may require of Elba Express in terms of receipt or delivery points is currently unknown. The September 20 Order certificated the construction of five interconnections: one with Southern LNG, two with Southern at its Cypress Pipeline facility and Wrens, and two with Transco.³¹ While there

²⁹ NGA section 19(a).

³⁰ April 4 Order at P 2.

³¹ September 20 Order at P 9-11.

is no firm forward haul capacity available, whether there is or will be demand for firm backhauls or interruptible forward or backhauls is not known. Elba Express must offer any available transmission capacity under its open-access certificate to any eligible customer. Therefore Elba Express' open-access tariff must accommodate and be evaluated in the context of what may reasonably be anticipated to happen.³²

36. In the event the instant rehearing request is denied, Elba Express requests the Commission's reconsideration of the issue and the approval of alternative tariff language. Elba Express proposes to replace section 8.5 in its entirety with new language. The new section 8.5 eliminates the force majeure reference to the Southern LNG tariff and facilities and lowers the shipper eligibility requirements. Specifically, the revised provisions apply the buyout provision to any firm Receipt Point and any firm Shipper with a primary term of five (5) years or more. Elba Express states that a five (5) year primary term is an appropriate eligibility requirement since shippers with shorter terms have more flexibility to purchase gas supplies and reallocate their markets, or their terms will expire by the end of the required two-year duration of the force majeure event.

37. The new language provides that shippers may request to buy down a contract for any receipt point listed in its service agreement up to the contract levels provided through the affected receipt points. If the affected receipt point involves 75 percent or more of the contract demand, the shipper will have the right to buy down the full amount of the contract demand. The new language provides that the buy down amount will equal the higher of the negotiated rate or the maximum rate times the quantity to be bought down times the remaining primary term of the contract, discounted to present value by the Commission's then-effective refund rate.

38. The Commission believes Elba Express' alternative section 8.5 adequately addresses our concerns. The Commission agrees with Elba Express' representation that a five-year primary term is an appropriate eligibility requirement in light of the added flexibility these shorter term shippers experience. The alternative language no longer extends the ability to buy out a long-term firm contract to only those shippers on Southern LNG with 25-year contracts and does not require interpretation of Southern LNG's tariff to implement. The Commission also finds reasonable Elba Express' proposals for a minimum five-year primary term, a two-year duration for the force

³² The Commission disagrees with Elba Express' allegation that it must have a backhaul rate schedule to offer backhaul services. There is no statutory, regulatory or policy requirement that transmission rate schedules must be defined by the direction of flow of the gas. The Commission reviewed Elba Express' Rate Schedules FTS and ITS in its April 4 Order, and did not find any tariff provision that inhibited the ability of Elba Express to offer or customers to request backhaul service.

majeure triggering event, and the flexibility to buy down only affected receipt point contract demands. The Commission modifies Ordering Paragraph (M) of the September 20 Order to reflect this finding.

2. Section 44: Tariff Change Procedure

39. In the April 4 Order, the Commission rejected Elba Express' proposed GT&C section 44 in its entirety. Proposed section 44.1 would require Elba Express to consult with shippers before filing proposed changes to the GT&C with the Commission.³³ Elba Express would provide notice to shippers and engage in discussion about the proposed change. Section 44.1(c) required Elba Express, when certain disputes arise, to submit such disputes to the Commission's alternative dispute resolution service, for an expedited mediation to be completed within 15 days.

40. Under section 44.2(a), Elba Express would not propose changes to certain GT&C provisions, or make an NGA section 4 or 7 filing that expands or increases capacity if the change would have a material adverse effect on the shippers unless agreed to by shippers that subscribed at least 75 percent of the total firm transportation capacity on its system. Under section 44.2(b), shippers would be precluded from filing to change, or support any other person's filing to change, specified provisions of the tariff, including GT&C provisions, rates and discounts. In rejecting GT&C section 44, the Commission noted that Elba Express could choose to commit to a pre-rate filing consultative process, but that the Commission would not commit its staff to resolve unknown proposals by completion of non-binding mediation within 15 days. The Commission also rejected the provisions that would restrict shippers' rights to support certain tariff changes. In addition, the Commission determined that the notice requirements regarding rate changes should not be in a tariff because they may not remain consistent with Commission regulations.³⁴

41. In the September 20 Order, the Commission denied the sole request for rehearing (filed by Shell). Shell argued that section 44 and its various components should be retained in Elba Express' tariff. With respect to section 44.1(c), the September 20 Order noted that the April 4 Order specifically noted that Elba Express may choose to commit to a pre-filing consultative process.³⁵ The Commission did not object to such pipeline commitments, but stated that they need not be part of the tariff. The Commission found

³³ Under GT&C section 44.1(e), this procedure would not apply to tariff filings made to comply with FERC orders, required on an emergency basis for operational or financial reasons, or concerning rates or surcharges.

³⁴ April 4 Order at P 46-48.

³⁵ *Id.* at P 44. The *Southern Natural Gas Company* order to which Shell refers involved just such a settlement-provided pre-filing procedure aimed at informing

that Shell's stated belief, that the submission of disputes to Commission staff described by section 44.1(c) does not commit Commission staff to overly burdensome deadlines, and is intended merely to provide a prompt process for dispute resolution, was not consistent with a reasonable reading of the section's language. The proposed tariff language specifically provided for submission of pre-filing disputes to the Commission and its staff for expedited mediation resolution within 15 days.

42. As to sections 44.2(a) and (b), the Commission noted that Shell's interests as a shipper may well be different from those of other new customers reasonably anticipated to seek service from Elba Express, a new open-access pipeline. Thus the proposed limitation of the rights of such shippers is unsupportable. Finally, the Commission found that customer reliance upon the Commission's regulations governing appropriate notice requirements concerning proposed tariff changes is much more administratively efficient than the expenditure of Commission resources to review and approve/deny individual tariff changes aimed at conformance to future Commission regulation amendments.³⁶

43. On rehearing here, Shell again requests that section 44 remain in Elba Express' tariff. Shell notes that the Commission did not forbid the inclusion of consultative provisions in the tariff, and Shell believes that it is helpful for the parties to discuss potential tariff changes. Shell repeats its request for rehearing arguments of the April 4 Order and concludes that the Commission should allow Elba Express to reinstate its tariff proposal, to preserve an important piece of the parties' overall commercial arrangements.

44. Shell did not allege any new error in the September 20 Order, nor did it identify any new issue not already addressed by either the April 4 or September 20 Orders. Shell has not provided a persuasive argument for including section 44 in Elba Express' tariff. While the Commission does look favorably on parties being informed of proposed changes before a tariff proposal is submitted, it nonetheless is unnecessary to include such language in the tariff as it is Elba Express' prerogative to commit to a pre-filing consultative process. Further, Shell's explanation that section 44.1(c) is only a process to resolve disputes promptly with Commission-supported alternative dispute resolution is not accurate, as Shell continues to misconstrue the use of Commission supported alternative dispute resolution.³⁷ The alternative dispute resolution services are offered for

customers of the nature of the change. *See* 91 FERC at 61,732 (2000). No pre-filing procedures or submissions of disputes to Commission staff for mediation were included in the tariff provisions. *See* Appendix D to the March 10, 2000 *Southern Natural Gas Company* settlement.

³⁶ September 20 Order at P 30-38.

³⁷ The *Town of Norwood, Massachusetts v. National Grid USA, et al.* order to which Shell refers did support settlements in contested proceedings. *See* 115 FERC ¶ 61,396 at P 36 (2006). However, this case involved proceedings that were already

issues deemed appropriate by the Commission; thus, the language is not appropriate in the tariff.

45. Elba Express did not request rehearing of the Commission's finding with regard to section 44. However, Elba Express asks for reconsideration to approve alternative tariff language. Elba Express states that the revisions to section 44 eliminate the references to a fifteen day deadline for mediation completion and remove the restrictions on Elba Express' ability to make a section 4 or 7 filing under the NGA or a shipper's ability to comment on generic tariff provisions. Elba Express believes that such revisions address the concerns raised by the Commission in the September 20 Order and should allow for section 44 to remain as part of the tariff.

46. The Commission rejects the proposed revisions and denies reconsideration. Contrary to its claims, Elba Express does not acknowledge the findings made by the Commission. Removing the 15 day mediation completion requirement at section 44.1(c) is not completely responsive to the Commission's objection. This new proposal at sections 44.1(c) and (d) is not appropriate in the tariff as it still requires the Commission to potentially expend its resources in a manner the Commission may find to be inefficient.

47. Further, at section 44.2(b), Elba Express now proposes to limit negotiated rate shippers' rights to file an NGA section 5 proceeding to change "any specific negotiated rate agreed to with COMPANY in any individual negotiated rate agreement...." Where parties have agreed to a negotiated rate, it is reasonable for the parties to include a provision that the shipper not seek, under NGA section 5, to change the agreed-upon rate for the service to be provided under the negotiated rate. This assures that there will be rate certainty for the duration of the agreement and that both parties will receive the benefits of their bargain. The Commission has also observed that, in the negotiated rate situation, the shipper has the option of obtaining service at the just and reasonable recourse rate, without having to give up its section 5 rights.³⁸

48. However, the right to apply that precondition is limited to only the terms of negotiated agreements. In *Columbia Gas Transmission*,³⁹ the Commission stated that "the Commission has been reluctant to sanction a section 5 waiver in a service agreement for a particular transaction, where the customer waives its section 5 rights not only as to the rate for its particular transaction at issue, but as to the pipeline's rates for all services." The United States Court of Appeals for the District of Columbia Circuit recently affirmed

before the Commission for decisions, not changes that were only in the pre-filing process.

³⁸ *Gulf South Pipeline Company, LP*, 118 FERC ¶ 61,262 at P 15 (2007).

³⁹ *Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 at P 14 (2005).

the Commission's decision in *Columbia Gas Transmission*.⁴⁰ The court accepted the Commission's explanation that it has a general policy of restricting the use of section 5 waiver clauses to relatively narrow situations involving individual transactions, which do not involve market power, discrimination issues, or significantly insulate the pipeline's rate structure from challenges.

49. When the Commission issued its *Alternative Pricing Policy Statement* and established the negotiated rate program, it did so explicitly for pipelines that did not attempt to establish a lack of market power and did not want to undertake an incentive rate program.⁴¹ For such pipelines that wished to engage in negotiated rates, the Commission established a series of conditions. In that discussion, the Commission noted, in the context of reviewing negotiated rate agreements for statutory compliance, that others could file NGA section 5 complaints if there were issues of undue discrimination.⁴² Elba Express proposes to limit negotiated rate shippers from challenging not only the terms of their negotiated agreement, but also the terms of “any” negotiated agreement. This is contrary to the *Alternative Pricing Policy Statement* and *Columbia Gas Transmission*. The Commission rejects Elba Express’ proposal. Elba Express cannot pick-and-choose among the duties and responsibilities that accompany the right to offer negotiated rates.

3. Environmental Review

a. Certificate Policy Statement

50. Anderson submits that the September 20 Order was arbitrary and capricious by not balancing “the negative impact to the environment and the detriment to the private landowners along the proposed route against the economic windfall of the pipeline company and its foreign customers.”⁴³ Anderson states that, once the environmental investigation was completed, the Commission now “claims that the balancing test between the Anderson and associated environment and the need for the project was

⁴⁰ *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, (D.C. Cir. 2007).

⁴¹ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 at 61,238 (1996).

⁴² *Id.* at 61,241-242.

⁴³ Anderson Motion for Rehearing at 7 and 14, *citing* September 20 Order at P 143.

determined prior to the environmental investigation.”⁴⁴ Anderson claims that such reasoning is arbitrary and capricious.

51. Anderson has misapprehended the Certificate Policy Statement and the nature of the balancing conducted in the Commission’s Preliminary Determination. The Commission’s Certificate Policy Statement provides guidance as to how it will evaluate proposals for certifying new construction. The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences.⁴⁵

52. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant’s existing customers, existing pipelines in the market and their captive customers, or Anderson and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, we will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will we proceed to complete the environmental analysis where other interests are considered.

53. In the Preliminary Determination, the Commission conducted its economic inquiry based on the record before us.⁴⁶ We noted that Elba Express’ proposal satisfies the

⁴⁴ *Id.* at 14.

⁴⁵ Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, and the avoidance of the unnecessary exercise of eminent domain or other disruptions of the environment.

⁴⁶ As of April 4, 2007, the date of issuance of our Preliminary Determination, the only filing Anderson had made was their untimely motion to intervene, which was granted. The motion stated, in relevant part, the following: “Intervenors are owners of lands through which [Elba Express] proposes to construct and operate the interstate pipelines. Accordingly, the Commission’s actions in these proceedings, which relate to the construction and operation of the pipeline directly and immediately affect Intervenors, and no other party can adequately represent Intervenors’ interests. The Commission, therefore, should allow Intervenors to intervene in these proceedings.”

threshold requirement that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.⁴⁷

54. We found also that Elba Express meets the remaining criteria for certification of new facilities set forth in the Certificate Policy Statement.⁴⁸ We noted that no pipelines or their customers have protested Elba Express' proposal.

55. We concluded further that Elba Express has made efforts to minimize impacts on Anderson and communities affected by its project. Specifically, Elba Express proposes to acquire an undivided ownership interest in Southern's Twin 30s pipelines which will obviate the need to construct pipeline facilities in sensitive areas. Indeed, the April 4 Order noted that Elba Express proposes to locate its facilities for a significant portion of its proposed route in, or adjacent to, existing utility right-of-ways.⁴⁹ No further economic impact issues were raised by intervenors, including Anderson, requiring analysis.

56. We noted that Elba Express has identified a need for its project by the execution of long-term agreements for the entire capacity of both phases of the pipeline project, and that Elba Express' project will benefit existing pipelines and their customers by providing additional access to LNG supplies from Southern LNG's Elba Island terminal. In particular, the proposed interconnections between Elba Express and Transco will provide customers along the eastern seaboard access to Elba Island supplies. Therefore, based on the discussion above, and consistent with the Certificate Policy Statement and section 7 of the NGA, we preliminarily found that, pending completion of our environmental review, approval of Elba Express' pipeline is required by the public convenience and necessity.⁵⁰

57. We conducted the economic analysis required by the Certificate Policy Statement based on the issues raised by intervenors, issued the appropriate Preliminary Determination on April 4, 2007, and the work of environmental analysis proceeded. Anderson's request for rehearing on this issue is denied.

⁴⁷ April 4 Order at P 20. Elba Express currently has no gas pipeline facilities or customers; thus, there will be no subsidization by existing customers.

⁴⁸ *Id.* at P 21. There will be no adverse effects on existing services because Elba Express has no existing customers. Further, Elba Express' proposal will not adversely impact existing pipelines and their captive customers because the project is designed to meet incremental demand with incremental supplies.

⁴⁹ *Id.* at P 22.

⁵⁰ *Id.* at P 23.

b. Alternative Routes

58. Anderson argues that the Commission manipulated alternative routes “to skew the balance of adverse impacts between [Elba Express’] desired route and any analyzed or available alternative.”⁵¹ Anderson seizes upon a statement in the Draft Environmental Impact Statement (DEIS),⁵² later corrected and changed substantially in the Final Environmental Impact Statement (FEIS), and makes the repeated claim that the various alternatives considered by the staff and the Commission include unnecessary additional facilities added merely to skew the comparative environmental impact between the northern leg opposed by Anderson and the other alternatives.

59. As stated in the FEIS,⁵³ the initial discussion in the DEIS concerning existing capacity available on Southern’s system between Wrens and Thomaston, Georgia (referred to as the “western leg of Major Route Alternative A” in the DEIS) was revised because of newly available and more accurate information, derived from a complete hydraulic simulation, concerning the facilities and capacity required to move the Elba Expansion volumes (1.175 Bcfd) between Wrens and Thomaston via Southern’s existing system. The complete hydraulic simulation showed that over 50 miles of 30- and 36-inch-diameter pipeline loop would be needed to provide firm transportation between Wrens and Thomaston. Anderson does not challenge the accuracy of the revised projections of necessary western leg facilities, and thus offers no rebuttal to the comparative environmental impact analysis provided by the FEIS of the proposed route versus the various alternatives.⁵⁴ In the September 20 Order, we reviewed the various alternatives considered in the course of the environmental review of this project,⁵⁵ and affirmed the conclusion that the proposed route is the least environmentally intrusive option.

60. Anderson argues that the September 20 Order should be reversed because the Commission failed to examine the relevant data and articulate a satisfactory explanation

⁵¹ Anderson Motion for Rehearing at 8.

⁵² “Along the western leg, Southern’s existing pipeline system between Wrens and Thomaston has a west-to-east design capacity of a little less than 1 Bcfd; therefore, little or no new pipeline would be needed . . .” DEIS at 3-19.

⁵³ FEIS at 3-17 (n. 4) and 6-52, Responses P5-10 and P5-11.

⁵⁴ Indeed, the bulk of Anderson’s statements and argument on rehearing concerning alternative routes (Anderson Motion for Rehearing at 18-24) simply re-states its comments on the DEIS.

⁵⁵ September 20 Order, P 128-146.

for its action including a rational connection between the facts found and the choice made.⁵⁶ To the contrary, our September 20 Order reviewed the rigorous examination conducted in the FEIS of the environmental impacts of the various alternatives proposed and reviewed in this case.⁵⁷ As we noted there, the “consistent and well-supported conclusions have been that each possible alternative route would cause more environmental degradation.”⁵⁸ Anderson offers no reason why such conclusions are incorrect, and we deny the request for rehearing on this issue.

c. Transco’s Zones 4 and 5

61. Anderson argues that the Commission “acted arbitrarily and capriciously by never considering changing the artificial designations between Transco Zones 4 and 5.”⁵⁹ Anderson assumes that Transco’s zone rate structure operates to impose unreasonable charges and that the underlying goal of Elba Express’ proposal is to increase the profit margin of two major shippers on the new pipeline.

62. In fact, the proposal to include two interconnections, one on either side of the Savannah River, to interconnect with Transco in both Transco Rate Zone 4 and Transco Rate Zone 5 operates to the benefit of natural gas customers in both such zones. Natural gas transportation rates increase as gas moves through one zone into an adjacent zone on its path to a customer. By using interconnections in both Transco rate Zones 4 and 5, customers located in or obtaining access to gas in those zones will pay less for such service, which is good news for all affected natural gas markets. Anderson’s claim that no public benefit results from this aspect of the proposal is thus incorrect,⁶⁰ and no reason is identified for the Commission to consider any review of the propriety of Transco’s

⁵⁶ *Citing Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁷ September 20 Order, P 128-146; *see also* FEIS at 5-13.

⁵⁸ *Id.* P 143.

⁵⁹ Anderson Motion for Rehearing at 8.

⁶⁰ *See* Final EIS at 6-50, Response P5-8. Further, for a summary of how the proposal will operate to the advantage of Transco’s current and future customers, despite Anderson’s claims, *see* September 20 Order, P 139-142.

zone rate system.⁶¹ As noted further in the FEIS,⁶² the western leg of Alternative A does not include an interconnection with Transco Zone 5, and would not satisfy a specific objective of the project. The result of following Anderson's objection would be to add substantial and needless costs to the charges for affected domestic natural gas service. We decline to do so, and we reject the request for rehearing on this issue.

d. No Action Alternative

63. Anderson argues that the Commission has "acted arbitrarily and capriciously by failing to properly study and consider the No Action Alternative."⁶³ Anderson states that there is no record evidence showing a need for the natural gas supplies to be made available through the project, and that the Commission has not taken a hard look at the No Action Alternative.⁶⁴ Further, Anderson states that the Commission implies that postponing the project could cause gas suppliers to punish the United States East Coast by cutting off supplies, which is akin to being swayed by implied extortion.

64. We directly addressed and analyzed the issue of need in the April 4 Order, noting that Elba Express has identified a need for its project by the execution of long-term agreements for the entire capacity of both phases of the pipeline project, and that Elba Express' project will benefit existing pipelines and their customers by providing additional access to LNG supplies from Southern LNG's Elba Island terminal.⁶⁵ In particular, the proposed interconnections between Elba Express and Transco will provide customers along the eastern seaboard access to Elba Island supplies. Responding to such need was a fundamental reason for our approval of Elba Express' pipeline as required by the public convenience and necessity. The September 20 Order reviewed and affirmed the analysis conducted in the EIS regarding the consequences and costs of following the No Action Alternative.⁶⁶ Anderson presents no reason, beyond its broad and unsupported claim of insufficiency, why that consistent analysis is flawed. We deny the request for rehearing on this issue.

⁶¹ The Commission could only change, under NGA section 5, the rates, terms and conditions under which Transco's service is provided after identifying substantial evidence supporting such a change. Nothing approaching such evidence is alluded to here.

⁶² Final EIS at 6-53, Response P5-11.

⁶³ Anderson Motion for Rehearing at 27.

⁶⁴ *Id.* at 28.

⁶⁵ April 4 Order at P 23.

⁶⁶ September 20 Order at P 122.

e. **Evidentiary Hearing**

65. Anderson repeats its request for an evidentiary hearing, without stating any reason why the Commission's discussion and rejection of the prior request was in any way incomplete or incorrect.⁶⁷ The September 20 Order summarized and analyzed in detail the arguments submitted by Anderson and concluded that no good reason had been offered why further evidentiary hearings were appropriate in the absence of an adequate proffer of evidence to support allegations of disputed facts.⁶⁸ Anderson simply repeats the request for a hearing but does not address the Commission's discussion and ruling. Anderson provides no rationale supporting an evidentiary hearing and the request for rehearing is denied.

The Commission orders:

The requests for rehearing are denied as discussed in the text of this order. The April 4 and September 20 Orders are modified as discussed in the text of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁷ *Id.* at 1-2. The September 20 Order discusses Anderson's request for a hearing at P 128-146.

⁶⁸ September 20 Order at P 143, *citing Cerro Wire & Cable v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1981).