

121 FERC ¶ 61,116
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 31, 2007

In Reply Refer To:
Tennessee Gas Pipeline Company
Docket No. RP96-312-169

Tennessee Gas Pipeline Company
1001 Louisiana Street
Houston, TX 77002

Attention: Jay V. Allen
Senior Counsel

Reference: Service Agreements and Negotiated Rate Letter Agreement Comprising
Service Package Nos. 64029, 64030, 64023, 64024, 64027, 64028, 64026
and 64025

Dear Mr. Allen:

1. On September 20, 2007, Tennessee Gas Pipeline Company (Tennessee) filed eight service agreements dated April 1, 2007, and eight related negotiated rate letter agreements under Tennessee's Rate Schedule FT-A, each dated between March 9 and April 1, 2007. Tennessee states that it is filing the agreements as negotiated rate agreements because the agreements contain fixed rates. Tennessee also states that the service agreements and related negotiated rate letter agreements contain certain deviations from Tennessee's *pro forma* Gas Transportation Agreement for service under Rate Schedule FT-A. Tennessee included in the filing redlined versions of the service agreements highlighting the differences from the form of service agreement.

2. Tennessee states that it believes the deviations are not material. However, Tennessee further states that it anticipates that the Commission will require it to include the service agreements in its tariff listing of nonconforming agreements; and Tennessee states that, if so directed, it will make the necessary filing. Tennessee also requests that the Commission grant any waivers necessary to approve each agreement to be effective as provided in each agreement.

3. As discussed below, the Commission finds that the service agreements and related negotiated rate letter agreements deviate materially from the form of service agreement. While the Commission finds that most of the deviations are permissible, the Commission finds that one deviation presents a significant risk of undue discrimination and must be removed. Therefore, waiver of the Commission's notice provisions is granted;¹ and the service agreements, as well as the related negotiated rate letter agreements, are accepted for filing as non-conforming agreements, with such acceptance to be effective, as requested, on each agreement's respective commencement date, as described below, subject to refiling the agreements to remove certain provisions as discussed below.

4. Public notice of the filing was issued on September 25, 2007. Interventions and protests were due as provided in section 154.210 of the Commission's regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2007)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

5. Each service agreement is for service on facilities to be constructed or upgraded by Tennessee in the Northeast ConneXion Project – New England (Northeast ConneXion Project).² That project will allow Tennessee to provide up to 110,300 Dth per day of incremental firm transportation capacity to the New England region from Gulf of Mexico supply sources. The Commission issued a certificate for the Northeast ConneXion Project on May 9, 2006,³ and Tennessee expects to place the project in service by November 1, 2007. The Shippers under the service agreements are: (1) Berkshire Gas Company, whose maximum daily transportation quantities (MDTQ) are 1,800 Dth (Service Package No. 64029) and 2,200 Dth (Service Package No. 64030); (2) Boston Gas Company, whose MDTQ are 50,715 Dth (Service Package No. 64023) and 61,985 Dth (Service Package No. 64024); (3) Connecticut Natural Gas Corporation, whose MDTQ are 3,600 Dth (Service Package No. 64027) and 4,400 Dth (Service Package No. 64028); and (4) Narragansett Electric Company, whose MDTQ are 6,380 Dth (Service Package No. 64026) and 5,220 Dth (Service Package No. 64025) (collectively, "the Shippers").

¹ 18 C.F.R. § 154.207 (2007).

² The Northeast ConneXion Project creates new capacity of 110,300 Dth per day. This combined with 26,000 Dth per day of reserved capacity provide the total 136,300 Dth per day as required by the Shippers.

³ *Tennessee Gas Pipeline Co.*, 115 FERC ¶ 61,160 (2006).

6. Each service agreement includes both a completed form of “Gas Transportation Agreement” and a separate “Firm Transportation Negotiated Rate Letter Agreement.” Each Gas Transportation Agreement contains several deviations from the form of service agreement which concern the regulatory authorizations Tennessee is required to obtain from the Commission in order to render service over the new facilities. Specifically, section 2.1 permits Tennessee to make the sole determination: (1) whether to receive and continue all such necessary regulatory and non-regulatory authorizations; and (2) whether the facilities over which service will be rendered have been completed to its satisfaction. Tennessee asserts such deviations are reasonable because, unlike normal circumstances under which it executes service agreements, Tennessee cannot provide service under the subject agreements without constructing the facilities and obtaining the necessary authorizations. Similarly, Tennessee modified section 9.1 to emphasize its exclusive right to determine whether it will accept the terms of all necessary regulatory approvals and authorizations.

7. Section 2.2 (Commencement of Service) provides that Tennessee will provide written notice to the Shipper when service will commence. In addition, section 2.2 provides the Shippers with options to commence service at a different commencement date, since Tennessee cannot provide service until the facilities are constructed. The provisions of section 2.2 further provide that (a) the shipper may elect, no later than September 1, 2007 to postpone the commencement date to instead occur no sooner than November 1, 2008; (b) if the commencement date has not occurred on or before August 1, 2008, then the shipper may elect to postpone the commencement date to occur no sooner than November 1, 2009; (c) Shipper shall have no further election rights after September 1, 2008. If the commencement has not yet occurred on or before November 1, 2009, then following notice to shipper, the commencement date shall in no event occur other than on November 1, 2009, or on November 1 of any subsequent year, unless otherwise mutually agreed to in writing. Tennessee also modified Article IV to clarify that it will construct, install, own, and operate the required facilities.

8. Section 12.1 of each Gas Transportation Agreement deviates from the form of service agreement by establishing that, while the agreement will be effective as of the date of its execution, service will not commence until the commencement date determined pursuant to section 2.2, and the primary term will also run from that date. Consistent with section 12.1, the shipper’s payment obligations under section 6.1, and its warranty obligations under section 11.1(a) begin on the agreement’s commencement date rather than its effective date.

9. As authorized by Article XXVIII, section 5.2 of Tennessee’s General Terms and Conditions (GT&C), each Gas Transportation Agreement includes an Exhibit B setting forth a contractual reduction option. Sections 1(b) through (d) of each negotiated rate letter agreement set forth the agreed-upon negotiated rates. In addition, section 1(a) provides that if the shipper or its assignees violate the terms of the negotiated rate letter

agreement or the overall service package, including the Gas Transportation Agreement, Tennessee shall have the right in its sole discretion to immediately terminate the negotiated rate agreement and/or assess from the date of the violation Tennessee's maximum rates. Section 1(e) of each negotiated rate letter agreement includes the same contract demand reduction option as in Exhibit B to the corresponding Gas Transportation Agreement. Sections 2 and 3 of the letter agreement include certain other provisions related to the implementation of the negotiated rate, including provisions for the renegotiation or termination of the letter agreement if it is disallowed or modified by the Commission.

10. The Commission's regulations require that pipelines include in their tariff a form of service agreement and file any contract that deviates materially from it.⁴ In *Columbia Gas Transmission Corp. (Columbia)*, the Commission found that a material deviation is "any provision of service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."⁵ However, not all material deviations are impermissible. If the Commission finds that such deviation does not constitute a substantial risk of undue discrimination the Commission may permit the deviation.⁶

11. Consistent with *Columbia* and Commission action on similar filings by Tennessee,⁷ the Commission finds that the Gas Transportation Agreements deviate materially from Tennessee's form of service agreement but do not present a substantial risk of undue discrimination. The deviations from Tennessee's *pro forma* Gas Transportation Agreement in sections 2.2, 6.1, 11.1, and 12.1 described above clearly affect the substantive rights of the parties, and therefore those deviations are material. However, those deviations simply reflect the special circumstance under which the contracts were executed, namely that the contracts were entered into before the newly certificated facilities over which the service will be performed have gone into service. It

⁴ 18 C.F.R §§ 154.1(d) and 154.110 (2006). In its policy statement issued July 25, 2003, the Commission held that a material deviation includes any provision in a service agreement that is not in the approved language of the form of service agreement and: (1) goes beyond filling-in-the-blank spaces with the appropriate information allowed by the tariff; or (2) affects the substantive rights of the parties. *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 27 (2003) (2003 Policy Statement).

⁵ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,002 (2001).

⁶ *Id.* at 62,004.

⁷ See, e.g., *Tennessee Gas Pipeline Co.*, 112 FERC ¶ 61,259 (2005); and 118 FERC ¶ 61,103 (2007).

is reasonable for section 2.2 to define the commencement date of the parties' service agreements to be the later of November 1, 2007 or the date Tennessee is ready to begin service, and for related provisions of the service agreements to reflect the agreed-upon commencement dates. Tennessee cannot provide service until it completes construction of the Northeast ConneXion Project and obtains the requisite regulatory authorizations, and the parties cannot undertake their service obligations under the agreements until gas begins to flow. These provisions do not affect the quality of service provided either to the subject customers or to other shippers on Tennessee's system.

12. The Commission also finds that the Firm Transportation negotiated rate letter agreements contain material deviations from Tennessee's *pro forma* Gas Transportation Agreement. Section 6 of that form of service agreement provides that the shipper's rate will be the maximum rate for the service "except as provided to the contrary in any written or electronic agreement(s) between the Transporter and Shipper." Thus, the form of service agreement permits the shipper's negotiated rate to be set forth in a separate letter agreement; and the Commission has stated that service agreements may be structured in this manner.⁸ Therefore, paragraphs 1(b) through (d) of the instant negotiated rate letter agreements, setting forth the agreed-upon negotiated rates, do not constitute deviations from Tennessee's *pro forma* Gas Transportation Agreement. Those sections of the letter agreements are appropriately treated as filling in the spaces in the service agreement with the negotiated rates authorized by the negotiated rate provisions in section 5.6 of Tennessee's Rate Schedule FT-A.

13. However, the remaining provisions of the negotiated rate letter agreements do constitute material deviations from Tennessee's *pro forma* Gas Transportation Agreement, because they go beyond setting forth the agreed-upon negotiated rate and affect the substantive rights of the parties.⁹ Based on our review of the documents, we find the material deviations in paragraphs 2 and 3 of the negotiated letter agreement are permissible, because they are limited solely to matters related to the implementation of the negotiated rates. For example, Paragraph 2 of the negotiated letter agreement states that the negotiated rate agreement will be filed and is subject to the approval of the Commission. In addition, Paragraph 2 deals with the effectiveness of the negotiated rate agreement which is contingent upon the parties executing service package and service commencing. Paragraph 3 of the negotiated letter agreement provides that, if the Commission modifies the agreement in any way, Tennessee may immediately terminate the agreement or Tennessee and the Shipper may mutually agree to amend the negotiated letter agreement in order to ensure that the original commercial intent of the parties is preserved. The Commission has previously approved provisions for the renegotiation or termination of negotiated rate agreements if the Commission takes an action that requires

⁸ *East Tennessee Natural Gas LLC*, 107 FERC ¶ 61,197 at P 14 (2004).

⁹ *Tennessee Gas Pipeline Company*, 118 FERC ¶ 61,103 at P 16 (2007).

modification of the negotiated rate.¹⁰ Therefore, the Commission will accept these provisions as being not unduly discriminatory.¹¹

14. However, the Commission finds that the deviations in paragraphs 1(a) and 1(e) are not permissible deviations for inclusion in the negotiated rate letter agreements. The Commission has held that, while permissible, separate negotiated rate letter agreements must be limited to setting forth the agreed-upon negotiated rate, together with any provisions that are solely related to implementing the agreed-upon rate.¹² The Commission has specifically advised Tennessee that all provisions controlling non-rate rights and obligations of the parties should be in the service agreement itself. This avoids potential conflicts between the service agreement and the rate document.¹³

15. Paragraph 1(a) of each negotiated rate letter agreement permits Tennessee to immediately terminate the negotiated rate letter agreement or charge the maximum rate, if the shipper violates any term of either the negotiated rate letter agreement or the Gas Transportation Agreement. That paragraph therefore appears to give Tennessee a broad right to penalize the subject shippers for violations of the service agreement unrelated to payment of the negotiated rate.¹⁴ As such, the provision is not appropriately included in a negotiated rate letter agreement. In any event, the Commission finds that allowing the pipeline discretion to negotiate such provisions as a material deviation from the form of service agreement would create a substantial risk of undue discrimination among shippers on Tennessee's system. Requiring a shipper who is currently paying less than the maximum rate as a result of either a negotiated rate or discounted rate agreement to pay the maximum rate can have a substantial adverse effect on that shipper. The Commission finds that a pipeline should only have the right to impose such a requirement under generically applicable tariff provisions, setting forth the circumstances under which the

¹⁰ See *East Tennessee Natural Gas LLC*, 109 FERC ¶ 61,232 at P 27 (2004) and *CenterPoint Energy Gas Transmission Co.*, 102 FERC ¶ 61,037 (2003).

¹¹ If Tennessee desires to minimize the need for nonconforming provisions in its negotiated rate agreements, it could include in its tariff a *pro forma* negotiated rate letter agreement which would include the provisions solely related to implementation of the negotiated rate agreement which it typically includes in such agreements. See *Natural Gas Pipeline Co.*, 111 FERC ¶ 61,376 at P 12 (2005) and *Gulf South Pipeline Company, LP*, 118 FERC ¶ 61,262 (2007).

¹² *East Tennessee Natural Gas LLC*, 107 FERC ¶ 61,197 at P 14.

¹³ *Tennessee Gas Pipeline Company*, 118 FERC ¶ 61,103 at P 16 (2007).

¹⁴ Section 12.3 of the Gas Transportation Agreement permits Tennessee to terminate a shipper's service agreement if the shipper fails to pay a bill for service.

pipeline may require such a shipper to pay the maximum rate. Such a tariff filing would give the Commission and interested parties an opportunity to review the conditions under which the pipeline may terminate the discounted or negotiated rate agreement, in order to ensure that those conditions are just and reasonable and not unduly discriminatory.¹⁵

Therefore, the Commission's acceptance of the filed agreements is subject to the condition that, within 15 days, Tennessee makes a revised filing removing paragraph 1(a) from each of the negotiated rate letter agreements.

16. Finally, paragraph 1(e) of each negotiated letter agreement includes the same contract demand reduction option as is already included in Exhibit B to the Gas Transportation Agreements. Tennessee must also remove that provision from the letter agreements, since it is a non-rate provision covered by the service agreement itself.

17. On October 3, 2007, in Docket No. CP05-412-003, Tennessee filed, among other things, tariff sheets listing the eight negotiated rate contracts as non-conforming contracts in section XXXVII of its tariff. Since Tennessee has already filed tariff sheets listing the eight contracts as non-conforming contracts, Tennessee need not revise its tariff listing of its nonconforming agreements.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

¹⁵ See *Tennessee Gas Pipeline Co.*, 97 FERC ¶ 61,225 at 62,029-30 (2001), and *East Tennessee Natural Gas LLC*, 109 FERC ¶ 61,232 at P 23 (2004).